

# VERDICTUM.IN

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

TUESDAY, THE 12<sup>TH</sup> DAY OF JULY 2022 / 21ST ASHADHA, 1944

CRL.A NO. 1350 OF 2016

CRIME NO.111/2008 OF Vanchiyoor Police Station, Thiruvananthapuram

AGAINST THE ORDER/JUDGMENT IN CP 41/2008 OF ADDITIONAL CHIEF

JUDICIAL MAGISTRATE ,TRIVANDRUM

SC 1485/2008 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT - VII,

THIRUVANANTHAPURAM / IV ADDITIONAL MACT

APPELLANT/ACCUSED NO.15:

SIVALAL, S/O SIVASUTHAN, KAILASAM VEEDU, T.C.79/1950,  
PUNNAKATHOPPU, KANIKKAKAM WARD, KADAKAMPALLY VILLAGE

BY ADVS.

SRI.B.RAMAN PILLAI (SR.)

SRI.R.ANIL

SRI.T.ANIL KUMAR

SRI.B.KRISHNA KUMAR

SRI.A.RAJESH

SRI.SUJESH MENON V.B.

SRI.THOMAS ABRAHAM NILACKAPPILLIL

SRI.M.VIVEK

SRI.M.SUNILKUMAR

RESPONDENT/COMPLAINANT:

STATE OF KERALA

REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,  
ERNAKULAM KOCHI-31

BY ADVS.

ADDL.DIRECTOR GENERAL OF PROSECUTION

ADDL.DIRECTOR GENERAL OF PROSECUTION

ADDL. STATE PUBLIC PROSECUTOR

SRI.S.U.NAZAR, SPECIAL GP (CRIMINAL) ASSISTED BY SMT.  
PREETHA N.V.

OTHER PRESENT:

SRI.S.U.NAZAR, SPECIAL GOVERNMENT PLEADER (CRIMINAL)  
ASSISTED BY SMT.PREETHA.N.V

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON  
30.06.2022, ALONG WITH CRL.A.48/2017, 1320/2016 AND 1327/2016, THE  
COURT ON 12.07.2022 DELIVERED THE FOLLOWING:

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Crl.Appeal Nos.1350 of 2016,  
1320 of 2016, 1327 of 2016  
& 48 of 2017

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

TUESDAY, THE 12<sup>TH</sup> DAY OF JULY 2022 / 21ST ASHADHA, 1944

CRL.A NO. 48 OF 2017

CRIME NO.111/2008 OF Vanchiyoor Police Station,

Thiruvananthapuram

AGAINST THE ORDER/JUDGMENT IN CP 41/2008 OF ADDITIONAL CHIEF

JUDICIAL MAGISTRATE ,TRIVANDRUM

SC 1485/2008 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT -

VII, THIRUVANANTHAPURAM / IV ADDITIONAL MACT

APPELLANTS/ACCUSED NOS.1,8,10 AND 13:

- 1       SANTHOSH  
S/O. THANKAPPAN NAIR, ANEESHA HOUSE, VILAYIL MUDUKKU,  
KOZHIYODE LANE, PALKULANGARA WARD, VANCHIYOOR  
VILLAGE.
  - 2       SATHEESH KUMAR  
S/O. SADANANDAN, PATTUVILAKATHU VEEDU, TC76/654,  
ANAYARA. P.O, KADAKAMPALLY.
  - 3       SATHEESH  
S/O. SATHYARAJ, MUNTHAZ MAHAL VEEDU, MANNARAKONAM,  
VATTIYOORKAVU VILLAGE.
  - 4       SUBHASH KUMAR  
S/O. SUDHAKARAN, NEDIYAVILA VEEDU, PUTHANCODE LANE,  
CHEKKALAMUKKU, SREEKARYAM, ULLOOR VILLAGE.
- BY ADVS.  
SRI.B.RAMAN PILLAI (SR.)  
SRI.R.ANIL  
SRI.A.RAJESH  
SRI.SALISH ARAVINDAKSHAN

RESPONDENT/COMPLAINANT:

STATE OF KERALA

REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF  
KERALA. ERNAKULAM, KOCHI - 31.

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BY ADVS.

ADDL.DIRECTOR GENERAL OF PROSECUTION  
ADDL.DIRECTOR GENERAL OF PROSECUTION  
SRI.S.U.NAZAR, SPECIAL GP (CRIMINAL)

OTHER PRESENT:

SRI.S.U.NAZAR, SPECIAL GOVERNMENT PLEADER  
(CRIMINAL) ASSISTED BY SMT.PREETHA.N.V

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON  
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Crl.Appeal Nos.1350 of 2016,  
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& 48 of 2017

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

TUESDAY, THE 12<sup>TH</sup> DAY OF JULY 2022 / 21ST ASHADHA, 1944

CRL.A NO. 1320 OF 2016

CRIME NO.111/2008 OF Vanchiyoor Police Station,

Thiruvananthapuram

AGAINST THE JUDGMENT IN CP 41/2008 OF ADDITIONAL CHIEF

JUDICIAL MAGISTRATE ,TRIVANDRUM

SC 1485/2008 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT -

VII, THIRUVANANTHAPURAM / IV ADDITIONAL MACT

APPELLANTS/ACCUSED NO.4,5,9 & 11:

- 1 BIJU KUMAR  
AGED 39 YEARS  
S/O.SOMAN NAIR, X/523, PALATHARA, ULIYAZHTHARA,  
THIRUVANANTHAPURAM.
- 2 RENJITH KUMAR  
S/O.RAMACHANDRAN NAIR, AGED 37 YEARS, ARW A61,  
REVATHY BHAVAN, KARIYATHI WARD, MANACAUD VILLAGE,  
THIRUVANANTHAPURAM.
- 3 BOSE  
S/O.NISSAR, AGED 33 YEARS, PANAKUZHY VEEDU, NEAR  
RAILWAY GATE, PETTAH, VANCHIYOOR,  
THIRUVANANTHAPURAM.
- 4 HARILAL  
S/O.PONNAPPAN NAIR, AGED 48 YEARS, KUNCHUMILAPPALLY  
VEEDU, MALAPPARIKONAM, ULIYAZHTHARA,  
THIRUVANANTHAPURAM.  
BY ADVS.  
SRI.P.S.SREEDHARAN PILLAI  
SRI.P.VIJAYA BHANU (SR.)  
SRI.ARJUN SREEDHAR  
SRI.P.M.RAFIQ  
SRI.V.C.SARATH  
SRI.ARUN KRISHNA DHAN  
SRI.T.K.SANDEEP

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SRI.M.REVIKRISHNAN  
SRI.AJEESH K.SASI  
SMT.POOJA PANKAJ  
SRUTHY N. BHAT  
SRI.THOMAS J.ANAKALLUNKAL

RESPONDENT/COMPLAINANT & STATE:

STATE OF KERALA  
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF  
KERALA, ERNAKULAM-31.  
BY ADVS.  
ADDL.DIRECTOR GENERAL OF PROSECUTION  
ADDL.DIRECTOR GENERAL OF PROSECUTION  
SRI.S.U.NAZAR, SPECIAL GOVERNMENT PLEADER  
(CRIMINAL)

OTHER PRESENT:

SRI.S.U.NAZAR, SPECIAL GOVERNMENT PLEADER  
(CRIMINAL) ASSISTED BY SMT.PREETHA.N.V

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON  
30.06.2022, ALONG WITH CRL.A.1350/2016 AND CONNECTED CASES,  
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Crl.Appeal Nos.1350 of 2016,  
1320 of 2016, 1327 of 2016  
& 48 of 2017

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

TUESDAY, THE 12<sup>TH</sup> DAY OF JULY 2022 / 21ST ASHADHA, 1944

CRL.A NO. 1327 OF 2016

CRIME NO.111/2008 OF Vanchiyoor Police Station,

Thiruvananthapuram

AGAINST THE ORDER/JUDGMENT IN CP 41/2008 OF ADDITIONAL CHIEF

JUDICIAL MAGISTRATE ,TRIVANDRUM

SC 1485/2008 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT -

VII, THIRUVANANTHAPURAM / IV ADDITIONAL MACT

APPELLANTS/ACCUSED NOS.2,6,7 & 12:

- 1 MANOJ, AGED 35 YEARS/2016  
S/O.THAMPY, CHERUVAKOTTUKONAM PUTHEN VEEDU,  
MALAPPARIKONAM, ULIYAZHTHARA.
- 2 BALU MAHENDRAN  
AGED 36 YEARS/2016  
S/O.MAICHEL, SUNIL NIVAS, MALAPPARIKONAM,  
ULIYAZHTHARA.
- 3 BABIN, AGED 35 YEARS/2016  
S/O.BABY OOLANKUZH, KIZHAKKATHIL VEEDU, TC  
76/2122, KADAKAMPALLY VILLAGE.
- 4 VINOD KUMAR, AGED 45 YEARS/2016  
S/O.PURUSHOTHAMAN CHENCHERIVEEDU, TC 10/1284,  
CHENCHERIVEEDU, TC 10/1284, CHENCHERI LAKSHAM VEEDU  
COLONY, NALANCHIRA, ULLOOR VILLAGE.  
BY ADVS.  
SRI.P.VIJAYA BHANU (SR.)  
SMT.MITHA SUDHINDRAN  
SMT.POOJA PANKAJ

RESPONDENT/COMPLAINANT:

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

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BY ADVS.

ADDL.DIRECTOR GENERAL OF PROSECUTION

ADDL.DIRECTOR GENERAL OF PROSECUTION

SRI.S.U.NAZAR, SPECIAL GOVERNMENT PLEADER  
(CRIMINAL)

OTHER PRESENT:

SRI.S.U.NAZAR, SPECIAL GOVERNMENT PLEADER  
(CRIMINAL) ASSISTED BY SMT.PREETHA.N.V

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON  
30.06.2022, ALONG WITH CRL.A.1350/2016 AND CONNECTED CASES,  
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K.VINOD CHANDRAN & C.JAYACHANDRAN, JJ

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Crl.Appeal Nos.1350 of 2016, 1320 of 2016,  
1327 of 2016 & 48 of 2017  
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Dated this the 12<sup>th</sup> July, 2022

### JUDGMENT

Vinod Chandran, J.

Political rivalry, is a simmering cauldron of intrigue, spite and deceit, often spewing out the venom of hatred, in the form of mindless bloodshed. The men in red and those saffron clad, are divided on political lines and the instant case is alleged to be the murder of one among the former, by a few in the latter group. The prosecution alleges that starting from 2001 there were instances of violence, eventually leading to the murder of the deceased in this case; an active CPI(M) worker at Thiruvananthapuram. The crime is also alleged to be the result of a conspiracy hatched and the criminal acts in furtherance of the same, by the accused; dedicated cadre of the R.S.S.

2. A1 to 10 and A12 to 15 are alleged to

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have conspired to murder Vishnu, and in furtherance of such common intention, formed themselves into an unlawful assembly, committed rioting, armed with deadly weapons and country bombs and hacked Vishnu to death. The accused were charged with offences under Sections 120B, 143, 147, 148 and Section 302 read with Section 149 IPC. A11 and A16, accused of attempting to screen and harbour A2 and A3, were charged under Section 201 and under Sections 120B, 148 and 302 read with Section 212 IPC. A1 was also charged under Section 5 of the Explosive Substances Act and A12 to 13 under Section 27 of the Arms Act. A3 died during the trial, A14 absconded and A16 was acquitted. A1 to 13, except A3 & A11, were sentenced to separate life imprisonments under both the offences of Section 302 read with Section 149 and 120B read with 302 IPC. They were also sentenced for various periods under Section 143, 147 & 148. A15 was sentenced to life imprisonment under Section 120B read with 302 IPC and A11, with rigorous imprisonment of three years under Section 212 IPC. Under each of

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the offences, fine amounts were imposed with suitable default sentences. The convicted accused are in appeal.

### I. THE TRIAL COURT'S FINDINGS:

3. The trial Court framed eleven issues regarding the offences of conspiracy, unlawful assembly, rioting with deadly and dangerous weapons, murder, possession of explosive substance and harbouring of accused. Relying on Ext.P39 post-mortem certificate, proved through PW37, who conducted the post-mortem examination, it was found that the attack was a brutal one, leaving no chance for the victim to survive. The testimony of PWs.13 & 14 regarding the conspiracy, was reckoned as having been proved. The accusation of the prosecution having procured the ocular witnesses, to the conspiracy, the crime and the get-away, was rejected. PW1's vocation being not seriously disputed, his presence was affirmed and the difference in the number of persons and bikes, as spoken of by him in the FIS and before Court, was found to be insignificant. PW1 himself admitted that

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he had informed PW51, who recorded the FIS, that there is a mistake in the narration; which he was advised to correct before the I.O. PW1 who had seen his friend being murdered, a heart rending spectacle, would definitely have been confused and in any event, the FIS is not an encyclopedia of all events found the trial Court. There was found, no material contradictions or omissions, brought out from the S.161 statement, given on the very next day.

4. On the delay in submitting the FIR, the Court found that the SHO was busy preparing the inquest report and scene mahazar and if there was any attempt to fabricate the FIS, there would not have been the discrepancy, in the number of persons and the bikes, as now argued by the defence. The argument that PWs.3, 4 & 13 to 15 were chance witnesses, was rejected and it was found that they had reasonable explanation to be in the spot. PW4 an auto driver, came with a fare, PW3 & PW15, came on hearing about the suicide of one Potti, PW13, the friend of PW14, visited him in his house. The omissions in the

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deposition of PWs.13 & 14 were ignored on the ground that they had admitted that their statements were not recorded in detail. The above witnesses and PW1 were also not shown to have any prior grudge or enmity against the accused and there was no reason to find them interested or partisan. Their political colour does not commend the Court to disbelieve them as held in *Myladimmal Surendran v. State of Kerala [AIR 2010 SC 3281]*, especially since the assailants being masked persons was not a possible inference, either from the deposition of DWs.3, 5 & 8 or the argument raised regarding crucial witnesses having not been examined. The right to examine a witness was exclusively found to be resting with the prosecution and there was no adverse inference possible on the facts of this case.

