George & Ors vs State Of Kerala & Anr on 18 March, 1998

Equivalent citations: AIR 1998 SUPREME COURT 1376, 1998 (4) SCC 605, 1998 AIR SCW 1255, (1998) 2 JT 496 (SC), 1998 (2) SCALE 411, 1998 CRIAPPR(SC) 386, 1998 SCC(CRI) 1232, (1998) 2 SCR 303 (SC), (1998) 1 KER LT 83, 1998 CALCRILR 310, 1998 (4) ADSC 133, 1998 CRILR(SC MAH GUJ) 305, 1998 (2) SCR 303, 1998 (2) JT 496, (1998) 3 SUPREME 192, (1998) 2 RECCRIR 199, (1998) 2 CURCRIR 44, (1998) 23 ALLCRIR 923, (1998) 2 SCALE 411, (1998) 36 ALLCRIC 739, (1998) 2 ALLCRILR 796, (1998) 2 CRIMES 27, (1998) 14 OCR 630, 1998 CHANDLR(CIV&CRI) 100, 1998 CRILR(SC&MP) 305, 1998 (1) ANDHLT(CRI) 297 SC, (1998) 1 ANDHLT(CRI) 297

Author: M. K. Mukherjee

Bench: M.K. Mukherjee, Syed Shah Mohammed Quadri

PETITIONER:
GEORGE & ORS.

Vs.

RESPONDENT:
STATE OF KERALA & ANR.

DATE OF JUDGMENT: 18/03/1998

BENCH:
M.K. MUKHERJEE, SYED SHAH MOHAMMED QUADRI

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T M. K. MUKHERJEE, J.

George @ Vakkachan, Rajeev and Joshy, the three appellants before us (arrayed as A1 to A3, respectively in the trial Court and hereinafter so referred to) along with four others, (A4 to A7) were

put up for trial before an Additional Sessions Judge, Kottayam to answer charges under Section 143, 147, 148, 449, and 302 read with Section 149 I.P.C. The gravamina of the charges were that on May 28, 1990 at or about 11 P.M. they formed themselves into an unlawful assembly with the common object of committing the murder of Sasidharan Nair and in prosecution thereof they trespassed into his house and hacked him to death. The trial ended in acquittal of all of them; and aggrieved thereby the respondent-State of Kerala filed an appeal and Smt. Sarojini Amma (mother of the deceased) filed a revision petition before the High Court. The High Court also issued a suo motu Rule calling upon the seven acquitted person to show cause why their acquittal persons to show cause why their acquittal should not be set aside. All the matters were heard together by the High Court; and by a common judgment it set aside the acquittal of the three appellants and convicted them under Sections 302, real with Section 34, and 449 I.P.C, while affirming the acquittal of others. For the above convictions the High Court sentenced each of them to suffer imprisonment for life and rigorous imprisonment for five years respectively, with a direction that the sentences shall run concurrently. The above judgment of the High Court is under challenge in these appeals preferred by the appellants under Section 2 of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act read with Section 379 Cr.P.C.

(2) Briefly stated, the prosecution case is as under:-

> (a) The deceased Sasidharan Nair was a petty trader and lived in Pulickel of Pallikkathodu Police Station. He was also a reporter for `Thaniniram' daily published from Kottayam. On May 19, 1990 a new item appeared in the daily [Ext. P. 31 (a)] in which serious imputations were made against high placed police officers of Kottayam district and one Thadivakkan was a pimp and gunda and had great influence over corrupt police officers to whom he supplied women and wine and under cover of their protection carried on his immoral activities unabashedly in Palai town. Thadivakkan, who was none other than A1, was upset and enraged by the above defamatory publication. He, therefore, along with the other six accused person went to the house of the deceased armed with deadly weapons to kill him on the fateful night.

The three appellants entered into the room where the deceased was sleeping with his wife (P.W.2) and child and started assaulting him. While A2 and A3 dealt blows upon him with stick and iron rod, A1 stabbed him with a knife. On that very night while on the way to the Medical College Hospital, Kottayam, he succumbed to his injuries.

(b) P.W.1. (Ninan Varghese), a neighbour of the deceased, who had rushed to the scene of offence on hearing the commotion, was told by the deceased that Urulikunnam Vakkachan had stabbed him with knife. Next morning he went to Pallikkathodu Police Station and gave a report of the incident (Ext. P.1) which was recorded by P.W. 30 (Thomas), a Sub-Inspector of police; and thereupon a case was registered against A1 and three unidentified persons. P.W.54 (M. Samuel), Deputy Superintendent of Police, took up investigation and went to the Medical College Hospital where the dead body of Sasi was lying. After holding inquest he sent the dead body to the Forensic Science Department for post-mortem examination which was conducted by P.W.51 (Dr. Velayudhan).

(c) P.W.54 then went to the house of the deceased and seized among other articles, a knife (M.O.1), a blood smeared cross beam of bed stead (M.O.2), a show, a blood stained lungi and some scalp hairs. He continued with the investigation till May 31, 1990 and then entrusted it to P.W.52 (Abraham Mathew), Circle Inspector of Pampadi, who seized a car bearing registration No. KEK 3114 in which the accused had gone to commit the murder. Investigation was again taken over by P.W.54 and he arrested A2 and A3. At the instance of A2 a stick (M.O.3) was seized from a bamboo cluster on the side of the Pallikkathodu-Chengalam Road. Later on he arrested A1 on June 7, 1990. On completion of investigation P.W. 54 submitted charge sheet against the accused persons.