5. The explanation given by PWs.60 & 73 (I.Os) regarding the secrecy with which the investigation was carried out was found to be a valid explanation for the prosecution having not furnished the entire details of the investigation to the

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Magistrate, at the time of remand of the accused. The identity of the accused from the dock, as also that of the weapons and the dress of each of them, was amply supported by the Test Identification Parade [TIP]. Considering the report of the TIP, it was held that there was no material irregularity in the TIP carried out so as to vitiate the entire proceedings. The identification in the dock for the first time, though not always reliable; as a proposition, is not applicable in the facts of this case was the categorical finding. Though the recoveries under S.27 could not be proved through the attesting witnesses, the testimony of the I.O and the scribe was sufficient. The evidence of the Doctor also corroborated such recoveries, since the weapons recovered, could cause the injuries on the deceased.

6. The two slippers of A10, one seized from the crime scene and the other under S.27 and the pair of slippers of A8, identically seized and recovered, with blood stains were held to be clinching evidence. The seizure of bikes was believed for reason of the

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defence having not disproved the recoveries made by the Police Officer. The accused were found to have committed culpable homicide and everybody in the scene of occurrence including the persons who drove the bikes having shared the common object. The conspiracy was found to have been proved from the testimonies of PW13 & PW14 and so was the motive proved, of the earlier instances of political strife between the same parties. A11 was found to have harboured and screened the accused while there is nothing to prove A16 having taken an active role to harbour the accused. A1 was acquitted of the offence under the Explosive Substances Act and that charged under the Arms Act, was not sustainable, for reason of lack of a notification. Entering conviction on all; except A3 (dead), A14 (absconding) and A16 (acquitted), sentences were imposed as has been earlier detailed.

### II. THE ARGUMENTS:

7. Sri. B. Raman Pillai, learned Senior Counsel, assisted by Sri. Mahesh Bhanu appears for

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A1, A8, A10 and A13 in Crl.Appeal 48/2017 and A5 in Crl.Appeal No. 1315/2016. Sri. P.Vijayabhanu, learned Senior Counsel assisted by Smt. P.Sruthi, appears for A9 in Crl.Appeal No.1320/2016 and A2, A6, A7 and A12 in Crl.Appeal No.1327/2016. Sri. Arjun Sreedhar appears for A4, A5 and A11 in Crl. Appeal No.1320/2016.

8. Sri. Raman Pillai, learned Senior Counsel, challenged the investigation as tainted from the very commencement and argued that the entire prosecution against the accused was engineered to satisfy the ruling party diktats; whose member, the deceased was. PW68, who was in charge of the Station House Officer [SHO], commenced the investigation, after the FIS was made and FIR registered, evidenced from the FIR itself. PW68 also prepared the Inquest Report, Ext.P2 and the Scene Mahazar, Ext.P28 and was in the scene for a considerable time; when definitely inquiries would have been made. But no Case Diary [CD] was opened and though it is alleged that the investigation was then handed over to PW73, only the

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Inquest Report and the Scene Mahazar were handed over. The investigation was handed over, at 6.30 p.m as deposed by PW68 & PW73 or at 9.30 p.m., as per the remand report; but no CD changed hands. The report regarding handing over also reached the Court only on 03.04.2008. According to the Senior Counsel the suppression was insofar as the initial reports being of an attack by masked men, having come in motor bikes, driven by persons wearing helmets; as revealed from the paper reports produced by the defence witnesses. PW73, the I.O, also did not record any 161 statement, even of PW1, till the next day.

9. PW1, while speaking of the deceased having been taken to the hospital by locals, in the FIS, deposed before Court that it was by PW15 & CW10. It is his clear deposition that PW1 was known to him from 1992 and CW2 from 2000, in which event definitely their names would have figured in the FIS. PW1 was also with his friends Suresh Thomas and Sarath Chandran when the incident occurred, both of whom were not questioned by the Police or examined

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before Court. PW68, who carried out the inquest has to necessarily enquire on the identity of the assailants from the witnesses present. One Ratheesh is shown as the person who last saw the accused alive, in Ext.P2, with whom inquiries were made, as admitted by PW73; but no statement under S.161 was recorded and he was not included in the witness array. CW14 was the attestor to Ext.P2, who also witnessed the incident as per his statement recorded; admitted by the I.Os, but he was avoided from being examined before Court nor was his version regarding the incident recorded in the Inquest Report.

10. Further, the ocular witnesses speak of two important spots regarding the crime; one the spot where the actual crime of hacking of the deceased occurred and then the spot near '*Madan kovil*', where the bikes driven by six persons were kept ready for the get-away. The significance of the spot near the '*Madan kovil*' cannot be ignored since the witness speak of the bikes having been kept ready, in full throttle. The significance of that spot had been

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affirmed by PW73, but there was no attempt to prepare a mahazar of that scene. PW68, who is said to have prepared the Scene Mahazar after the FIR, also does not identify the said scene, despite the get-away having been spoken of by the first informant. Coupled with this, is the delay in the FIR registered at 11.30 p.m. having been received in the jurisdictional Court only at 4.30 p.m; which Court was just 100 meters away in the same compound at Vanchiyoor, Thiruvananthapuram.

11. PW1 is a chance witness and even his vocation has not been proved; though challenged. There is also no attempt made to examine the owner of the shop in whose veranda, PW1 carries on his vocation of assisting the passport-applicants. PW1's testimony is full of contradictions & omissions. PW13 & PW14, witnesses to the conspiracy, are unreliable for reason of the complete omissions in their S.161 statement. Besides the fact that it is very unlikely that the assailants and the riders of motor bikes could be identified from the sighting made of them,

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from a group of people, the witnesses just saw them in a flash, riding the bikes. It is also pertinent that none of these witnesses to the conspiracy or the witnesses to the get-away, from the front of 'Madan kovil', speaks of the registration numbers having been masked with paper. The recoveries of bikes also do not speak of such a masking of the number plates and none of the bikes were connected to the accused or identified by the witnesses. As per the recoveries made from the crime scene, recorded in Ext.P28, it is pointed out that the photographs do not show the single slippers recovered or the newspaper. Though even the blood stains recovered were sealed and packed, there was no such caution exercised with respect to the slippers, making the recovery itself suspect. The slippers recovered were also submitted to Court much later after the unsubstantiated recoveries were allegedly made; throwing suspicion on that piece of evidence.

12. Learned Senior Counsel took us elaborately through the depositions of PW68, PW73 &

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PW76, the I.Os, to point out the irregularities committed, inconsistencies coming forth and proof of the contradictions and omissions in the prior statements of the witnesses examined. To sum up, it is contended that A15 was unnecessarily included on the feeble premise of PW13 & PW14 having sighted him in the group of people in the morning of the subject day. The identification of A15 is only from the dock and there is no other incriminating circumstance against him. A1, A8 & A10, though alleged to have been identified by the witnesses in the TIP, serious infirmities vitiate the TIP. For one, only four witnesses from around nine or ten ocular witnesses in the final report were chosen for such identification. The explanation of the I.O that he chose only those persons who were available, has to be rejected immediately since he admits that no attempts were made to cause issue of summons to the other witnesses. Further, from the evidence of PW73 & PW76 it is pointed out that just after the day on which the request was made to the CJM to conduct a TIP, the

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four witnesses were summoned to the Police Station, on the pretext of identifying the dress and weapons of the accused. It is asserted that the witnesses were shown the photographs of the accused to be identified and given very clear descriptions. As far as A13 is concerned, there is no document produced to show his arrest nor is any recovery made on his confession. A13 was also identified from the dock by PW15 and PW3 did not identify him. A13 was said to be driving a bike, which however has not been recovered. All the above accused are entitled to be acquitted, finding that there is absolutely no evidence against them and disbelieving the entire ocular testimonies.

13. Sri.P.Vijayabhanu, learned Senior Counsel adopts the arguments of Sri.Raman Pillai and takes us specifically through the recoveries made from A2, A6, A7, A9 & A12, for whom he is instructed to appear. The recovery of the weapon as against A2, was only spoken of by the I.O and there were no blood stains seen at the time of recovery. In the report of the FSL, Ext.P35, though blood was found, origin

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could not be traced. As far as the dress is concerned, the confession is said to have been made by PW73 on 11.04.2008 while the recovery was made on 18.04.2008; allegedly to have more clarity as explained by PW73. PW76, the Circle Inspector who carried out the recoveries only speaks about the recovery as if the confession was made to him. The attesting witnesses were not examined and PW71 the scribe alone was examined to prove the recovery. As far as A6 is concerned the dress did not have any blood stains and though the FSL found blood, origin could not be traced. The weapon marked as M013 alleged to be recovered through A6 did not show any blood stains and the blood detected on analysis was not sufficient to trace the origin. In the case of A7 the dress did not contain any blood stain and the bike recovered was not identified by any of the witnesses. Ext.P11 mahazar was attested by PW11 who turned hostile. The dress recovered, M023 and M024, allegedly of A9, had no incriminating material detected or found on analysis. The bike recovered,

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allegedly used by A9 was missing from the police station. A9 was asserted to have worn a track suit by PW3 in his chief-examination, but in cross-examination it was admitted that he did not speak about the dress, till he was shown the track suit by the police. There are absolutely no documents produced regarding the arrest of A12 and neither is there any recovery through him. The identification made by PW1, of A12 is highly suspect and the deposition of PW1 regarding the identification made from the police station is contrary to the deposition of PW77, the I.O who arrested A12. PW3 identified A12, but he does not have a case that he saw the attack proper, in which A12 is implicated. PW3 categorically stated in cross-examination that he did not see the attack and hence there is no possibility of his recognizing A12.

14. Adopting the arguments of both the learned Senior Counsel, Sri. Arjun Sreedhar, learned Counsel for A4, A5 & A11, points out that PW1's testimony is inherently dishonest and he even had

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prevaricating statements about the first statement given to the police. When, embellishments were projected, he attempted to cover it up in cross-examination, by stating that he had pointed out the mistakes in the FIS, to the person who recorded it. His original testimony on 25.05.2016 was that he realized the mistakes even before he put his signature and told the officer, when, he was asked to inform the I.O. Later, in re-examination on the afternoon session of the next day, a question was put to him as to when he realized that there was a mistake committed. It was his statement that it was after he signed the FIS. PW1 again was proffered as a witness to speak on the crime proper and not about the conspiracy of the get-away. PW1, however, identified A5 in the TIP and there was an attempt made to identify him in the dock, which however miserably failed as is seen from his testimony.

15. PW3 and PW15 are the eye witnesses who saw the get-away in which A4 and A5 are alleged to have participated. PW3 alone was called for the TIP

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and he identified A5 both in the TIP and also on the dock. However, he also identified A11, who, even according to the prosecution, was neither associated with the crime proper or the get-away and was implicated for his role in the conspiracy. In cross examination, PW3 asserted that both A11 and A12 were present in the crime scene, quite contrary to the prosecution case. He also made a statement that A11 and A12 were seen in the Sub Jail; all of which together, make him inherently dishonest.

16. As far as the recoveries are concerned, there was no independent witness to the recovery of A4's bike and the father of A4, who is said to have witnessed Ext.P68 recovery mahazar of his dress, turned hostile. There was no independent witness examined to identify A5's bike, and PW44, the attesting witness turned hostile. It is also pointed out that though A5 was not identified by PW1, interestingly, his dress was identified as M016 and

17. The trial court went wrong in assuming that PW46 was the attesting witness to the recovery by A5.

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PW44, who was the attesting witness, to A5's recovery turned hostile, but the trial court placed reliance on PW46 who was proffered to affirm the recovery of A3, who had the identical name of A5. PW1 also deposed that he saw A5 sitting on the bike with its engine on; which case, even the prosecution did not have. As far as the identity of the bikes are concerned, it is pointed out that PW71, scribe of the scene mahazars marked them without it being produced in Court. The ownership or the registration particulars of the bikes were not proved and though PW32 and PW33, the Joint R.T.Os produced Exts.P29 to P32 registration particulars, nothing was spoken about the details or the registration particulars.

17. PW15 again identified A4 and A5 in the dock for the first time. The omissions in the depositions of the ocular witnesses as proved by the I.Os were specifically pointed out. On the question of identification of the bike and the inculcating circumstances of a recovery, the learned Counsel would rely on Varun Chaudhary v. State of Rajasthan

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(2011) 12 SCC 545. As far as A11 is concerned, there is absolutely no evidence to show that he harboured the other two accused. The evidence available only shows that he accompanied the accused to Kanyakumari, not in the course of absconding from the crime scene. They took a room in the wee hours and checked out immediately thereafter. It is pointed out that it is quite natural for tourists to Kanyakumari, to do just that, to view the sun rise, a major attraction. All the accused returned back to Thiruvananthapuram and were available in the locality itself till their arrest. The hand writing of A11, found in the register Ext.P41 seized from the hotel at Kanyakumari was compared with the sample taken. There is absolutely no evidence as to how the sample was taken. Admittedly, there was no sample taken in the presence of the Magistrate or the trial Court and PW76, the I.O speaks of the sample having been taken from the police station, which he is not authorized to do, even as per the Identification of Prisoners Act, 1920, as it stood then. The learned Counsel

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asserts that the accused are entitled to be acquitted.

18. Sri.S.U.Nazar, Learned Special Government Pleader [Criminal] argued that PW68 admittedly did not take any S.161 statement since he was more concerned with the law and order situation, especially since the crime had political overtones. PW73, was also present in the location, for the very same reason and he was authorized to take over the investigation only by evening and he would not have taken down any statements of witnesses; quite realizing that the SHO, the C.I of the jurisdictional Police Station is the I.O. Further it is pointed out that immediately after the crime, on information of the death of the victim, there was a *hartal* declared and all the shops in the area were closed down, thus there would not have been anybody present in the scene of occurrence to carry out inquiries. There is no delay in the FIR being submitted to the Court, since it was registered at 11.30 a.m and reached the Court by 4.40 p.m. As a matter of practise, if a FIR

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reaches the court after commencement of its day's business, the same will be certified by the Magistrate concerned only after his regular court work, contends the learned Public Prosecutor. It is pointed out that the prosecution case has three limbs, the conspiracy, the attack and the get away. PW13 and PW14 speak of the conspiracy and identified each of the accused who were involved in it and who proceeded to execute the same. PW14 identified some of the accused, having proceeded from the RSS Karyalayam in bikes. When the identity of the said persons has been established at the scene of occurrence and in the subsequent get-away there is a reasonable inference of the conspiracy, which ropes in the other accused who did not play an active role. Conspiracy, it is argued is always hatched in secrecy and there could be no direct evidence.

19. The second limb of attack was witnessed by PW1 and PW4. Countering the arguments of the defence, it is pointed out that there was never a suggestion in cross-examination about PW1 not

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carrying on the vocation he claimed. The witness categorically spoke of having pursued the occupation of aiding passport-applicants, from 1992 onward. He also spoke in detail about the locality, which only a person closely acquainted can speak of. PW1 denied every suggestion that he was affiliated to a political party. He withstood the grueling cross-examination and the challenge raised on his reliability. On the identification made, it is argued that the witness saw a brutal attack on his friend and it left a lasting impression on him. The identification of the accused, weapons and the dress having been stated clearly, it cannot be ignored as an impossibility. The testimony that the incident lasted for about one and half minutes need not be taken literally since there were 25 injuries found in postmortem. There would be considerable time taken for inflicting such injuries and the corresponding recoveries corroborate the eye witness testimony. Alternatively, it was contended that graphic narration of the dress worn by each of the accused

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and the weapons wielded by them, simultaneous with their identification is no reason to disbelieve the witness in toto. Even if this court is of the view that the narration as regards the dress and weapon is difficult to believe; the accused being in the vicinity of the witnesses for a minimal time, still that part of their evidence as regards identification of the accused is liable to be separated from the rest and accepted, for, the principle in '*falsus in uno, falsus in omnibus*' is not followed by Indian courts, is the forceful submission of the the learned Prosecutor.

20. Regarding the mistake committed in the FIS it is argued that the witness pointed it out at the first instance and it could very well be that of, the number of accused persons. In any event on the very next day PW73 took a S.161 statement from the witness and the first arrests were made only on 10.04.2008. The FIS as has been held, is not an encyclopedia of all events and there cannot be any disbelief in the testimony, especially when the

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omissions brought out are not very material. Harpal Singh v. Devinder Singh [1997 6 SCC 660] and Rattan Singh v. State of H.P [AIR 1997 SC 768] are relied on. It is argued that PW1 and PW4, the eye witnesses to the attack clearly identified A2, A6, A8, A10 & A12 in the TIP and also before Court. As far as recoveries are concerned the weapons recovered through A2, A6, A8 & A10 clearly clinch the issue as against those accused. Though the independent witnesses turned hostile, the scribe and the I.O deposed about the recovery and there is nothing to indicate the recoveries to be artificial. On the scientific evidence, Ext.P36 is pointed out to indicate MO4 Sword, wielded by A8 having been detected with human blood belonging to Group B. Likewise, the dress recovered of A2 indicated blood, the origin of which could not be traced. However, that alone cannot lead to such scientific evidence being eschewed as has been held in Gura Singh v. State of Rajasthan [2001(2) SCC 205]. As to the witnesses to the recovery turning hostile, reliance

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is placed on Modan Singh v. State of Rajasthan [(1978) 4 SCC 435] and Mohd. Aslam v. State of Maharashtra [(2001) 9 SCC 362]. It is argued that when the evidence of the I.O is convincing, the recovery of the weapons and the dress can be believed; since often the independent witnesses, for various reasons, turn hostile to the prosecution.

21. The recoveries of slippers from which blood was detected as per Ext.P35 is clinching evidence against A8 and A10. Two slippers, each of different pairs, was seized from the scene of occurrence, as per Ext.P28. The other slipper of the right leg, of both pairs were recovered on the confession statement of A8 and A10 by mahazars, Exts.P6 and P66. There is also trace of blood seen in the chemical examination which clinches the guilt of both the said accused. Resisting the argument of delay in TIP, reliance is placed on Chandraprakash v. State of Rajasthan [2014 Cr1.J 2884]. Mulla v. State of U.P [(2010) 3 SCC 508] is also urged to support the TIP carried out. The mere publication of

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photographs in News Papers cannot by itself negate the identification made by the witnesses, in a properly carried out TIP as held by this Court in Sajeevan v. State of Kerala [1993 KHC 120] and Saji v. State of Kerala [2007 2 KHC 595]. PW3 and PW15 identified A1, A4, A5, A7 & A9 who were on the bikes to facilitate a get-away to the actual eye witnesses. PW3 and PW15 again are natural witnesses who can be believed and both of them not only saw the get-away but also accompanied the injured victim to the hospital. The eye witnesses are natural and trustworthy and there is sufficient corroboration from the recovery of vehicles, weapons and dress of the accused coupled with the scientific evidence, the last, though nominal. The cumulative effect of the evidence led, would definitely justify a conviction as entered by the trial Court; which along with the sentences are to be upheld.

### III. THE FIS AND THE WITNESSES:

22. The First Information Statement (Ext.P1) was by PW1, a person engaged in assisting applicants,

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who flock to the passport office at Kaithamukku in Thiruvananthapuram. According to him, he was engaged in his avocation, in the veranda of a shop-room, wherein Thanima Studio was run. Hearing a commotion, he rushed out and saw Vishnu, surrounded by 4 to 5 people who were armed with swords and choppers, standing in front of Saranya Associates, which is on the road in front of the Passport Office. He saw the assailants hacking on Vishnu; on the head, neck and various parts of the body. The injured victim cried aloud and fell on the road and those who were watching the attack, including himself, ran to the fallen man, while the assailants ran to the north, mounted three motor cycles parked near the *Madan kovil* and went in the direction of Thengapura. The victim who was bleeding from the grievous wounds sustained on his head, neck and hands was boarded into an auto by the locals and taken to the Ananthapuri Hospital at Chakka. Himself and his friends followed in another auto and since they were advised to take the victim to the Medical College

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Hospital (MCH); in an ambulance, the victim was taken from the Ananthapuri Hospital to the MCH, where he was declared dead. He stated that he did not know why the victim was hacked to death and that he can identify the assailants and the weapons used. He also stated that he did not know the number of the motor cycles in which the assailants got away and asserted that the ghastly attack was seen by a lot of persons.

23. The first informant, the eye witness to the incident of hacking was examined as PW1 and so was PW4, who saw the attack. The ocular witness examined to prove the immediate subsequent fact of the flight of the assailants, in motor bikes, which allegedly had the number plates masked, was PW3 & PW15. PW13 and 14 were examined to prove the conspiracy that occurred at the RSS Karyalayam (office). PW2 attested the Inquest Report and the loyal attestors to the recovery mahazar's under Section 27 of the Evidence Act were, PW5 (Ext.P3-MO10, chopper by A2 and Ext. P4-MO1, pipe, accused not identified), PW6 (Ext. P5-MO5, chopper by A6) & PW7

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(Ext.P6- MO6, slipper by A10). PWs.8 to 11, 39, 44, 47, 50, 64, 66 & 67 attestors to the recovery of various articles like dress, footwear, bike and a bomb, on alleged confessions made by the different accused, turned hostile. PW12 is the landlord of A10, who did not say anything incriminating. PWs.16 to 21, 23 to 25, 29, 31, 42, 43, 48, 2, 54, 58, 60, 62, 65 & 74 who were expected to speak on the various actions of the different accused, which provided a link to the crime, also turned hostile. However, some of these witnesses spoke in favour of the defence. PW19 said that, there was a news in the Mathrubhoomi Daily of the attack having been carried out by masked men, PW25, of A5 having been in constant contact with him and having attended a festival on April 4<sup>th</sup> and 6<sup>th</sup> at the R.S.S Sakha.

24. PW48, the Manager of the Bank in which A5 was working confirmed his presence for duty on 01.04.2008, the crucial day; as also before and after that day and marked Ext. D15 covering letter sending the details of the attendance in the Bank for March-

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April, as send to the AC of Police, Sanghumukham. PW52, an office bearer of the R.S.S admitted having been attacked by the CPI(M) workers, after the murder of Vishnu, but denied having stated that it was in retaliation. He also was to speak on the immediate provocation of Vishnu's murder, alleged by the Prosecution to be an incident of Bomb throwing at the RSS office, which he rubbished as only an act of cracker bursting by miscreants, as evidenced from Ext.D16, FIS made by him before the Police. PW 65 is the Manager of the Bank in which A1 was working and he admitted to have signed the Mahazar Ext. P67 by which the Attendance Register of the Bank was surrendered to the Police. But he denied the Register confronted to him as the one seized from him, at the Bank.

25. PW26 is the Village Officer who prepared the scene plan Ext.P21, and PWs.27, 28, 30, 34, 35, 37, 61 & 69 were the witnesses from the FSL, who deposed on the scientific evidence. PWs.32 & 33 were the Joint RTOs who produced the registration

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particulars of the seized motor bikes and PW36 marked the scene mahazar of the house of PW17, but PW17 turned hostile. PWs.38 & 40 are respectively the Manager and Room Boy of a hotel at Kanyakumari, wherein, A2, A11 and A16 had stayed for a night. Rather, they checked-in, in the wee hours and vacated in the morning. PW41 attested Ext.P44 mahazar (motor-bike) and so did PWs.45 & 46, respectively Ext.P47 (Car) & 48 (dress of A3) mahazars. PW49 produced the attendance register of A4; which however is a digital extract, not supported by a Section 65B certificate. PW51 marked the FIS & FIR in this case and PW55 registered the FIR, Ext.P57(a) in Crime No.60/2002, in which FIS, the complainant was PW53. PW56 proved Ext.P58, FIS given by PWs.53 & P57 registered FIR in Crime No.192/2008. PW59 sold a Yamaha bike KL-01Q-677 to A5.

26. PW63 a Sub Inspector with the bomb disposal squad disposed of the country bomb recovered at the instance of A1. PW68 is the C.I, who commenced the investigation. PW71 the Constable at the

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Vanchiyoor Police Station, who accompanied the I.O, during the various recoveries and the scribe of the mahazars; whose testimony is crucial in so far as the attesting witnesses having turned hostile. PW72 is the Judge who carried out the TIP. PW73 is the I.O who took over the investigation on the very same day at 9 p.m. and arrested A1 to A6 & A10. PW75 is the CI who carried out inspection and recoveries and PW 76 arrested A7 to A9 & A11 as also laid the final report against A1 to A11. PW77 is the ACP who took charge of the investigation from PW76 and laid charge against A12 to A16. Among the defence witnesses, DWs.5, 6 & 7, reporters of newspapers turned hostile. A11 gave evidence as DW1 & DW2, a Dy.SP of the Crime Branch marked Ext.D23, certified copy of final report in Crime No.17/2001, wherein, PW14 was one of the witnesses. DW3 works in a Travel Agency near the passport office, who deposed that he witnessed the incident and the assailants were wearing helmets and masks. DW4, the special correspondent of a daily and DW8, Chief Reporter of another daily, spoke of having

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reported the incident and produced documents.

### IV. THE CAUSE OF DEATH:

27. PW37 is the Doctor, who conducted post-mortem examination on the deceased. The body had 25 injuries of which twelve were incised wounds and the other mostly abrasions and one or two contusions. The opinion as to the cause of death was due to head injury. The Chemical Examiner's Report was also marked as Ext.P40 and the post-mortem certificate as Ext.P39; which indicate the blood group of the deceased to be, B-positive. Injuries Nos.1 to 9 were opined as being fatal and having caused the death. The twelve incised wounds according to the Doctor could be caused, using sharp edged heavy cutting weapons like chopper and sword. MO4, MO7, MO10 & MO13 weapons shown to the Doctor was opined as possible of causing such injuries. MO11 iron rod shown to the Doctor was also possible of causing injuries as found in the body at the time of post-mortem examination. There was nothing brought out in cross-examination and definitely the death is by homicide.

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### V. THE MOTIVE:

28. The motive for the crime, according to the prosecution is the political rivalry between the CPI(M) and the RSS. PWs.52 to 57 were examined to prove the motive. PW52 had raised a complaint before the Fort Police Station and the FIS in Crime Number 127/08 registered on the said complaint was marked as Ext.P52. He admitted that there was an attack on him and that the perpetrators were CPI(M) workers. But he denied having made a statement that the same was in retaliation of the murder of Vishnu and said that it was due to his being an active member of the RSS. There was also a suggestion made by the prosecution by virtue of his S.161 statement that there was a complaint of bomb throwing at the RSS Karyalayam on 27.03.2008; which was denied by him. The complaint marked as Ext.D16, in cross-examination, was regarding some miscreants having thrown fire crackers at the RSS Karyalayam. PW52 categorically stated that there was no allegation that the same was done either by the deceased or the CPI(M) workers. PW57, the then

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ASI of the Fort Police Station proved Ext.P60 FIR in 192/2008, registered pursuant to Ext.D16 FIS.