3. The appellants pleaded not guilty to the charges levelled against them and contended that they had been falsely implicated at the instance of the police. A1, on being examined under Section 313 Cr. P.C., stated that P.W.50 (Sreekumar), the driver of car No. KEK 3114, had made a false statement before the Magistrate (recorded under Section 164 Cr. P.C.) due to threst by the police. According to him prior to the examination of P.W.50 in Court his brother was caught by the police at Thiruvalla with some ganja in his car and to get his brother exonerated from that case he gave false evidence at the instance of P.W.54.

4. In support of its case the prosecution examined 54 witnesses and the appellants none. However, the appellants exhibited some documents in support of their defence.

5. To give an ocular version of the incident the prosecution sought to rely upon the evidence of P.Ws2 and 3, the wife and mother of the deceased respectively, both of whom had during investigation claimed to have witnessed the entire incident. P.W.2, however, did not support the prosecution case and was declared hostile. She testified that she woke up from sleep on hearing noise and saw some persons going away from their room after attacking her husband. In the next breath she stated that she did not see the incident nor could she identify the intruders as there was no light either in her room or in the neighbouring room where her mother-in-law was sleeping.

6. P.W.3 (Sarojini Amma), however, fully supported the case of the prosecution. P.W.3 stated that the deceased was her only son with whom she and her husband were staying at the elevant time. On that fateful day her son came home around 9 P.M., had his food and went to sleep. She remained awake, keeping a lamp burning in her room as was her wont. Some time later she heard of people running. She then heard the screams of P.W.2 and Sasi. She rushed towards his room with the lamp, and raising the curtain in between their room saw three persons standing inside, one standing at the doorstep and behind him two others who were flashing torches. Of the three who were inside, two were seen beating her son on his head with stick and Iron rod. She cried out and implored them not to kill him; and when he tried to get up one of the assailants stabbed him with a knife on his right shoulder. Again he tried to stab, but her son warded off the blow with his hand. Thereafter the assailants escaped through the northern door. She heard P.W.2 to ask her husband about the intruders and he named Urulikunnan Vakkachan. She and P.W.2 then cried aloud to alert the neighbours. Immediately, P.W.1 (Ninan), P.W.4 (Radhamoni), P.W.6 (Joseph @ Ouseph), P.W.7 (Aravindakshan), P.W.8 (Moni), P.W.9 (James) and P.W.10 (Ayyappan) and others rushed to the house. P.W.1 was heard to ask her son whether he could identify the assailants. Again she heard him saying that he was stabbed by Urulikunnan Vakkachan. Around 1.00 A.M. he was taken to the

Medical College Hospital in a vehicle and in the early morning she heard that he died. She identified A1 as the person who had stabbed her son and A2 and A3 as those who assaulted him with stick and iron rod. She could not identify those outside the room, but said that there was sufficient light in the room, shed by the lamp she held and by the torches the intruders had, to identify the persons who hit and stabbed her son.

7. P.W.1, who, amongst the neighbours, came to the house of the deceased first on hearing the cries, stated that he saw Sasi lying in a pool of blood. He, however, did not support the version of P.W.3 that Sasi named one of the assailants. On the contrary, he stated that he asked Sasi as to what happened but he did not say anything. As regards lodging of the F.I.R (Ext.P.1) his version was that he had gone to the police station on the following morning and given an information about the incident but the Sub Inspector (P.W.30) did not record it. According to him, he left the police station after half an hour. He, however stated that in the afternoon he again went to the police station on being summoned by P.W.30 and made to sign on a paper but he did not know what was written therein. At that state of his deposition he was declared hostile and cross- examined with reference to the F.I.R. he lodged, wherein he had stated, inter alia, that Sasi told him that Irumbikkunnam Vakkachan stabbed him with a knife and that he (Sasi) should be taken at once to hospital.

8. P.W.4, another neighbour, however, supported the prosecution case. She stated that on hearing the screams and cries from the house of Sasi she rushed there along with her husband (P.W.7). Reaching there she saw Sasi rolling in blood in the western room of his house. Appaichettan (P.W.1) then asked sasi as to what had happened to him. He said that Irumbikunnam Vakkachan stabbed him with knife. According to her, at that time besides Sasi's wife and mother some neighbours were near him. Then Sasi asked for water from his mother and told that he would die and he should be taken to the hospital. She further stated that Sasi's mother and wife told them that 3 persons had entered into the room and assaulted Sasi, and another person had been showing light from the door. She testified that when she reached there, she saw a burning kerosene lamp in the hand of Sasi's mother and that in its light she saw Sasi lying bathed in blood. The other neighbours who were examined, namely, P.Ws.5 to 10 did not support the prosecution case fully and hence some of them were declared hostile.