29. PW53 marked Ext.P57 FIS in Crime No.60/2002 wherein he was attacked by certain CPI(M) workers and the deceased was also in the array of the accused. PW55, the ASI of Fort Police Station marked FIR registered in the said crime as Ext.P57(a). PW54 another worker of the RSS marked Ext.P58, FIS in Crime No.24/2002 given at the Vanchiyoor Police Station in which PW54 was attacked by the deceased and the others. Ext.P59 is the portion of the S.161 statement given by PW54 in the said case, wherein he apprehended that the motive for the present killing was the enmity of the year 2002; which was marked as a contradiction. PW56 also spoke of the attack against PW54. PWs.52 to 54 & 56 were admittedly members of the RSS who were proffered to prove the motive. The FIRs registered was of the year 2002 and the allegation is also of rivalry existing from that date onwards. In any event we do not see any reason to place reliance on the FIR 192/2008(Ext.P60) which

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was registered just a few days back which does not indicate any allegation having been raised against the deceased or the CPI(M). It has to be noticed that motive is not an imperative circumstance and this is a case in which there is ocular evidence. Further in cases of political rivalry the motive always seems to exist against active workers and that alone cannot lead to a presumption that if 'Keechaka' is dead it should necessarily be 'Bheema's' doing.

### VI. THE TEST IDENTIFICATION PARADE:

30. The TIP, being part of the investigation, which is not substantive evidence; we consider the same first to find, if it has any corroborative relevance. The final report of the Police, indicates numerous ocular witnesses, two (PWs.13 & 14) on the conspiracy, eight (PWs.1 & 4, CWs.8 & 10 to 14) on the crime proper and two (PWs.3 & 15) of the get-away. CW8 was Malik, who was walking along with the victim when the attack commenced. PW3 spoke of having been at the scene of occurrence with PW15 & Anjalose (CW10), when Jayakanthan (CW11)

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joined them to see the body of Potty, who committed suicide in the residence opposite to *Madan kovil*. PW15 also spoke of the presence of PW3, CW10, CW11 and one Raju (CW12). PW15 & CW10 were the persons who took the victim to the hospital and was with the body throughout. PW1 deposed that Suresh Thomas & Sarath Chandran, two persons with the very same vocation, was with him when the attack occurred, who were never even cited. CW14 was the attestor to the Inquest Report, who also is said to have witnessed the incident. None of these persons were called for the TIP nor arrayed before the Court as witness. Of the two eye-witnesses to the conspiracy, PW13, and from the two who were to speak on the get-away, PW15, were not summoned for the TIP. PWs.1, 3, 4 & 14 alone were called for the TIP carried out, on three separate dates; of the different accused. The TIP for A1 to A5, arrested on the night of 10.04.08 (A1&4), morning of 11.04.08 (A2&3) and 19.04.08 (A5) was conducted on 29.04.08, that of A6 & A10 (arrest on 25.04.08) on 17.05.08 and A7 to A9 (arrest on 20.05.08) on

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31.05.08.

31. The first TIP was requested formally by PW73 on 15.04.2008 on which date he also obtained custody of A1 to A4 from the Court. It is PW73's deposition that A1 to 4 were in his custody from 15.04.2008 to 19.04.2008. It also comes out from the evidence that A1, A2, A3 & A5 were taken out to carry out recoveries on 18.04.2008 and 19.04.2008 as per mahazars Exts.P44, P77, P48 & P78 respectively. Though in Court, it was stated that precautions were taken to mask the identity of the accused while recoveries were carried out, nothing was said in the mahazars. Further, the witnesses required to identify the accused were summoned to the Police Station on 13<sup>th</sup>, 23<sup>rd</sup> and 28<sup>th</sup> of April, 2008 just before the TIP, which was on 29.04.2008. Likewise, PW76 gave a request for the TIP of A7 to A9 on 23.05.2008, just before which the witnesses were summoned to the Police Station on 22.05.2008, and the TIP was held on 31.05.2008. This fact was admitted by both the I.O's (PWs.73 & 76) who deposed that they

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were so summoned, to identify the recoveries made. The identification of the various accused was made without any reference to their overt act; which is not very material but PW1 says that he did point out the accused based on their overt acts; a falsehood.

32. The TIP was conducted by PW72, who was then, the JFCM-I, Thiruvananthapuram, as per the directions of the CJM. In the TIP conducted on 29.04.2008, A1 to 5 were in the parade. PW1 identified A2 & A5, PW14 identified A1 to A5, PW4 identified A2 & A3 and PW3 identified A1, A4 & A5. The TIP was carried out in the Sub Jail and witnesses were available when the Magistrate reached the Sub Jail. About 51 persons were chosen and the accused along with the 51 were lined up in a 'U' shape at the first TIP. The witnesses were brought one by one to identify the suspects from the line-up. After each witness carried out the identification, they were asked to leave the jail premises. The suspects were informed of their right to change their position, which some of them did, before the next witness was

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brought.

33. On 17.05.2008, A6 & A10 were on parade and the very same witnesses were summoned for identification. PWs.1, 4 & 14 identified both the witnesses while PW3 did not identify anyone. On 31.05.2008, A7 to A9 were on parade. PW14 identified all the three, while PW1&P4 identified A8 alone and PW3 identified A9. The reports of TIP were produced and marked as Exts.P80, P81 & P82. The reports indicate that the Magistrate came to the Jail premises with a Peon and his L.D Clerk on the first day and the Junior Superintendent and Peon on the next two days. The witnesses were kept in another room where the L.D.C or the J.S. supervised them. The Peon was asked to bring the witnesses to the room where the identification parade was arranged. On the first day there were 51 persons picked up for the parade, on the second and third days 26 persons each. The parade was held only once for each witness and the Magistrate admitted that he had not asked them about the overt acts; which is not necessary.

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Budhsen v. State of U.P [(1970) 2 SCC 128] held that the Magistrate only supervises the identification proceedings and has no duty to interrogate the witnesses to elicit the facts relevant to the crime.

34. The procedure with respect to TIP has been detailed, on the strength of precedents and also based on the guidelines issued by the State of Kerala, in Pradeepan v. State of Kerala [2005 (3) KLT 1075]. Trite law, noticed from the precedents, was that, the TIP is only a step, in aid of investigation and the identification in Court is the substantive evidence and that, TIP only provides corroborative evidence and the failure to hold TIP would not in all cases be fatal. The aspect of delay in holding a TIP was also held to be not fatal and the same would depend upon the attendant facts. The safeguard for conducting a TIP were listed as, (i) the necessity to hold it without undue delay before the expiry of the first remand period, (ii) the witnesses (NOT) being given sufficient opportunity to see the accused and acquaint

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themselves with the features before identification is made, (iii) the precaution to ensure that the accused is not paraded before the public to facilitate a publication in News Papers, (iv) the necessity to mix up the persons of the same race, culture, age, height, position in life etc., (v) the accused to be permitted to select their positions, (vi) concealment of distinguishing marks of the accused, (vii) the witnesses not being permitted to communicate with each other and (viii) the police being not at all involved and the Jail authorities as far as possible, kept away.

35. For the guidance of the Magistrates, the Division Bench additionally stressed upon the requirement *inter alia* to select non-suspects from the same religion and status; unknown to the witness, the need for privacy, the recording of the names and age of the men assembled, the requirement to ensure that the suspect does not wear any conspicuous garment and so on. The Division Bench also noticed G.O.MS.791HomeAdt.25.06.1958 which contained

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instructions for holding TIP. The guidelines also stipulated that if the number of suspects are one or two, there may be non-suspects up to nine or ten per suspect and if the number of suspects are larger, it could be not less than five non suspects for each suspect. The guideline also requires that unnecessarily long parades should be avoided and identification should be made in two or three batches. If it is so done in batches, the same non suspects should not be made to stand in more than one parade. It is also stipulated that ordinarily every person in the parade should wear the same clothes.

36. In the afore cited case, the TIP conducted was not accepted by the trial Court on the premise that the Magistrate was not able to rule out the possibility of the witnesses having seen the suspects when they were brought to the Court premises; where the TIP was held in that case. The above reasoning was not accepted by the Division Bench of this Court. However, it has to be noticed that in appeal, the Hon'ble Supreme Court in

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did not fully accept the TIP, especially due to the undue delay in arranging the TIP of the accused, excepting that of A1, in that case. In the present case, we have to look at whether the Magistrate has conducted the TIP in accordance with the safeguards and the guidelines provided respectively by the precedents and the G.O. The identification was held only once by each of the witnesses and normally, even if the identification is made at the first instance; it is repeated for each of the witnesses. However, that could aid the prosecution or the accused and this does not vitiate it all together. In the first TIP, there were 51 persons arrayed in the parade quite contrary to the guidelines. The Magistrate had ensured the safeguards, only to the extent of the number of non-suspects per suspect, but not the specific safeguard of avoiding long parades. In fact the Division Bench held that if there are more number of accused persons to be identified, then the identification should be held in stages. Insofar as

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the next two parades are concerned, the suspects were two and three in number and the number of non-suspects were twenty six which can be accepted as permissible, as per the guidelines.

37. Be that as it may, there was no attempt to ensure that the persons included in the parade are of the same description or religion. The name and age of each of the non-suspects have been recorded, but there is not even a statement by the Magistrate who conducted the TIP that he ensured the persons in the parade to be of almost identical features or that they wore the same attire as the suspects. The above fact has to be considered especially noticing the fact that the specific allegation of the defence, which is admitted by the I.O, is that the witnesses were summoned to the Police Station after or just before the request for TIP was made and before the TIP was actually conducted. It is also of significant import that the accused were paraded in public when recoveries were made just prior to the TIP, when they were taken into custody, simultaneous to the request

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for TIP, on 15.04.2008 and remanded back only on 19.04.2008. The last of the TIP conducted on 31.05.2008 also suffers from the same infirmity. This puts at peril the corroborative quality of the first and the last of the TIP conducted.

38. No weight can be attached to the TIP carried out when there is clear evidence that the witnesses were summoned to the Police Station, after or just before the request for TIP was made. There was every possibility of the witnesses being given a description of the accused; they were supposed to identify or shown the photographs which could have been available in the Police Station, despite the stiff protests to the contrary, in the cross-examination of the I.O's. The suspects were also taken into custody after the request for TIP was submitted. Ravi @ Ravichandran v. State rep. by Inspector of Police [(2007) 15 SCC 372] considered the question of the suspects' photographs appearing in local newspapers and the suspects being in lock up, with the possibility of being shown to the

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witnesses and held that if that possibility is not completely ruled out then much importance cannot be attached to TIP.

39. Insofar as the second TIP is concerned, we have no doubt that the same has to be eschewed completely. The Magistrate in the report has clearly stated that he directed the Jail authorities to ensure that the two accused are produced in the parade clean shaven. They would have been produced at the parade immediately after they were shaved, on the instructions of the Magistrate, and they would stand out; making the identification a cake walk. The Magistrate has an explanation that the accused told him that they are normally clean shaven. But the G.O specifically empowers the I.O to request the Jail Authorities to ensure that the accused remanded, who are to be put on TIP, are not allowed to disguise themselves or change their appearance. We cannot but notice that one identifies another, based on his appearance and features, which, if interfered with, will make the identification next to impossibility. A

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balance has to be struck between safeguarding the interests of the accused on the one hand; and not creating an atmosphere impeding the natural prospects of a genuine identification by interfering with the ordinary features and appearance of the person to be identified. The latter cannot be said to be subservient to the former. Whatever be, the act of the Magistrate directing the Jail authorities to shave the suspects, just prior to the identification, without the non-suspects being subjected to a similar procedure would vitiate the entire proceedings.

40. As has been held in Budhsen (*supra*) the Magistrate has to carry out the TIP, with the balancing considerations of, not jeopardizing the life and liberty of the accused while ensuring that justice is not frustrated. The proceedings are to be carried out with great caution and vigilance, which we find to be totally absent in the instant TIP, and the Magistrate merely went through the motions and filed a lackadaisical report. In such circumstances, we find the TIP carried out in the above case to be

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grossly insufficient to corroborate the identification made by the witnesses from the dock at the time of trial. But that does not restrain us; from examining the substantive evidence as such and if no corroboration is necessary, from convicting the accused who are properly identified in the dock.

### VII. THE OCCULAR WITNESSES :

#### (i) THE ATTACK:

41. PW1 spoke of the attack on Vishnu before Court, but with major embellishments. Rattan Singh (*supra*) held that '*criminal courts should not be fastidious with mere omissions in the First Information Statement, since such statements cannot be expected to be a chronicle of very detail of what happened, nor to contain an exhaustive catalogue of the events which took place*' (*sic*). Therein after a shooting, two witnesses pounced on the assailant and one of them wrested the gun from the accused; which subsequent act was not there in the FIS. Holding that the narration in the first information of a crime, would depend on various factors like the skill and

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ability of the person to recant the facts, even of a just prior incident and even important details may be missed; it was cautioned that the omissions should be considered along with other evidence led on the crime. The gun having been seized from the scene of occurrence itself, even after the accused fled, it was held that the omission cannot lead to determination of the wresting of the gun to have never occurred. The omissions in the ocular testimony, as they come out in this case cannot be dismissed as irrelevant and are very material, as we would presently demonstrate.