9. The next witness whom the prosecution much relied upon is P.W.50, the driver of the tourist car KEK 3114 in which, according to the prosecution, the accused persons had gone to commit the murder. He stated in details as to what had happened in the night of May 28, 1990. He said A1 hired the taxi to go to Pallikkathodu and, as arranged, at 7.00 P.M. A5 came and got into it. He drove along the T.B. Road as directed by him and on the way from near the Star Studio, A6 and A7 boarded the car. Then he took it to Seema Lodge, from where A1 got in. The car was taken to Paika side and on the way from near Kurusupally, A4 got into it. The car again was taken to the house of A1, from where A2 and A3 also boarded. Around 8.00 p.m. they reached Pallikkathodu road junction and then went to Kayyoori Junction, where all alighted. A1, A3 and A7 went towards the house of Kayyoori Appachan, but returned soon. They then proceeded to Pallikkathodu and then to Chengalam road. After covering a distance of 2 furlongs he stopped the car and except A6, all of them got out. A1 and another were seen ging along a pathway but returned soon and got into the car, which was later stopped at Sarvathra junction. All except A7 alighted there. A2 and A3 had sticks

(M.O.3 and M.O.4) and A4 and A5 had torches. A7 then asked him to drive the car around the place. After sometime he brought back the vehicle to Sarvathra junction. A little later all the six persons who had gone out returned and got into the car. According to him he felt the smell of blood when they came. He then drove off the vehicle to Palal as directed by them. On the way he switched on the light inside the car and saw stains of blood on the shirt and dhothi of A1 and asked him what the matter was about, when he replied that they had gone to thrash a person. He also heard some of them saying that the knife and shoe were lost in the place. Later, he dropped them near their respective places. Before leaving A1 told him to collect the fare from his shop the next day and not to disclose anything to anyone. He, however, contacted P.W.31 (Suresh), his brother the same night and told what had happened. On the following day they met Kunjumon, the owner of the car, and as per his advice he and his brother went to the Pampadi Police Station and disclosed the incident.

10. Next we come to the evidence of P.W.51, the doctor who held the post-mortem examination and found 27 ante-mortem injuries on the person of Sasi. Of those injuries, injury No.1 was a lacerated wound, scalp deep, over the right side of the head. The underneath brain showed diffused subdural and subarachnoid haemorrhage with signs of raised intracranial tension. The doctor opined that the injury was sufficient in the ordinary course of nature to cause death and the deceased died due to it. He further opined that the above injury could be caused by a weapon like MO 3 (stick). Injuries No. 6 and 12 were incised wounds: one on the right side of chest cutting through the muscle plane downwards for a depth of 7 cms and the other on the front of right upper arm. Those injuries, according to P.W.51, could be caused by a weapon like MO.1 (knife). Injury Nos. 2 to 5, 9, 10, 16 to 20, 22, 25 and 27 were abrasions. The doctor said that some of the above injuries could be caused by the tip of Mos. 3 and 4 (iron rod). Injury Nos. 7, 8 and 24 were abraded contusions which could be caused by a weapon like MO. 3. Injury Nos. 11, 13, 14, 15, 23 and 26 were contusions and according to the doctor those injuries could be caused by MO.4.

11. From the above narration of the prosecution case and the evidence adduced in support thereof we find that the prosecution sought to prove the following facts and circumstances to bring home the charges levelled against the accused:

(i) the six accused persons came to the house of the deceased on that fateful night and three of them entered inside his bed room and assaulted him with different weapons. Those three, who entered into the bed room and actually assaulted him, were A1, A2 and A3, (the appellants before us);

(ii) the deceased made an oral dying declaration before P.Ws.l3 and 4 to the effect that A1 was amongst the assailants;

(iii) the deceased died owing to the injuries sustained at the hands of the assailants;

(iv) the appellants along with the other four accused persons came to the house of the deceased in a car bearing registration No. KEK 3114 and after committing the murder returned in the same vehicle; and

(v) A1 had a motive to commit the murder as the deceased had, ten days earlier, reported about his nefarious activities in the `Thaniniram' daily.

12. From the record we notice that the defence did not dispute that the deceased was found lying with a number of bleeding injuries on his person in the bed room on his house in the night of May 28, 1990 and that on the way to the hospital he succumbed to those injuries. Even otherwise, the evidence of P.W.1, P.W.4 and other neighbours unmistakably proves these facts. The nature of injuries found on the person of the deceased and the opinion of P.W.51 as to the manner how the injuries could be sustained also prove, in no uncertain terms, that more that one person was responsible for the murder. In the context of the above facts the trial Court proceeded to consider whether the deceased met with his homicidal death in the manner alleged by the prosecution.

13. For that purpose the trial Court first took up for discussion the evidence of P.W.3, the sole eye witness, and rejected her claim that she had seen the incident by the light of the kerosene lamp which was burning in her room with the following observations:

"The explanation offered by PW 3 for keeping the lighted lamp in her room instead of keeping it in the other room is not reasonable or convincing. Therefore, the version of PW3 that she had kept a lighted lamp in her room and it is with the said lamp that she rushed to the scene of occurrence is improbable and unbelievable. She might have lighted the lamp after hearing the hue and cry from the nearby room and gone to the scene room with the lamp. But the assailants would have escaped from there by the time. If that be so she might not have the opportunity to see the incident or identify the assailants. Even assuming that PW3 had gone to the scene with a kerosene lamp as spoken to by her it cannot be said that she was able to see the incident or identify the culprits. According to her, the entire incident occurred just after her arrival at the scene of occurrence. The lamp which is said to have been taken with PW3 is a small one without any covering glass. If such a lamp is taken to a place of turmoil as in present case one cannot keep it burning all the while as there is every possibility of getting it extinguished within no time due to the movement of the lamp in the hands of the person carrying it. To keep it burning till the end of the incident one should keep it away from the scene of occurrence. In that case there may not be sufficient light from the lamp to see the incident or identify the culprits at the scene of occurrence. More over when there is attack with deadly weapons such as knife, stick, iron rod etc. one may not dare to go near the scene. In the instant case it is doubtful as to whether PW3 had gone to the scene at all. If that be so, there would not have been sufficient light at the scene of occurrence in which the incident could be seen by this witness especially when she is of 62 years."

14. Then, assuming that she had seen the assault, the trial Court posed the question whether she could identify the assailants and answered the same in the negative with the following words:

"If P.W.3 had been holding the lamp at a little distance from the scene of occurrence she would not have identified the accused especially when they are utter strangers to

her. It is to test the veracity of the witness on the question of his capacity to identify unknown persons whom the witness may have seen only once, that the test identification parade is insisted upon. It is to be noted that to identify the accused during the examination of PW3 before this Court she had to step down from the box and go near the dock with the permission of the court. The difficulty shown by the witness in identifying in the witness box would indicate that she is having defective vision either due to old age or for some other reason. This witness has stated that no police office had shown the accused to her at any time. At the same time she has admitted to have seen the accused in the dock on the day previous to her examination. It is therefore clear that she had the opportunity of seeing and identifying the accused (At to A3) before they were identified in court. While reminding the necessity of test identification parades in cases where the accused are not known to the witnesses the Supreme Court in Kanan Vs. State of Kerala (AIR 1979 SC 1127) observed that where a witness identifies an accused who is not known to him in court for the first time, his evidence is absolutely valueless unless there has been a previous identification parade to test his power of observation. If no identification parade is held then it will be wholly unsafe to rely on his hare testimony regarding the identification of an accused for the first time in Court. I am therefore of opinion that the evidence of PW 3 who claims to have identified A1 to A3 in court for the first time is unreliable in the absence of test identification parade."

15. The oral dying declaration of the deceased about which P.Ws.3 and 4 testified was discarded by the trial Court as, according to it, the same was tainted with infirmities and inherent improbabilities. In drawing the above interference it observed that Ext.P.1 which was lodged by P.W.1 and wherein he had stated about the above dying declaration was a suspicious document and, therefore, the story of the dying declaration allegedly made in presence of P.Ws.1,3 and 4 was also suspicious. The other reason for disbelieving the testimonies of P.Ws.3 and 4 in this regard was that the neighbours who accompanied P.W.4 to the house of the deceased had categorically stated that the deceased did not say anything when P.W.1 asked him about the incident and consequently they could not have heard the deceased saying that he was stabbed by the appellant. The third and the last reason to disbelieve the dying declaration was that P.W.3 did not disclose about it to any of the persons who had assembled there.

16. The trial Court then took up for consideration the evidence of P.W.50 and disbelieved his evidence primarily on the ground that through in the trip sheet of the vehicle (Ext. P.54 a) the place of departure and place of arrival were shown, the name of the person who performed the journey was not there. Besides, the trial Court observed, P.W.31 (Suresh) was shown as the registered owner of the vehicle in Ext. P.54 but P.W.50 was the registered owner. In absence of any other evidence the trial Court held that it could not be said on the basis of Ext. P.54 that it was A1 who performed the journey on May 28, 1990. While on this point, the trial Court also found that the contention of A1 that under police coercion P.W.50 was compelled to give a statement before the Magistrate under Section 164 Cr.P.C. (Ext.P.42) was probable.

17. The trial Court lastly dealt with the motive ascribed to A1 for committing the murder in the light of the contention raised on his behalf that Thadivakkan referred to in Ext. P.31 was not A1 (Urulikunnam Vekkachan) and held it to be insufficient and weak. The reason therefor is as under:-

> "It is true that there is no evidence on record to show that Thadi Vakkan referred to in Ext.P.31 (a) as Urulikunnam Vekkachan. Even assuming it to be so it cannot be said that Ext P.31 would cause any provocation to A1. On the other hand the image of the person who is referred to as Thadi Vakkan on account of his alleged association with the high police officers in Kottayam District is boosted by the publication of Ext.
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> P.31 (a) news item. At the same time the reputation of the high police officials in Kottayam District (referred as Superintendents in the news item) has been tarnished by the said publication. Therefore the persons who are really aggrieved by Ext. P.31(a) are the high police officials in Kottayam District." With the above findings and observations the trial Court acquitted all the accused persons.

18. Coming now to the impugned judgment, we notice that the High Court first detailed the evidence of P.W.3 so far as it related to her having witnessed the incident and identified the assailants and then made the following observations:

> "Though 62 years old at the time of the incident, her faculties were intact and vision normal/unimpaired. No doubt the intruders were strangers to her; but she claimed to have identified them in the light shed by her lamp as also the torches, during those moments her son was belaboured and attacked and reached to the scene in a spontaneous and natural manner. She had given a graphic account of what had taken place in the room, which had hardly the shades of a tutored version. The scene not only shocked her but had left its imprint upon her mind, that she recalled effortlessly at the trial."

19. The High Court then adverted to the reasons canvassed by the trial Court for disbelieving P.W.3 (quoted earlier) and made the following comments:

> "There was nothing to suspect that she kept a light burning since she said that she usually went to sleep between 12 - 1.00 a.m. Yes! that accorded with the practice of some old people who sleep late. That there was no lamp in the room where the deceased slept was understandable since his wife and child slept by his side.
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> The court below has observed that as she rushed to the room the lamp she had perhaps would have been blown off since it was uncovered and that if would have been impossible for her to have seen anything in the total darkness that existed. The said observation seemed to have come out of distrust of her version and amounted to a piece of imaginative exercise that was inappropriate. The manner in which her evidence had been dealt with leaves much to be desired.

> Having gone through it in detail, we have no doubt about her veracity that the court below suspected without jurisdiction."