42. In his deposition, PW3's statement was that, while he was filling up a passport application at the counter of Thanima Studio, he saw some people running and heard a scream. When he looked, he saw about six people attacking Vishnu by hacking on his head, neck and all over the body. One of the assailants was carrying an iron pipe, who was not identified. He specifically said that there were four persons with choppers and one with a sword. A8 was

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pointed out as the person who was carrying MO4 sword, A10, a chopper with a hook, marked as MO7, A2, with chopper MO10. A5 and A6 were mixed up and one of them was said to have wielded MO13 chopper with a wooden handle and the other, having stood near the bikes parked in front of the 'Madan kovil'. He identified each of the weapons shown to him as having been wielded by the different accused; except the person who used MO1 iron rod. In this context we have to notice that the identification of the weapons was made on the specific weapon being taken out, by the Prosecutor and confronted to the witness. We repeat, it was not as if, the witness picked up the weapon wielded by each of the accused, from among the many displayed in Court.

43. Very surprisingly the eye witness identified the dress worn by each of the assailants, also as pointed out by the Prosecutor. The colour of each of the apparel worn by the individual accused was stated clearly by PW1. Further, A12 was also identified as the 4<sup>th</sup> man with a chopper. However,

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with respect to identification of A12, prior to his identification on the dock, PW1 had different versions. In cross-examination, initially PW1 said that he was not shown any witness by the Police and that he also did not point out each of them before the Police. It was his definite statement that he identified the accused only in the TIP carried out in the Sub Jail. Later he admitted that A12 was identified by him in the Police Station, albeit from a group of five people; while PW77, the I.O who arrested A12 did not subscribe to that version. A12 was never a part of the TIP.

44. It is very pertinent that the eye-witness also said that while he was going on with his work, on the subject day and while following the injured victim to the Hospital, he was accompanied by two of his friends and colleagues, Suresh Thomas and Sarath Chandran. While in the FIS, he stated that the victim was taken to the hospital by the local people, in his deposition he specifically spoke of two persons, Baiju (PW15) and Anjalose (CW10) having done that. PW1 knew both these persons for long, the first one,

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from 1992 onward and the second, from 2001. The names of these persons were curiously omitted in the FIS. To a specific question, whether the daily newspapers, reported the assailants to have worn masks and the bike riders' helmets, he affirmed it; but also said that he did not read them. On the suggestion made of photos published in the dailies, he said he had not seen them.

45. The FIS also spoke of 4-5 persons having attacked the victim and then made a getaway in three bikes. There was no statement in the FIS that there were riders sitting in the motor bikes, in full throttle. Before Court, the entire story was embellished, insofar as, about six people having surrounded and attacked Vishnu while there were six bikes waiting in full throttle, at the spot near '*Madan kovil*'. After the attack, which PW1 deposed, as having lasted for only about 1½ to 2 minutes; the six assailants ran to the running motor bikes mounted them and got away, all clear omissions from the FIS and prior statements.

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46. There was, neither description of the weapons in the FIS, nor of the dress worn by the various accused; which cannot be expected too, at that stage. But the same were omissions, even in the prior statements made to the Police. PW73 deposed that PW1 had not stated about the sword having an iron handle, having hand-length. Though PW1 stated that one of the assailants had an iron-rod, its description as deposed before Court did not figure in the prior statements. It is pertinent that in the FIS, the version was of an attack with swords and choppers, with no mention of an iron rod. PW73 also affirmed that PW1 did not speak of one of the choppers having a hook or out of the three choppers, one being small in the prior statements. He had also not spoken of a chopper, with a wooden handle and to a specific question as to whether the description of the weapons were spoken of, it was PW73's testimony that PW1 made such statements, when he was shown the weapons. The identification of the weapons and the apparels, have to be taken, not with a pinch, but a

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dollop of salt, as the expression goes. The omissions were clearly proved, coupled with which, the graphic description of the weapons and the pictorial depiction of the apparels; even before they were shown to the witness, the manner in which they were confronted to the witness by the Prosecutor; one by one as wielded by the specified accused, awaken serious misgivings, we cannot erase from our minds. These details would have to be presumed to have been etched in the mind of PW1, who, witnessed the attack, for only 1-1½ minutes, to testify, to be recanted, eight years after the incident; highly improbable. It is true that the maxim 'falsus in uno, falsus in omnibus' is not subscribed by Indian courts, but ultimately what is being scrutinized in criminal trial is the overall credibility of a witness. If the facts spoken of by the witness - in the instant case, the graphic narration of the dress and weapons - is not merely unbelievable, but verges on human impossibility, it may not be safe to sift the chaff from the grain from the testimony of such a

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witness. These grounds coupled with the embellishments make the testimony of PW1 very incredulous.

47. Further in the FIS, the statement was that a number of people witnessed the incident and that after the assailants ran away, PW1 went along with the others to the side of the fallen victim. Before Court, his statement was that there were not many people around and that he alone went near the fallen victim. It is obviously to aid the prosecution, who failed to examine crucial witnesses before Court. Even PW1 admitted to one Malik (CW8) having accompanied Vishnu, while he was walking on the street. Malik, who was with Vishnu while the attack was perpetrated on him was not examined and explanation given is that he was abroad. No attempt was made to summon him or get his presence before Court. But for the assertion made by the Prosecutor, we have not been shown any effort made by the Police to get the presence of the most crucial witness, who had seen the attack. If Malik was present with the

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victim at the time of his attack, there could be none other, who could better speak on the identity of the accused and he figures in the final report as a witness who could identify the assailants.

48. One other aspect which disturbs us, is the consideration of whether PW1 was a natural witness; as made out by the prosecution. The trial Court relied on the decision reported in Rana Pratap v. State of Haryana [AIR 1983 SC 680], which held that the term 'chance witness' is unsuitable in the Indian setting where people are less formal and more casual and that none would anyway, commit a crime with notice to witnesses. We perfectly understand that there could be a number of witnesses in the street, especially in front of the Passport Office, when the incident occurred at 10.15 a.m in the morning. Many of the witnesses were clear in their deposition that there would be a long queue of applicants, in front of the Passport Office at that time all of whom would be a 'chance witness'. But we observe that PW1 is not a chance witness and the

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prosecution asserts that he was engaged in assisting applicants for passports; a most natural witness. What is glaring, is that there is nothing produced by the prosecution to establish the avocation of PW1. We say this specifically because the other eye witnesses in the crime scene does not speak of the presence of PW1 before Court. It was also the admission of the I.O, PW73 that there is no witness cited, who speak of the presence of PW1, in the crime scene. We also find that the vocation of the witness was specifically challenged in cross-examination. In cross-examination PW1 admitted that there are licensed persons to assist applicants, inside the Passport Office. He admits that his name is not available in any Register and that he is not licensed. He does not have a case that he is working under a licensed person. We cannot but point out that two persons, who were his colleagues, were present at the crime scene and also followed the autorickshaw in which the fallen victim was taken to the hospital. They were not examined before Court and not even

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cited. The declared avocation of PW1, is also to place him just opposite to the crime scene, which was in front of one Saranya Enterprises, opposite to which is one Thanima Studio. PW1's FIS was that he was working in the veranda of Thanima Studio and before Court, he said he was filling up a passport-application at the counter of Thanima Studio. But the categorical admission of PW1 was that he did not know the owner of Thanima Studio, quite consequential touching the very credibility of the witness' version. The totality of the deposition of the witness raises gross suspicions in our mind about his very presence in the locality.

49. PW4 is another witness proffered by the prosecution. According to the prosecution, he is an autorickshaw driver, who came to the Passport Office with a fare and was waiting to get another one. He saw the attack, when he was waiting at the spot and also identified the accused, the weapons used by each of them and the dress worn by them. Again, the identification was precise to the dot and

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he spoke of the weapons wielded by each of them, which were shown to him by the Prosecutor, upon which he affirmed it to be the weapons used. Then, he also identified each of the accused from the dock, the dress worn by them was also described and when it was shown to him, he identified it; just as PW1 did previously. He had no prior acquaintance of the persons he saw at the crime scene and he saw them subsequently, only at the Sub Jail; obviously when the TIP was carried out. He too spoke of the crime having been committed in the span of about 1½ minutes. He admitted that he saw the news that the attack was made by masked men. He also added that he was amused, since he had witnessed the incident. He admitted that he was summoned to the Police Station many times and before the TIP, he was so summoned, but does not remember, how proximate it was to the TIP.

50. PW4 identified the weapons, according to him, at the crime scene itself, when the crime was going on. But he admitted that those weapons were

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shown to him about ten days afterwards by the Police and so were the dress of the individual accused shown to him; without any details of the weapons or the apparel being stated in the prior statements. PW4 claimed that he owned an autorickshaw and that he had stated so, to the Police; which was marked as an omission. Despite the witness having claimed to own an autorickshaw, which had a permit to park at Thiruvallam Auto Stand, nothing was produced to establish the same; which the prosecution ought to have produced especially since he was proffered as a natural witness. He would be a natural witness, if he was in fact an auto driver; the crime spot being in front of the Passport Office. His prior statement marked as Ext.D6 goes to the effect that he saw the victim being hit with swords and choppers. In the prior statement he had also not described the weapons or the dress worn by the accused. This witness also, by his precise narration, evokes disbelief in us and the fact that he had omitted to describe the weapons or the dress of each of the individual accused in the

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prior statements makes the identification itself very unbelievable. There are also doubts about PW4's presence, since the prosecution failed to establish that he was in fact an auto driver; which could easily have been done by producing the registration particulars of the autorickshaw, the driving licence of the witness and the permit, which he claimed, enabled operations within the city.

51. PW73, the I.O, in cross-examination affirmed that PW4 did not speak about owning an autorickshaw and that he did not speak specifically about the direction in which he came or that, he came from the '*Madan kovil*' road. PW4 did not speak of having seen the incident when he was waiting for a fare and the statement was only to the effect that he was standing outside the autorickshaw when he saw the incident. PW4 had not spoken of the physical features of the persons who wielded the sword or that, one of the choppers had a hook in it. He also did not say that the person wielding the sword was short and reasonably stout or that there was a person wearing

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white dhoti among the assailants. PW4 also had not spoken of one of the choppers being small. The weapons were identified in Court, obviously for having been shown to him by the Police. The prior statement of PW4 was only to the effect that he saw a person being beaten and hacked with swords and choppers (Ext.D6(a)). PW4 also did not speak about the description of the weapons to the Police and just as we found about PW1, there are major embellishments made, about the description of the weapons and the apparel worn by each individual which persuades us to disbelieve the witness. At the risk of repetition, we cannot but reiterate that both PW1 and PW4, spoke of the occurrence having been for 1 to 1½ minutes, within which time it is impossible to identify the assailants, their individual apparel, the minute details of the weapons and recount it after eight years. We also have to notice that the clear deposition of PW4 was that he was stunned, on seeing the attack despite which he expects the Court to believe that he saw all these details which remained

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engraved in his mind. In this context we also have to notice the fact that these minute details spoken of in Court were marked as omissions, proved through the I.O, PW73. It raises grave suspicion that both the witnesses were tutored to the extent of breaking and eclipsing the thread of truth, if at all, in their testimonies and silencing the ring of truth too, if there could have been.

### (ii) THE CONSPIRACY :

52. PW13 & PW14 are the eye witnesses to the conspiracy. Before we look at the testimony, we have to consider the argument raised by Sri.Raman Pillai that there is no clear ascertainment of the scene of the conspiracy. The scene of the conspiracy was said to be in an RSS Karyalayam, the location of which is not clear from the final report. No scene mahazar or site plan was prepared and despite a search conducted inside the so called Karyalayam, nothing incriminating was detected. It is for that reason that PW13 and PW14 were tutored to speak on a gathering outside the Karyalayam, near the Brahma

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Kshethram especially realizing that if the conspiracy is alleged to be inside closed doors, then the witness cannot speak of the identity of the persons, as has now been done. We keep this in mind when we look at the testimonies.

53. PW13 is a friend of PW14 and on the subject day he went to the house of PW14 which was near the RSS Karyalayam at West Fort. PW13 saw some people standing on the right side of the compound wall of PW14; outside it, in front of the temple, near a Banyan tree. There is a small pathway going through the side of PW14's house to reach the said spot. The pathway leads to the RSS Karyalayam and the gathering of people was found about ten to twenty meters from the Karyalayam. PW13 queried PW14, about the crowd in the adjacent property, when he was told that there was some meeting going on and two days before, there arose some issue at that place. According to PW13, there were about 15 people and 4-5 bikes, and when PW13 and 14 went forward, they witnessed groups of 4-5 people scattered here and

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there. Later they saw them going in the bikes, leaving two persons standing in the spot, the latter of whom walked back to the Karyalayam. A15 was one of the persons who had seen off the bike riders; which is the only incriminating circumstance against him.

54. A5, A13, A9, A1, A10, A2, A12 and A4, in that order, were identified as the persons who went in the bikes. Except A2, who was said to be riding pillion, the others were not, so identified by their position on the bikes. PW14 spoke in tandem with the testimony of PW13 and also explained the location of the Karyalayam. According to PW14, his house is facing west and the Karyalayam is on the eastern side, ie: on the rear side of the house. The Banyan tree is between the Karyalayam and his house and to the left of the Banyan tree, is the temple. There is also a wall on the eastern boundary of PW14's house having a height of 3½ feet. Reading the testimonies of PW13 and PW14 the residence of PW14 is bounded by a compound wall and faces west. The Banyan tree and

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the Karyalayam are on the rear of the residence, to approach which, one has to go through a narrow pathway adjacent to the northern boundary of PW14's residence. The specific contention of PW13 is that when he went to the residence of PW14, PW14 came out and both of them were standing on the outside, obviously on the courtyard of PW14's residence. It is also the testimony of PW13 that the gathering was seen on the outside of the compound wall on the right of the residence of PW14, which happens to be the southern side. The Banyan tree and the Karyalayam are on the rear of PW14's house, separated by a compound wall and it is very unlikely to see the assembly of people on the rear of the residential building, especially from its front compound; even if they moved a bit forward. It is from such a position that the accused are said to be identified, clearly from amongst a gathering of 15 people. PW14 also identified A1, A13, A5, A9, A4, A7, A10, A2, A12, A8 & A6 as persons who sped away in the bikes, when he was standing on the road. He identified A15 too, as

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the person who returned to the Karyalayam, when the bikes departed. According to both the witnesses the further identification is from the bikes, which sped through the road in front of the house; a fleeting glance at best.

55. In addition to the impossibility of identification of the witnesses from the location; as testified by PW14, it is to be noticed that there is no documentary proof as to the existence of a Karyalayam or even the residence of PW14. Be that as it may, there were a number of omissions marked in the testimony of both the witnesses which are very crucial. Ext.D7 is the portion where, PW13 said that he had visited the house of PW14 on the morning of 01.04.2007. PW13 admitted that he had not told the Police the location from where he saw the conspiracy. On a specific question as to whether the Banyan tree or the compound of the temple, can be seen from inside the house of PW14; it was answered that he was standing on the front compound of the residence. We repeat, if he was standing on the front compound of

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the residence of PW14, which faced west, definitely he would not have seen the assembly of people on the rear of the building; at least to enable precise identification. PW13 had also omitted to state to the Police, that he had seen people assembled in between the Banyan tree and the Brahma Kshethram.

56. PW13 admitted that he had not told the Police of PW14 having informed him that, two days back there was some problem at the Karyalayam, that, there was a pathway on the side of PW14's house leading to the RSS Karyalayam, that, the assembly of persons was 10-20 meters from the Karyalayam, that, they went forward to clearly see who was standing there to witness groups of 4-5 people standing there, that, they were talking over telephone, that, later they went in bikes in front of them; all of which were marked as omissions. While in chief-examination PW13 spoke of having seen 4-5 bikes, in cross-examination he prevaricated that it was 5-6 bikes and then that there were a number of bikes. It was also admitted by PW13 that, he did not say about two

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persons going back to the Karyalayam, that, he saw them clearly to facilitate identification in addition to the the colour and make of the bikes, which were admitted to be omissions. Likewise, the testimony of PW14 was also full of omissions and PW73 proved the omissions brought out in cross-examination. We can attach absolutely no credence or genuineness to the testimony of PWs13 & 14. It cannot be said from the location spoken by PW14 and the fleeting glimpse they had of the speeding bikes that they would have witnessed the conspiracy or clearly seen the conspirators, so as to identify them later, in Court after eight years. In this context, it has to be noticed that PW13 was not called for a TIP. PW14 also deposed that he had identified A12, A3 and A15 in the Assistant Commissioner's Office at Shangumugham; regarding which there was no prior statement. We find absolutely no reason to find credible, the testimony of PW13 & PW14 regarding the conspiracy and in that circumstance, we cannot sustain the allegation of S.120B charged in the above case.

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### (iii) THE GETAWAY:

57. PWs.3 & 15 are the witnesses who saw the get-away on the bike and identified the persons who had parked the bikes, near *Madan kovil* and kept them in full throttle, to facilitate the get-away. According to PW3, he was at the spot since there was a suicide in the locality. He had gone to that house, but nobody was allowed entry, since the police had not come. The deceased also came to the house with one Malik and left after asking PW3 to call them when the body is brought out. Immediately thereafter, PW3 heard a commotion and when he looked, he saw six bikes parked at the *Madan kovil*, in full throttle and six others running towards the bikes, who mounted them and sped away. According to him, it was after the attack that the bikes came to the spot and parked near them to facilitate the get-away. He also spoke of one of the bike riders having stepped down and stood on the road with a cover in his hands, who was identified as A1. The persons who came running had

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weapons in their hands, according to PW3, a sword, four choppers and an iron road.

58. Apart from A1, he identified A5, A4, A9, A7, A11 & A12 in that order. He also clearly stated the make and color of some of the bikes. However, immediately, it has to be noticed that, in the prior statements, there was no description of the bikes given, admitted in cross-examination. Only this eye witness spoke of the registration numbers of two bikes, having been masked with paper. He admitted that the police had never shown him the bikes seized and he had not told the police that he would be able to identify the bikes, if shown later. It was admitted in cross-examination that, the description of the bikes were stated for the first time in Court, after eight years. He also admitted in cross-examination that he had not told the police that the description of apparels, worn by the assailants known by sight, can be recalled. But still he described the apparel worn by the accused, in chief-examination, which was also admitted to have been spoken of, for

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the first time in Court. The body features of the accused were also not noticed or spoken to the Police, in the prior statements. The witness then prevaricated and stated that he had spoken to the Police about the physical features, for example, the height, girth and so on. However, the same was marked as an omission.

59. In cross-examination PW3 admitted that he had not informed the Police, the fact that while they were standing near Potty's house, Vishnu and Malik had come to them and Vishnu had asked them to call him, when the body is taken out. PW3 admitted that he was in the Medical College throughout and that, on the very same day the inquest and postmortem was over. He also said that Baiju (PW15), Anjalose (CW10) and Raju(CW12) were also at the Medical College along with Aji. Aji, among these, was the sole witness in the inquest report, who was not cited. All of them returned with the dead body at around 3.30 and the cremation was carried out on the same day. Every statement recorded from this witness

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started with the refrain that the 'earlier statements were read over and he affirms it as given by him'; which the witness, in cross examination specifically denied having made. Even according to the witness, the police had summoned him and shown him the dress of the accused and asked him whether that dress was worn by any of the accused, to which he answered in the affirmative. The description in Court for the first time of the apparel worn by the accused definitely arises from such confrontation made in the police station and not from memory of the incident, especially when no such description was stated by the witness in his prior statements. PW3 very strangely identified A11, who was not at the crime scene, even according to the prosecution. PW3 also said that he had identified A11 & A12 at the Sub Jail; when both were not subjected to a TIP.

60. PW15 categorically spoke of the victim having been taken to the hospital by himself and Anjalose (CW10), of whom PW15 alone was examined before Court. PW15 deposed that he was standing along

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with PW3, Suresh Thomas, Anjalose (CW10), Raju (CW12) & Jayakanth (CW11), near the *Madan kovil*. He also spoke of the incident in tune with what PW3 stated that while they were standing there, six bikes came and parked near the *Madan kovil* and kept the engines running in full throttle while one of the bike riders, got down, with a cover in his hands. PW15 did not see the attack but saw Malik, who was with Vishnu, running away and it was he who threw a stone at the bikes which sped away from the spot. They rushed to the victim who was seen lying down and when the victim was taken into the arms, they realized it was Vishnu.

61. PWs.3 & 15 were the persons who took the injured victim to the hospital in an autorickshaw. PW73, the IO, categorically stated that he inspected the vehicle and also the dress worn by the persons who accompanied the injured victim to the hospital and he could not perceive any blood stains on either the vehicle or the dress. Here we have to notice that there were 25 cut injuries on the body of the victim

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and the victim would have been profusely bleeding. PW3 accompanied the body to the hospital and PW15 deposed that he had come to the victim and taken him in his arms, then he realized that it was Vishnu. This further puts to jeopardy their alleged presence in the crime scene.

62. PWs.3 & 15 are persons of the locality and PW15, according to PW1, was very well known to him from 1992 onward. PW3 & PW15 do not speak of the presence of PW1 at the scene of occurrence or later at the hospital, nor is he a witness to the inquest. This further puts the veracity of the presence of PW1, in the scene of occurrence to jeopardy. PW73, the I.O, had categorically stated, twice in his cross-examination, that none of the other witnesses spoke of the presence of PW1 in the scene of occurrence. The gross embellishments in the testimonies of witnesses proffered before Court, to speak on the conspiracy, the impossibility of they having witnessed the alleged assembly of persons in that location, behind the residence of PW14, while

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standing at the front compound of PW14's residence, persuades us to reject those testimonies completely. PWs.1 & 4 also made embellishments before Court and the omissions marked from the testimony of the witnesses as also the contradictions in the testimony of PW4, coupled with the fact that their presence respectively, engaged in assisting passport-applicants, and engaged as an auto-driver having not been established, raises very serious doubts about their presence in the locality. The doubts are accentuated by the graphical precision with which the weapons and apparel of each of the accused, were spoken of before Court, after eight years, without any prior statement on that count. It was also admitted that they have been shown the weapons and apparel at the Police Station, without a prior statement regarding such description.

63. The TIP, as we found, does not offer any corroboration. PW3 & PW15 also have evoked disbelief by reason of the embellishments regarding the description of the bikes, which though seized was

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never attempted to be identified by any of the witnesses in Court. We perfectly agree that it is the absolute discretion of the prosecution to decide on the witnesses to be examined before Court and this discretion also ensures that there is no repetitive testimony about the very same fact. The contradictions that are bound to occur by change in perception, while past actions witnessed are recanted by different individuals, also is avoided. However, when such discretion is applied and witnesses are chosen, from those cited in the final report, the prosecution has to, stand or fall, on the testimonies of the witnesses before Court. State of Maharashtra v. Syed Umar Sayed Abbas [(2016) 4 SCC 735] , acquitted the accused, giving the benefit of doubt, since the fatal shootout therein, occurred in a crowded place and the witnesses had only a fleeting glimpse of the accused; insufficient to observe the distinguishing features and the TIP too, offered no corroboration due to the delay caused. The circumstances are identical in this case, where the

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attack occurred in a crowded place and every limb of the allegations occurred in a flash and the TIP is found incapable of providing corroboration. From the discussion above of the ocular witnesses, paraded to speak on all the three limbs of the transaction which led to the death of the victim, we cannot but find them to be tutored and planted for the purpose of bringing home the guilt against the accused.

64. We reiterate the best person available was Malik-CW8, then there were Anjalose (CW10), Jayakanthan (CW11), Raju (CW12), Suresh Thomas and Sarath Chandran, none of whom were examined. Raghava Kurup v. State of Kerala [1965 KHC 382] was a case in which a Division Bench of this Court considered a plea of self-defence. PW1, eye-witness who saw the stab being delivered by the accused, spoke of injuries on the accused and along with PW2 spoke of the presence of a woman in the scene of occurrence; who though cited was not examined. Relying on Seneviratne v. The King [AIR 1936 PC 289] it was held that the test whether a witness is material does not

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depend on whether he/she would support the defence, but the consideration should be whether the witness is essential for unfolding the narrative on which the prosecution case is based, effectively. Mohammed v. State of Hyderabad [AIR 1954 SC 51] also was relied on to hold that if a material witness has been deliberately or unfairly kept away, that is a serious reflection on the prosecution case. Ishwar Singh v. State of U.P [(1976) 4 SCC 355] reiterated the principle and Parminder Kaur @ Soni v. State of Punjab [(2020) 8 SCC 811] went a step further to hold that if prosecution does not lead the best evidence in its possession, then an adverse inference can be drawn. Harpal Singh (supra) while declaring that the absence of examination of a material would not enable Courts, to always draw an adverse inference, it was pointed out that Section 114 (g) of the Evidence Act is only a permissible inference and not a necessary inference. In the present case we are afraid the prosecution, sadly picked the wrong witnesses who are unable to convince us about their presence in the

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scene of occurrence or inspire us with their testimonies and the only inference possible, adverse to the prosecution, is of the best evidence having been kept away.

### VIII. THE COMMENCEMENT OF INVESTIGATION :

65. Ext.P1 FIS was recorded by PW51, ASI, Vanchiyoor Police Station and the FIR was registered on the same day at 11.30 hrs., which reached the CJM's Court at 4.40 p.m. Even if we take it, that the Police Station was situated within the Court complex and the CJM's Court was just 100 meters away, we cannot find any unreasonable delay. There definitely would have arisen a law-and-order problem, especially considering the brutal murder in daylight, within the capital city and the political overtones it had, due to the deceased being the member of a prominent political party. This would engage the Police thoroughly and surely, which could be the cause for the delay; which in any event cannot be said to be an unreasonably long one. The FIR also shows that investigation was commenced; which was by the C.I. of Police, PW68, who was in charge of the Petta Circle

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under which the Vanchiyoor Police Station was situated. He speaks of having taken over the investigation at 12'0 clock and conducted the inquest in the presence of the locals and witnesses including PW2; which report was produced as Ext.P2. He had collected the samples from the crime scene and also two slippers, worn on the left leg, of different pairs and make, from the crime scene, which were marked as M055 & M056.

66. While it was specifically stated that the samples taken were sealed, no such precaution was taken with respect to the two slippers seized from the crime scene as per Ext.P28 Scene Mahazar. Ext.P71, P72 & P73 property lists dated 01.04.2008 were marked by PW68, which reached the Court on 04.04.2008, however, the slippers were not included in the materials submitted before Court, when even the cap and the blood-stained newspapers recovered were submitted to the Court by Ext.P71 property list. We will deal with the slippers; a crucial incriminating material, according to the prosecution,

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when we deal with the seizures made. PW68 handed over the investigation to PW73 as per the orders issued by the Commissioner of Police. Despite PW68 having prepared the Inquest Report and also the Scene Mahazar, the seizure of the items by the Scene Mahazar having been carried out with the assistance of the Scientific Assistant; the witness categorically stated that he had not opened a Case Diary [CD], which is mandatory, as argued by the defence under S.172 of the Cr.P.C. PW73, looking at the remand report, testified that he took over the investigation at 9 p.m. He also said that usually the CD is written at the end of the day and the CD is formally opened when the recording is commenced. He also said that it is not mandatory that the time of commencement and close of investigation has to be recorded. In any event, PW68 on the close of the day ought to have opened a CD detailing the actions taken on the particular day or at least, on handing over the investigation, recorded the same before transmitting it to the Officer, who takes over the

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investigation.