20. The High Court next dealt with the evidence of P.Ws. 3 and 4 regarding the dying declaration and concluded that there was no reason to disbelieve them. In repelling the contention reiterated before it on behalf of A1 that he was not the person referred to in the dying declaration, the High Court observed that the evidence on record including that of P.Ws. 50 and 54 clearly established that the person named in the dying declaration and in Ext. P.31 was one and the same, namely A1. The High Court also held that the comments of the trial Court that the name of A1 was subsequently inserted by the Investigating Officer in the inquest report to implicate A1 was without any basis whatsoever. The High Court lastly held that the evidence of P.W.50 that the accused had travelled in his car to Sarvarthra junction, was wholly reliable. Since however, there was no legal evidence to prove overt acts of A4 to A7, the High Court gave them the benefit of doubt, while setting aside the acquittal of the appellants.

21. Mr. U.R. Lalit, the learned counsel appearing for the appellants, first submitted that the impugned judgment was rendered in utter disregard of the well established principle that for setting aside an order of acquittal it is not enough for an appellate Court to take a different view of the evidence and there must also be substantial and compelling reasons for it to hold that the Court below was wrong. In support of his submission he relied upon the following passage from the judgment of this Court in Ramesh Babulal Doshi vs. State of Gujarat [(1996) Vol. 9 S.C.C.225]:

> "This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial Court can be legitimately arrived at by the appellate Court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial Court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate Court is first required to seek an answer to the question whether the findings of the trial Court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate Court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate Court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then - and then only - reappraise the evidence to arrive at its own conclusions.
>
> In keeping with the above principles we have therefore to first ascertain whether the findings of the trial Court are sustainable or not."

22. According to Mr. Lalit, the reasons given by the trial Court to acquit the appellants could not be said, by any stretch of imagination, to be palpably wrong or wholly unsustainable so as to entitle the High Court to reverse the same. On the

contrary, he submitted, the judgment of the trial Court was based on proper and reasonable view of the evidence and reliance on law laid down by this Court. In elaborating his arguments on this point Mr. Lalit submitted that it being the admitted case of the prosecution that P.W.3 did not know the appellants from before, the trial Court was fully justified in rejecting her testimony regarding identification of the appellants in Court, two years after the incident, in absence of any Test Identification (T.I.) parade held to test her power of observation, relying on the judgment of this Court in Kanan vs. State of Kerala [(1979) 3 S.C.C.319]. Equally justified was the Court in pressing into service her admission that the appellants were shown to her by the police on the day before she testified in Court for such rejection, argued Mr. Lalit. While on this point Mr. Lalit further submitted that the High Court did not even advert to this aspect of the matter while accepting the evidence of P.W.3 regarding identification of the appellants in Court as the assailants.

23. There is some substance in the above contentions of Mr. Lalit; firstly, because the High Court did not deal with and dispose of the appeal strictly in accordance with the above quoted principles and secondly, because the aspect of T.I. parade was not at all considered by the High Court. Our endeavour, therefore, will be to reassess the evidence, more so, when this is a statutory appeal, in the light, of the findings of the trial Court.

24. As noticed earlier, the trial Court rejected the claim of P.W.3 that she had seen the incident in the light of a burning lamp. Apart from the comments made by the High Court (quoted earlier) for discarding the finding of the trial Court in this regard- which in out opinion are fully justified - we find that the relevant statements made by P.W.4 and her husband P.W.7 in their evidence were not noticed by the trial Court as also by the High Court. In their testimony both of them, who are the next door neighbours of the deceased, categorically stated that when they reached there (the house of the deceased) there was a burning kerosene lamp and that it was in its light that they saw Sasi lying in a pool of blood. Neither of them was cross-examined on this point nor do we find any reason whatever to disbelieve them. Indeed, no suggestion, for what it was worth, was even put to them that they were deposing falsely. Their evidence not only takes the wind out of the sails of the reasonings of the trial Court regarding the existence of the lamp - and, for that matter, of its burning at the material time - but fully corroborates the evidence of P.W.3 that she saw the assault and identified the assailants with it. Since the reasoning of the trial Court in this regard is based on non- consideration of material evidence it must be held to be patently wrong.

25. That brings us to the question whether the ground canvassed by the trial Court for rejection of her evidence regarding identification of the appellants, whom she, admittedly, did not know from before, as the assailants are improper or not. So far as the first ground is concerned, law is well settled that identification of an accused in Court is the substantive evidence of the person identifying and his earlier

identification in a T.I. parade corroborates the same. In other words, want of evidence of earlier identification in a T.I. parade does not affect the admissibility of the evidence of identification in court.

26. We may now consider what will be the effect of failure to hold the T.I. parade. In Kanta Prasad vs. Delhi Administration [1958 S.C.R. 1218] a two Judge Bench of this Court observed as under:

"It would no doubt have been prudent to hold a test identification parade with respect to witnesses who did not know the accused before the occurrence, but failure to hold such a parade would not take inadmissible the evidence of identification in Court. The weight to be attached to such identification would be a matter for the Courts of fact and it is not for this Court to reassess the evidence unless exceptional grounds were established necessitating such a course."

(emphasis supplied) (For reasons earlier stated exceptional grounds have been made out in this case to reassess the evidence.)