67. In fact, PW73 admitted that he took over the CD and connected papers and explained it, as the Inquest Report, the Scene Mahazar and materials seized, which were handed over. The CD, available in the case, was also admitted to have been opened by PW73. The absence of a CD assumes relevance, especially since the specific case of the defence is that the attack on the victim was made by masked and helmet clad men. A specific question was put to PW68 as to whether the reports in the newspapers indicated that the murder was committed by masked members of a goonda gang, to which the answer was that he does not know; an evasive reply, where a definite negation would have carried more credibility. The suggestion made to the various witnesses about the attack by masked men were evasively answered with statements like, they were not in the habit of reading the newspapers or that the children never permitted them to watch the TV and so on and so forth. PW19 deposed that, there was a news in the Mathrubhoomi Daily of the attack having been carried out by masked men PW4,

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who was asked whether the assailants had masks and the bike riders, helmets, did not deny the same. DW3 is an eye-witness and spoke of the assailants having worn helmets and masks. The newspaper marked by DW4 & DW8 indicated the initial reports having been of masked men having attacked a CPI(M) worker and killed him. In this context we also have to notice the application filed by the appellant in Crl.Appeal No. 48 of 2017, to summon the Assistant Commissioner of Police, to speak on a GD entry, regarding the incident, clearly specifying the attack on Vishnu, by masked men. There is an objection filed by the State, admitting the entry but explaining it away as an anonymous, hearsay information. The GD entry having been admitted, we did not feel it expedient to examine the witness. The information recorded is that conveyed by 'Tiger L/o' which in wireless lingo of Police, refers to 'Commissioner of Police, Law & Order' and it is not an anonymous hearsay information.

68. The Inquest Report prepared by PW68 is

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Ext.P2. Therein column 3, is for recording the person who first found the person dead. One Ratheesh, S/o.Sheelas is indicated in column 3 who has not been cited or examined. The prosecution case is that it was PW15 and CW10 who had taken the injured victim to the hospital; who did not witness the inquest. In Column 16, where the opinion of the locals has to be recorded, the narration is that on 01.04.2008 for reason of political or other rivalry, the accused came in three bikes and attacked the deceased, without specifying who among the four witnesses to the Inquest Report made that statement. There are four witnesses to the Inquest Report, of which only one was examined; the first, as PW2. He admitted his signature in Ext.P2 and vouched his presence at the time of the inquest carried on by PW68. To a specific question in cross-examination that the inquest report was signed on 2<sup>nd</sup> April, his answer was that he signed it on both days. He explained that on the 2<sup>nd</sup> day it was clearly written and he signed on it alone and not accompanied by the other three witnesses. The

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commencement of investigation is shrouded in mystery, which assumes ominous proportions with the absence of a CD, the delay, however nominal in furnishing the FIR to Court, the witnesses to the inquest report not having been cited, the witnesses accompanying the body to the Hospital, as asserted by the prosecution itself, not having witnessed the inquest and the narration regarding the attack having been actually made by masked men; for which there is even a GD entry.

### IX. THE RECOVERIES :

69. The recoveries at the instance of the accused cannot be a sole ground for conviction and can only offer corroboration. We have disbelieved the ocular testimonies and we discuss the recoveries only for completeness and the seizures made are also examined for their incriminating relevance, if any. Most of the witnesses attesting the recoveries turned hostile. But the prosecution relies on the evidence of PW71 a constable at the Vanchiyoor Police Station, who was the scribe of the recovery mahazars, the

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evidence of the I.Os, PW73 and PW76, and that of PW75, the Circle Inspector, entrusted to make the recoveries by PW76.

70. The recovery through A1 is alleged to be a country bomb, which is alleged to have been carried by him in a cover, to the crime scene. One of the witnesses who identified A1, saw him near a parked bike with a cover in his hands. We need not discuss the said recovery, especially since the charge under the Explosives Act has not been found in the impugned judgment. Another recovery attributed to A1 is a Bajaj Discovery bike having registration number KL-01AN-8123 by Ext.P44&44(a) dated 18.04.2008; which was not confronted to the ocular witnesses. MO10 chopper was recovered as per Ext.P3(a) confession of A2, by Ext.P3 scene mahazar. PW5, the attesting witness affirmed the recovery and identified the weapon and A2 from the dock. MO11 and MO12, shirt and pants of A2 were recovered through Ext. P77 mahazar as per Ext.P77(a) confession, spoken of only by PW75. Ext.P3 mahazar, evidencing recovery of MO10 chopper

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does not speak of any blood stains at the time of recovery. In Ext.P35, FSL report, MO10 chopper figures as item 25(15) [T.207/08-Ext.P100], from which blood was found without the origin being traced. Ext.P77 recovery mahazar of the dress of A2, MO11 and MO12 [T.226/08-Ext.P106] also did not indicate any blood stains. There was no independent witness for the said recovery. In fact, PW73 deposed that the confession with respect to the weapon and dress was made to him on 11.04.2008 and while recovery of the weapon was carried out, the dress, as per the confession was not recovered. The accused was remanded back to judicial custody and then again taken into custody for the recovery on 18.04.2008. The explanation of PW73 is that the recovery was not effected on the same day, on which the confession was made, since he was looking for more certainty; quite vague and unacceptable. Anyway, PW75 allegedly recovered the dress and as per the FSL report Ext.P35, item Nos. 29(19) & 30 (20); both were found with blood, that too of human origin and of Group B,

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which group was ascertained to be that of the deceased. PW75, the officer who carried out the recovery or PW76, I.O, does not have a case that the confession was made earlier, to PW73. In the above circumstance we can only disbelieve the evidence of recovery and hence the scientific evidence also cannot incriminate A2.

71. A3 is no more, but when alive, MO1 pipe was recovered as per Ext. P4 mahazar and Ext.P4(a) confession, attested by PW5. His dress MO2&3 were also recovered as per Exts.P48 & 48(a) dated 18.04.2008. MO1 pipe revealed no trace of blood on analysis as evident from Ext. P35, FSL Report, item No. 26(16) [T.No.207/08-Ext.P100]. The dress of A3 was examined as per Ext.P35, item Nos.27(17) & 28(18) [T.No.225/08-Ext.P107], of which the pants contained blood, not capable of determining group and the shirt with blood of Group B. But these evidences need not be looked into as A3 is not convicted; having died in the meanwhile. A4 was said to be riding a Hero Honda bike which was recovered by Exts.P76 & 76(a), but the

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independent witnesses were not examined. The bike is said to have been marked as MO59, but it is not clear through which witness and the same was not shown to the ocular witnesses or identified in Court. Varun Chaudhary (*supra*) refused to rely on the recoveries, when they are not proved and not confronted to the witnesses. A4's dress, MOs.53 & 62 were recovered by Exts.P68 & P68(a) attested by PW66, who turned hostile.

72. Exts. P78 & 78(a) are the mahazar and confession for recovery of the dress (Mos.16 & 17) and bike of A5. Both the independent witnesses PWs.44 & 47, denied the mahazar and turned hostile. The bike of A5, marked as MO60 was not shown to the ocular witnesses and identified. Exts.P5 & P5(a), evidence recovery of MO13 chopper by A6, attested by PW6, who only deposed that the police picked up the weapon and told him that the masked man, who was standing along with them was A6. Exts.P7 & P7(a) recovered the dress, MOs.14 & 15 of A6, with no blood stains recorded in the mahazar. The dress

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was detected with blood without trace of origin and the weapon without any trace as per FSL report, Ext.P35 as Item Nos.31(21), 31(22) & 41 (31) [T.240/08 & T.246/08-Exts.P123 & Ext.P124]. A7 & A9 gave joint confession of they having concealed two bikes at the same place, by Exts.P11(a) & P11(b) and recovery was effected by Ext.P11 mahazar. The bike of A7, a Bajaj Pulsar make with registration No. KL-01AH-8902 was marked as MO61; not confronted to the ocular witness. The Passion Plus bike of A9 recovered was lost from the Police Station. A7's dress MOs.25&27 was recovered as per Exts.P51 & 51(a), attested by PW50, who turned hostile. These apparels were examined at the FSL as Item Nos.1(1) & 2(2) (T.283/08-Ext.P140] without any blood detected as seen from Ext.P36, FSL report.

73. A8 recovered MO4 sword and MOs.5 & 6 dress, as per Exts.P9 & 9(a), which was spoken of only by PW71, the scribe and PW76, I.O. No independent witness was examined. MO4 sword [T.300/08] had trace of blood which was also tested

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as human blood of Group B, evidenced from Ext.P36 FSL report in which Item No.13(13) was a metallic sword. The dress of A8 was tested as item Nos.5(5) & 6(6) in Ext.P36, [T.No287/08-Ext.P142], detecting trace of blood without origin. A9's dress, MOs.23 & 24, recovered as per Ext.P10, neither showed blood stains as recorded in the mahazar, nor did Ext.P36 FSL report which examined those MOs. as item No.3(3) & 4(4) [T.284/08-Ext.P141], detect any incriminating material. PW10, the independent witness to the recovery also turned hostile.

74. MO7 chopper was recovered by A10 as per Exts.P79 & 79(a). PW71 scribe alone was examined and no independent witness. There was a confusion regarding this recovery since it was asserted that one weapon had the logo FIAT on it and that was recovered by A6. We have already seen the recovery of A6 which was by Ext.P5 and the measurement shown is a total length of 40cm, with the handle of length 14 cm and blade of 26 cm. This is Item No.1 in Ext.P124 [T.No. 246/08]. A10's recovery is by Ext.P79 as per

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Ext.P79(a) confession. The mahazar Ext.P79 shows the said weapon also having logo FIAT but the measurements differ. The recovered weapon has a length of 38cm, with blade of 17 c.m and width of 9.5 c.m. This is Item No.2 in Ext.P124, T.No. 246/08. Both these weapons were Item Nos.41 & 42 in Ext.P35 FSL Report with no trace of blood. There was no trace detected in any other recovered items.

75. Gura Singh (*supra*) found that the failure to detect the origin of blood found on a recovered weapon cannot always lead to rejection of the scientific evidence totally and the same would depend on the facts of each case. But in this case, most of the recoveries were not clearly proved. A2's weapon, MO10 contained blood with no group identity and the dress though analyzed with Group B blood, the recovery is suspicious for reason of the confession, deposed as given to PW73, by the I.O himself. But the recovery effected is much later, by PW75, as if the recovery was made through a confession made to him. A3's dress was detected with blood of Group B, but not

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the weapon, MO1, G.I. Pipe and A3 is no more. A6's dress had trace of blood without group and his weapon none at all. MO4 sword was detected with Group B blood, but the recovery by A8 had no independent witness. The cited decision has no application to the recoveries made in this case.

76. PW71, the scribe and PWs.73 & 76, the I.Os, affirmed the recoveries. The learned Special Government Pleader had relied on Modan Singh and Mohd. Aslam (both supra) to urge the recoveries as an incriminating circumstance even if the independent witnesses turn hostile. In Modan Singh the seizure was of a live and empty cartridge from the room, where the dead body was found and the gun from the accused, at the Police Station, in which circumstance the same was believed, for the I.O having convincingly stated so. Here the independent persons who were witnesses to the alleged confession statements, were either not examined or turned hostile. Moreover, the prosecution itself is found to be tainted; the witnesses being tutored. Absolute

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credibility cannot be placed on the police officers who spoke about the recoveries.

76 (a). Mohd. Aslam (supra) was a case in which the recovery was made from the house of the accused and there was nobody from his household examined to disprove the recovery. Both these cases have no application herein. It also requires to be observed that the recoveries would assume relevance, only if the testimony of the witnesses regarding the identification of the weapons are believed. In the present case we have already found that there is no convincing identification of the weapons and the deposition indicates each of the weapons having been confronted to the witness, without requiring the witness to select each, from the many available in Court. We have noticed that the testimonies spoke of the distinguishing features of the weapons, which we found to be a clear embellishment in Court and impossible of perception, in the short time when the incident occurred. We have detailed the scientific evidence from the dress and weapons; which are not very significant and has to be discarded when the recovery

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is not of convincing import. The attack was alleged to have been perpetrated by A2, A3, A6, A8, A10 and A12. There is absolutely no recovery against A12.

77. The recovery of bikes were spoken of earlier but however, none of these bikes were identified by the ocular witnesses, especially PW3 & PW15 who were proffered to speak on the get-away, and PW13 & PW14, who allegedly saw the assailants speeding away in the bikes from the conspiracy site. Their description of the vehicles were also found to be not believable for reason of the omissions in the prior statements. The prosecution had a case that the registration numbers were masked with paper stuck on to the number plates with the aid of gum. FSL report Ext.P33 indicates Item Nos.7 to 10,12&13 and Ext.P36 indicates Item Nos.9&10, containing fragments and fibres of paper in the number plates of vehicles, send for analysis. Ext.P37 report revealed traces of synthetic gum on two items; 9 & 10. However, the seizure mahazars did not speak of such masking with paper nor did the witnesses speak of the registration

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numbers having been masked; except PW3, that too only of two bikes. PW13 & PW14, witnesses to conspiracy, who allegedly saw the bike with pillion riders, did not say that the registration numbers were masked. The site alleged of conspiracy, was very near to the crime scene and the time gap is also nominal, thus erasing any possibility of masking, with paper pasted on the number plates, having been carried out on the way.