27. We may next refer to the case of Harbhajan Singh vs. State of Jammu & Kashmir [(1975) 4 S.C.C. 480], decided by a three Judge Bench. In that case Harbhajan Singh (the appellant therein) alongwith one Gurmukh Singh - both of whom were members of Border Security Force - absented themselves from their evening parade without obtaining leave and sauntered into Kangri, armed with two rifles which were issued to them for the performance of their official duties. They first went to the house of one Kashu Ram, demanded eggs from his wife and helped themselves to a bottle of rum. Thereafter, they went to the house of the complainant Munshi Ram. While Gurmukh Singh mounted guard at the door of his house the appellant went inside. The appellant caught hold of Munshi Ram's daughter Kamla Devi and began to drag her out of the house. MUnshi Ram entreated the two intruders to be merciful but Gurmukh Singh fired a shot at him which fortunately missed its target. In the confusion that followed Kamli Devi managed to rescue herself and started running back to her house. Thereupon the appellant fired a shot from his rifle at her as a result of which she died instantaneously. To prove its case the prosecution relied upon the evidence of Munshi Ram., his wife and a neighbour. This Court found that the evidence of those witnesses was amply corroborated in the circumstances that on the fateful evening the appellant and Gurmukh Singh were absent at the time of roll call, that on that night when they were arrested their rifles smelt of fresh gun powder and that the empty cartridge case which was found at the scene of offence bore distinctive markings showing that the bullet which killed Kamli Devi was fired from the rifle of the appellant. The evidence of Kesuram also showed that after the appellant and another accused drank liquor at his house they went to the house of Munshi Ram. An argument raised on behalf of the appellant therein that the investigating officer ought to have held an identification parade and that the failure of Munshi Ram to mention the names of the two accused to the neighbours who came to the scene immediately after the occurrence showed that his story could not be true, was rejected by this Court and the appeal dismissed with the following observation:

> "As observed by this Court in Jadunath Singh v. State of U.P., (1971) 2 SCR 917 = (AIR 1971 SC 363 = 1971 Cri LJ 305) absence of test identification is not necessarily fatal. The fact that MUnshi Ram did not disclose the names of the two accused to the villagers only shows that the accused were not previously known to him and the story that the accused referred to each other by their respective names during the course of the incident contains an element of exaggeration. The case does not rest on the evidence of Munshi Ram alone and the corroborative circumstances to which we have referred to above lend enough assurance to the implication to the appellant."

(emphasis supplied)

28. We need not however refer to the other cases on the point as in Surendra Narain Vs. State of U.P. [(1998) 1 S.C.C. 76] this Court has, after considering the earlier cases of this Court, including Kannan (supra), on which the trial Court relied, Kamta Prasad (supra) Jadunath Singh (supra) and Harbhajan Singh (supra), and of different High Courts, held that failure to hold the T.I. parade even after a demand by the accused is not always fatal.

29. It cannot be denied however that though not fatal, absence of the corroborative evidence of prior identification in a T.I. parade makes the substantive evidence of identification in Court after a long lapse of time a weak piece of evidence and no reliance can be placed upon it unless sufficiently and satisfactorily corroborated by other evidence. We have, therefore, to ascertain whether the other evidence adduced by the prosecution lends implicit assurance to the evidence of P.W.3 regarding her identification of the appellants as the assailants. Before adverting to such evidence it would be necessary to refer to the other comments made by Mr. Lalit to the `identification' evidence of P.W.3. Mr Lalit submitted that the evidence of P.Ws.3 and 54 clearly established that the former had seen the accused in the dock on the day previous to her examination. That necessarily means, according to Mr. Lalit, the `identification' evidence of P.W.3 was wholly unreliable. Mr. Lalit further submitted that when the trial Judge had rejected the evidence of P.W.3 on the question of identification taking into consideration also the above admission of P.W.3 it could not be said that the finding of the trial Court was improper so as to justify the High Court to disturb the same. On perusal of the relevant portion of the evidence of P.Ws.3 and 54 we are unable to accept the contention of P.Ws.3 and 54 we are unable to accept the contention of Mr. Lalit nor the finding of the trial Court in that regard for the same are based on misreading of the evidence. In her cross examination P.W.3 was asked the following question: "You have seen the accused standing in the dock, hadn't you?" and her reply was "had seen." In cross examination of P.W.54 on this point the following answers were elicited:

> "No records have been produced in the Court to show that the witnesses have recognised the accused. I have not submitted application for conducting identification parade for recognising the accused. As the witnesses had identified the accused it did not occur that there was any need for identification parade."

We are at a loss to understand how the trial Court could come to the conclusion that P.W.3 had admitted that she had seen the accused a day before she testified in Court. On the contrary, the above statement of P.W.3 does not in any way belie or weaken the prosecution case that she had

seen the accused on the day of the incident and thereafter in Court at the time she was being examined. This apart the answer elicited from P.W.54 only indicates that he felt (which in our view was wholly wrong) that as the witnesses (which obviously included P.W.50) had identified the accused he did not think it necessary to pray for T.I. parade. IN any view of the matter the above statements do not support the submission of Mr. Lalit nor the conclusion drawn by the trial Court.

30. That brings us to the dying declaration made by the deceased before P.Ws.3 and 4 which has been pressed into service by the prosecution to corroborate the ocular version of P.W.3. Before proceeding further we must confess that we have not able to fathom how the trial Court could rely upon the contents of Ext. P.1, lodged by P.W.1, and that too for the purpose of discarding the evidence of P.Ws.3 and 4. P.W.1 turned hostile and testified that he did not make any statement before the police but signed on the dotted lines. It is trite that an F.I.R. is not substantive evidence (unless of course it is admitted under Section 32(1) of the Evidence Act) and can be used to corroborate or contradict the maker thereof; and therefore, the question of corroborating P.W.1 by his purported statements, as contained in Ext. P.1 could not arise. Inspite thereof the trial Court observed `.....the first informant statement is further supported by the evidence of P.W.1' and used the statements contained therein (Ext.P.1) as substantive evidence to discredit P.Ws.3 and 4. It must, therefore, be said that the approach of the trial Court in dealing with the F.I.R. was legally impermissible. We are also surprised to find that the trial Court disbelieved P.Ws.3 and 4, relying upon the statements contained in an inquest report, to the extent they relate to what the Investigating Officer saw and found are admissible but any statement made therein on the basis of what he heard from others, would be hit by Section 162 Cr.P.C..

31. The whole purpose of preparing an inquest report under Section 174 (1) Cr.P.C. is to investigate into and draw up a report of the apparent cause of death, describing such wounds as may be found on the body of the deceased and stating in what manner, or by what weapon or instrument, if any, such wounds appear to have been inflicted. In other words, for the purpose of holding the inquest it is neither necessary nor obligatory on the part of the Investigating Officer to investigate into or ascertain who were the persons responsible into or ascertain who were the persons responsible for the death. In dealing with Section 174 Cr.P.C. in Podda Narayana vs. State of A.P. [(1975) 4 S.C.C.153], this Court held that the object of the proceedings thereunder is merely to ascertain whether a person died under suspicious circumstances or met with an unnatural death and, if so, what was its apparent cause. According to this Court the question regarding the details how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of such proceedings. With the above observation this Court held that the High Court was right (in that case) that the omissions in the inquest report were not sufficient to put the prosecution out of Court. In Eqbal Baiq vs. State of A.P. [(1986) 2 S.C.C.476] this Court observed, while dealing with a similar question, that the inquest report was not the statement of any person wherein all the names of the persons accused were to be mentioned. On this ground also the finding of the trial Court based on the inquest report cannot be sustained.

32. Now that we have demonstrated that the principal reasons put forward by the trial Court for discarding the dying declaration are patently wrong and opposed to the fundamental principles of criminal jurisprudence, we have to ascertain for ourselves whether the evidence adduced by the

prosecution to prove the same can be safely relied upon. To prove the dying declaration the prosecution examined some neighbours of the deceased namely, P.W.1 and P.Ws.4 to 10, besides his wife (P.W.2) and mother (P.W.3). Of them P.W.1, P.W.5 and P.Ws.8 to 10 - and even P.W.2 - turned hostile and resiled from their statements recorded under Section 161 Cr.P.C. wherein they had testified about it. However, P.W.3 averred that when the persons who had assaulted Sasi were gone, Vijayamma (P.W.2) asked him who assaulted and Sasi said that it was Urulikunnam Vakkachan. The evidence of P.W.3 in this regard is fully corroborated by P.W.4. She stated that when she accompanied by her husband (P.W.7) reached Sasi's house she saw him rolling in blood in the western room in their house. P.W.1 then asked Sasi "What is this Sasi?" Sasi said "Appaichettan" (referring to P.W.1) I know the man; Urulikunnam Vakkachan stabbed with knife". According to her at that time amongst others Sasi's wife, mother and child were near Sasi. While discussing the evidence of P.W.4 with reference to the burning of the kerosene lamp we have found that she is a truthful witness; and indeed, we find no reason to disbelieve this neighbour of the deceased. The evidence of dying declaration as testified by these two witnesses was criticised by Mr. Lalit on the ground that neither the other neighbours nor P.W.2 spoke about the same. The trial Court also made a similar criticism while disbelieving the evidence of P.Ws.3 and 4. We do not, however, find any substance in this criticism. As earlier stated, except P.Ws.6 and 7 all others examined by the prosecution resiled from their statements during investigation and were declared hostile. So far as the other two neighbours are concerned namely P.W.6 and P.W.7 we find that the former stated that he did not hear Sasi saying anything and he did not also ask Sasi about the injuries that he sustained. From the above statement made by this witness it cannot be said that the evidence of P.Ws.3 and 4 stands contradicted in any way. Had he testified that neither Sasi nor P.Ws.3 and 4 spoke about the assailants when asked, it would have, of course, discredited the statements of P.Ws.3 and 4. It might as well be said that he came at a later stage when Sasi was not in a position to speak. As regards P.W.7 no question regarding the dying declaration was put to him neither in examination-in-chief or in cross examination and consequently his evidence also does not in any way discredit the prosecution case. Having carefully gone through the evidence of P.Ws.3 and 4 we find no justifiable reason to disbelieve their assertion that Sasi made a statement that Urulikunnam Vakkachan stabbed him.

33. Thus said we have to ascertain whether A1 is Urulikunnam Vakkachan mentioned by the deceased, for much comment has been made by the trial Court as also by Mr. Lalit on this aspect of the matter. The evidence on record unmistakably proves that A1 is a resident of Elikkulam village in the district of Kottayam. From the evidence of P.W.54, we learn that "Urulikunnam" is a Kara (locality) of that village. P.W.50 who knew A1 from before testified that he (A1) is a resident of Urulikunnam; and, again, in answer to a question put to him in cross examination, he said that he knew the residence of the accused. When the above pieces of evidence are put together and considered in the context of the fact that it was not even suggested to any of the prosecution witnesses - much less elicited in their cross examination - that there was any other person by the name Vakkachan in Urulikunnam, the conclusion is inescapable that the deceased referred to A1 when he named Urulikunnam Vakkachan as the assailant.