### X. THE SEIZURES :

78. The next incriminating circumstance is the two pairs of slippers recovered from the scene of occurrence. We have already found that the seizure by Ext.P28 was not immediately followed up with the submission of those material objects before court. We have looked at the property list and the deposition of PW68. MOs.55 & 56 are slippers recovered from the crime scene. PW68 submitted the articles recovered from the inquest and the scene of crime to the Court by property lists, Exts.P70 to P73, all dated 01.04.2008, but the slippers seized were not included but, retained on intimation, to Court. PW73 recovered

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MO26 slipper by Ext.P6 mahazar, on Ext.P6(a) confession of A10. PW7 independent witness spoke of the recovery having been witnessed by him and A10 having recovered the slipper. Ext.P66 is a mahazar with Ext.P66(a) confession of A8, by which PW75 recovered MO54 slipper of A8; allegedly the other pair of MO55 slipper. PW64 who was examined to prove the recovery, admitted the signature on the mahazar and the slipper having been recovered. However, the recovery was by the police and he only spoke of a masked person sitting inside the jeep; without any identification of that person.

79. Now we have to look at the production before Court, of the slippers seized by Ext.P28, which was done only after the recovery of the other of the two pairs. MO26 slipper, allegedly of A10 was recovered by Ext.P6 mahazar dated 26.04.2008 as per ExtP6(a) confession. The property list Ext.P124, which forwarded both MOs.26&56 slippers has the dates, 01.04.2008 and 26.04.2008. There is a deception practiced here, insofar as, if the property list was

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prepared on 01.04.2008 after MO56 was seized from the scene of crime, definitely MO55, seized on the same day, from the crime scene would have figured therein. MO55 slipper seized on 01.04.2008, was forwarded after recovery of MO54 by Ext.P66 mahazar dated 21.05.2008 as per Ext.P66(a) confession. The property lists were Exts.P143 & P144, respectively of MOs.54 & 55, both dated 21.05.2008. There was no reason to retain the slippers seized from the crime scene. Even if there was contemplation of recovery of the other slippers, the same could have been compared with the one produced in Court; which would have underscored the veracity of the recovery.

80. Yet again, while the I.Os deposed that they satisfied themselves about the slippers belonging to A8 and A10, there was no attempt made to satisfy the Court; which alone can lead to the same being considered as an incriminating circumstance. The prosecution did not attempt to seek the permission of the Court to satisfy itself by directing the respective accused to wear the slippers

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nor was the size of the recovered slippers or that of the respective accused, stated before Court. Ext.P35 FSL report indicated that both slippers recovered from the crime scene contained blood, though without trace of the origin; quite natural. But the seizure from the crime scene is suspicious and the I.Os never attempted to submit the same before Court in time. We find absolutely no reason to rely on the recovery of the slippers or find it to be incriminating, either A8 or A10.

81. The prosecution also attempted to prove that A1,A4 & A5 who were employees in Institutions within the city were not present for duty on the subject day. A1 & A5 were working in Ananthapuram Co-operative Bank in two different branches. PW65, a Branch Manager at the time of testifying before Court, was a Clerk working in the Kaithamukku Branch of the Co-operative Bank where A1 also was employed. On the requisition of the Police, he produced a Register before the Police; which when confronted to him, he denied it to be the one given by him to the

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Police. He admitted that he had in fact surrendered an attendance register to the Police on 07.06.2008 and that he had signed the mahazar for the same. The mahazar dated 31.05.2008 was denied as not signed by him, but the mahazar dated 07.06.2008 was admitted and marked as Ext.P67. The Register confronted was asserted to be not the one he had submitted, especially since the original one contained the seal and signature of the Manager as also attendance marked by the employees till 07.06.2008. On verification of the Register, he also said that what is shown to him in Court has only the attendance from January 2008 to 17.05.2008.

82. A5 was employed at the time, in the branch in which PW48 was the Branch Manager. He knew both A1 and A5 as the employees of the Co-operative Bank and A1 was working in the Bank Branch in which, he was the Manager. He confirmed that on 01.04.2008, A5 had marked his attendance. He also stated that one week before and after the said date, A5 was present for duty in the Bank Branch. Ext.D15 covering letter

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for production of the attendance register for the month of March-April, of the Bank Branch, was also marked by him. The Register however, was not confronted to him. A4 was employed as a Driver in Lourdes Hospital and the Manager, PW49 was examined to prove his absence on the crucial day. He also marked Ext.P50 forwarding letter by which the extract of the digital records of attendance was forwarded to the Court. The same was objected to be marked since there was no certification under S.65B of the Evidence Act. In the above circumstances the prosecution miserably failed to establish that A1, A4 & A5 who were employees of a Bank and a Hospital were absent on that crucial day.

83. A11 was roped in for harbouring A2 & A3 at a hotel in Kanyakumari. After arresting A2 & A3, PW73 deposed that A2 & A3 had given confession statements as to the stay in Kanyakumari, at one Hotel Sunrock. PW73 took the accused to Kanyakumari and at the hotel, pointed out by the accused, PW40, the room boy identified A2 & A3 having come to the

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hotel. A2 & A3 were thus taken to the hotel on 16.04.2008 and at 5.15 p.m in the presence of PW71 and CW29 (PW38), the Register and Bill Book were seized. The Seizure Mahazar was marked as Ext.P43 and the confession statements of both the accused were marked as Exts.P43(b) & P43(a) respectively. To a question in chief-examination itself as to how the Police got the information of the stay of the accused in the hotel at Kanyakumari, PW73 replied that he got the information in the course of investigation. But on further questioning as to how exactly; he answered that it was on the statement of A2 & A3. We notice this only because there was an objection raised on marking the Seizure Mahazar with the confession statement. The statement obviously is a S.161 statement under the Cr.P.C and cannot be deemed to be a confession under S.27.

84. Be that as it may, it was also deposed by PW73 that the Register and bill book seized were handed over back to the person from whom it was seized. Later, PW76, the I.O who took over the

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investigation, arrested A11. He entrusted PW75 to take A11 to the hotel at Kanyakumari for further investigation. It was his deposition that PW75 went to Kanyakumari with A11 and Ext.P41 Register; which was described in the mahazar prepared by PW73, was taken back from the hotel and produced before Court.

85. PW38 is the Manager of the hotel at Kanyakumari. He spoke of the Police having come there with two accused. He identified A11 from the dock as the person who made the entry in the Register of the hotel while checking-in on 07.04.2008. He also identified A2 & A16 as having accompanied A11 to the hotel. He, however, clarified that he did not see the Police seizing the Register and that he was not available at the time when such seizure was made. He also does not speak of PW73 having prepared a mahazar for the seizure of the Register and a Bill Book; which were returned for safe keeping, since they were in daily use at the hotel. PW40, the room boy, identified the three accused as pointed out by PW38 also. He spoke in tandem with the testimony of PW38.

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When Ext.P43 mahazar was sought to be marked and even earlier when PW73 spoke of the mahazar, there was an objection raised by the defence. The objection was insofar as the mahazar containing only a S.161 statement of the accused.

86. Exts.P43(a) & (b) are the respective confessions of A3 & A2 regarding the stay at the hotel at Kanyakumari. However, they cannot be considered as confessions under S.27 of the Evidence Act, since neither is any concealment of material object stated in the confession nor is any recovery made of an object, which has a connection with the crime, from the place pointed out by the accused. We can only refer to a decision of another Division Bench of this Court in Thadiyantevida Nazeer v. State of Kerala [2022 KHC 72]. A recovery under S.27 should necessarily be on a confession made, regarding concealment of a tangible object, which is recovered from the place of concealment, leading to the discovery of a fact, which is relevant to the crime proper. True, the subsequent conduct of the accused

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can come under S.8 of the Evidence Act. But the statement, all the same is a S.161 statement and the defence was perfectly right in raising an objection that Ext.P43 cannot be marked, since it contains a statement of the accused, made to the Police not amounting to a confession under Section 27 of the Evidence Act.

87. The defence laboured much on the fact that the first recovery, the handing over of the documents for safe keeping and the subsequent seizure having not been referred to, by any of the witnesses. But more intriguing is as to how the entries in the Register or even the stay at the hotel at Kanyakumari would lead to the allegation of harbouring the accused, as against A11. There is nothing to indicate that A11 owns the hotel or has any connection with the hotel. A11 was only accompanying the alleged accused in the crime, to Kanyakumari. It is also seen from Ext.P41 produced, the copy of the Register, that the four people, who checked-in at 2.30 a.m, checked-out at 9.50 a.m on the same day, ie.,

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07.04.2008. Kanyakumari, on the tip of the Indian Peninsula, is known for the confluence of the three oceans; the Indian Ocean, the Bay of Bengal & the Arabian Sea, the 'Sunrise' and the 'Sunset' and of course the Devi Temple of lore. The crime occurred on 01.04.2008 and we have already seen that there is no allegation of any of the accused having absconded after that. A2 & A3, along with A11, and probably A16, visited Kanyakumari on 07.04.2008, much after the crime occurred. We cannot find an attempt to abscond, since they checked in at 2.30 a.m and checked out at 9.50 a.m. It is common practice for the tourists to visit Kanyakumari to view the Sunrise, an attraction par excellence of that tourist site. The prosecution had a further case that the accused went to Kumali and stayed there in hiding, which has not been proved at all in evidence. Considering the totality of the circumstances as seen above, we are not convinced that there is neither any material to find harbouring of the accused by A11, nor was any attempt made by A2 & A3 to abscond from

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the place where the crime occurred.

88. In this context, we also have to refer to the prosecution case that the handwriting of A11 in Ext.P41 Register has been affirmed by the handwriting expert. In the context of our finding above, the affirmation does not result in any incriminating circumstance against A11. Despite that, we have to notice that the sample handwriting of A11 was taken, when in custody. There is absolutely no evidence as to the sample taken or the manner in which it was taken, but for the deposition of the I.O, PW76. We cannot but notice that even the Prisoner's Act, as it stood then, does not enable the Police to take a handwriting sample from the accused, when in custody, without the orders of the Magistrate. It is also relevant that the sample has not been produced before the Court, nor forwarded to the handwriting expert through the Court. The result of the discussion is that A11, who has been inculpated only on the basis of the above evidence cannot be said to have participated in the crime and has to be necessarily

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acquitted, which even otherwise has to be, on the other accused, whom he is said to have harboured, being acquitted.

### XII. CONCLUSION:

89. There is a deliberate attempt visible, from the commencement of the investigation, to project half-truths and cherry-pick witnesses so as to shape the case in a particular manner. There is enough indication of the possibility of the attack having been made by masked men, which stands accentuated by the absence of a Case Diary, which is mandatory as per the Criminal Procedure Code. True, the absence of the CD was only for a day, when the SHO had commenced and carried forth the investigation. However, the relevance is insofar as the first facts being not put forth before Court as it were. The veiled references to newspaper reports of masked men having participated in the attack, the actual reports to that effect, the deafening silence of I.Os, who refused to deny such reports outright, in the box before Court and the GD entries placed

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before this Court, together, gives rise to very reasonable doubts as to the manner in which the attack was carried out. This casts a shadow of doubt on the identification made by the eye-witnesses, which stands heightened by the precise pictorial description by them, of the weapons and the apparel worn by the assailants. The incident lasted for hardly two minutes and one of the witnesses, on his own saying, was left stumped. There was no possibility of observing the details of the weapons and apparel of the assailants as spoken by them. In many a case where the crime is the product of political rivalry, we see an over zealousness on the part of the investigating and prosecuting agency. The cherry-picked witnesses speak with precision on every minute aspect, unmindful of the disbelief it evokes. It's time that we express a caution, that the version of a witness, however exhaustive, extensive and precise the same be, is of no avail, unless it is believable and trustworthy. The conspiracy is nonsensical and the witnesses are clearly tutored,

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who go on a tirade of embellishments, about what transpired in a public place in broad daylight, without any of that spoken in the prior statements to the Police. The get-away was equally quick and the witnesses exaggerated on the identification and the details of the get-away vehicles. The vehicles seized were also not confronted to the ocular witnesses or the details of their registration or connection with the suspects established. The witnesses proffered by the prosecution; whose very presence is suspect, speak on the details of the attack, the crime proper and the get-away, in a manner which makes the observations made, impossible of perception, within the short time in which the incident is said to have occurred.

90. The omissions and contradictions in the ocular testimony again puts the prosecution on the defence and raises questions about the veracity of the story projected before Court. The recoveries and seizures are strained and most of the witnesses paraded before Court turned hostile. The I.Os were

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changed in quick succession, three of them, within a period of five months; each adding on to the array of accused. We cannot but specifically notice the manner in which the arrest of A12 to A16 were made without any evidence of their involvement and the casual manner in which they were taken into custody by PW76, the details of which or the documents relating to it, were not produced before Court.

91. The manner in which events were portrayed before Court, smacks of a deliberate attempt to tutor witness and collect evidence, to define a scripted story. The sad saga of political rivalry and mindless killing, as we have noticed in many cases, tears asunder the social fabric of the State. The saga written in blood continues and the memorials held by the rival parties offer no solace to destitute parents, hapless widows and orphaned children, who often lose the only bread winner of the family. The yearly remembrances, only stoke the fires of rivalry and does not wipe the tears of the bereaved or awaken the conscience of those who matter. Another life is lost and yet another prosecution fails, both lying on the

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wayside, grim reminders to the society of the futility of it all. We cannot but acquit the accused of the charges levelled against them; the prosecution having miserably failed to prove the incriminating circumstances against the accused. The eye-witness testimonies are incredulous, the identification unbelievable, the recoveries unsubstantiated and the seizures leading to nothing. There is absolutely no evidence worth its salt, and the prosecution failed to prove any corroborative circumstance, but for the political rivalry existing between two groups.

The criminal appeals are allowed and the accused are acquitted. The accused shall be released forthwith if they are not wanted in any other case and if there are any accused on bail, their bail bonds shall stand cancelled.

Sd/-

K.VINOD CHANDRAN, JUDGE

Sd/-

C.JAYACHANDRAN, JUDGE