34. Mr. Lalit, however, argued that the deceased had named one Thadivakkan, as the person who was in league with the police and was indulging in nefarious activities, in his report (Ext. P.31) and

not `Urulikunnam Vakkachan' and that necessarily meant that `Thadivakkan' referred to in that report and `Urulikunnam Vakkachan' referred to in the dying declaration were not one and the same person. In other words, according to Mr. Lalit, A1 was not the person mentioned in the dying declaration. This contention of Mr. Lalit and the finding recorded by the trial Court to that effect is devoid of merit. The newspaper report (Ext. P-31a) refers to a person who belongs to Elikkulam village in Kottayam district and has the sobriquet `Thadivakkan'. There is, therefore, no confusion in the identity, for while in the report the deceased had given the sobriquet of the deceased along with the name of the village where he resides, in his dying declaration he gave out the name by which he is known to all, including P.W.50, and also addresses himself. Both motive of A1 for committing the murder as also his identity as one of the participants in the murder thus stand established.

35. Even if we were to assume that the person named in the report (Ext.P.31) referred to someone other than A1 it would not have affected in any way the prosecution case regarding the identity of A1 as one of the assailants in view of our earlier findings based on the evidence of P.Ws. 3 and 4, for it would have only meant that the prosecution failed to prove the motive ascribed to A1 for committing the murder. To put it differently, once it is established that A1 was amongst the miscreants the proof of motive pales into insignificance. Besides, it may as well be, that being a villager of Elikkulam village with similarity of names, A1 thought that the news item referred to him and, therefore, he decided to commit the murder of the reporter, namely the deceased. In any view of the matter, the identity of A1 as one of the assailants, as stated in the dying declaration of Sasi, cannot be doubted.

36. We may now turn to the evidence of P.W.50, detailed earlier. From the judgment of the trial Court we notice that the substantial parts of its comments, (quoted earlier) are based on his statement recorded under Section 164 Cr.P.C. and not his evidence in Court. The said statement was treated as substantive evidence; as would be evident from the following, amongst other observations made by the learned trial Court:-

> "If Ext. P.42 (the statement recorded under Section 164 Cr.P.C.) is found to be a genuine statement it can be used as an important piece of evidence to connect the accused with the crime".

In making the above and similar comments the trial Court again ignored a fundamental rule of criminal jurisprudence that a statement of a witness recorded under Section 164 Cr.P.C. cannot be used as substantive evidence and can be used only for the purpose of contradicting or corroborating him. Instead of appreciating the evidence of P.W.50 from that perspective the trial Court confined its attention mainly to his statement so recorded and discredited him. This legal infirmity apart, factually also the trial Court committed patent errors. As earlier noticed, one of the grounds for disbelieving him was that in the trip sheet the name of the person who performed the journey, namely, A1 was not shown. If the trial Court had cared to look into the other trip sheets which form part of Ext. P.54 it would have found that in none of them the name of the person who hired the car is mentioned. The trial Court was, therefore, not at all justified in commenting upon such non-mentioning of the name of the hirer and concluding therefrom that the document was suspect. The comments of the trial Court that P.W.50 made the statement before the Magistrate (Ext. P.42)

to oblige the police as his brother was arrested in connection with an excise case is also without any basis whatsoever. In drawing the above inference the trial Court was much influenced by the fact that the car in question, namely, KEK 3114 was seized by the police May 31, 19920 and that it was released on June 28, 1990. According to the trial Court it was wrongfully detained by the police for such a long period to compel P.W.50 to make a statement according to its dictate. Once a car is seized in connection with a case it can be returned pursuant to the order of a competent Court only and there is nothing on record to indicate that inspite of such an order the car was not returned so as to entitle the trial Court to comment that the long detention of the car was itself a suspicious circumstance. Having gone through the evidence of P.W.50 we find that each of the reasons canvassed by the trial Court for disbelieving P.W.50 is either legally unsustainable or factually incorrect.

37. The evidence of P.W.50 goes to prove that his vehicle was hired by A1 and all the accused persons including A1 had gone in his vehicle and got down at Sarvathra junction. His evidence, therefore, is an incriminating circumstance, more so when we find that the house of the deceased was at a distance of 150 mtrs. from that junction.

38. On a comprehensive view of the materials on record we are fully satisfied that the prosecution has been able to prove beyond all reasonable doubts that A1 was among the assailants, as testified by P.W.3 and fully corroborated by the dying declaration made by the deceased before P.Ws.3 and

4. The evidence of P.W.50 also lends assurance to the above conclusion we feel that they are entitled to the benefit of reasonable doubt, having regard to the fact that their identification in Court for the first time was not corroborated by any identification in a T.I. parade earlier held nor by the dying declaration. It is of course true that the evidence of P.W.50 corroborates the evidence of P.W.3 regarding their identification but we feel that we will not be justified in raising a conclusive inference, relying thereupon that they were also amongst the miscreants. Besides, the prosecution has not ascribed any motive to them for committing the murder.

39. On the conclusions as above we uphold the convictions and sentences of A1 (George @ Vakkachan) as recorded by the High Court, but set aside the convictions of A2 and A3. Resultantly, we direct that A2 (Rajeev) and A3 (Joshy), who are in jail, be released forthwith unless wanted in connection with any other case. The appeals are thus disposed of.