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**(2016) 02 KL CK 0089**  
**In the High Court Of Kerala**  
**Case No : Crl. A. No. 859 of 2011**

Vayalali Girishan and Others

APPELLANT

Vs

State of Kerala

RESPONDENT

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**Date of Decision :** 15-02-2016

**Acts Referred:**

Arms Act, 1959 — Section 27(1)  
Criminal Procedure Code, 1973 (CrPC) — Section 209, Section 232, Section 313(1)(b),  
Section 428, Section 432, Section 433  
Explosive Substances Act, 1908 — Section 3, Section 5  
Penal Code, 1860 (IP)

**Citation :** (2016) CriLJ 1724 : (2016) 2 KLT 2

**Hon'ble Judges :** P. Bhavadasan and Raja Vijayaraghavan V., JJ.

**Bench :** Division Bench

**Advocate :** P. Vijaya Bhanu, Sr. Adv., M. Revikrishnan, Unni Sebastian Kappen, Sebastian Paul, S. Vijayakumar and Ron Bastian, Advocates, for the Appellant; S. Hyma, Public Prosecutor, for the Respondent

**Final Decision :** Partly Allowed

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## Judgement

Raja Vijayaraghavan V., J.—1. As many as 25 accused were indicted for the offence under Section 143, 147, 148, 324 and 302 read with Section 149 of the IPC, S. 3 & 5 of the Explosives Substances Act, 1908 and Section 27(1) of Arms Act, 1959 and they were tried by the Court of Sessions, Thalassery, for their role in a gruesome incident involving explosive devices which took place at 5.15 p.m. on 23.5.2002 at a place called Karkode in Thillankari amsom, Kannur District.

2. The prosecution case, as is revealed from the evidence, unfolds in the following manner:-

Uthaman, an activist of the RSS was murdered on the previous day and a hartal was organized by the RSS on 22.5.2002 at the Karcod Area. Deceased Ammukutty Amma was a distant relative of Uthaman, and she along with her grandson, Shiju (P.W. 1) and some other persons who owe allegiance to the RSS

were returning back in a Jeep driven by one Shihab, after attending the funeral ceremonies of the deceased. A total of 13 persons were inside the Jeep which included P.W. 2 - P.S. Prakash, P.W. 3 - Abhilash P.V., C.W. 5 - Sasidharan, C.W. 11 - Velayudhan, C.W. 7 - M.N. Biju, C.W. 6 - K.P. Santhosh, C.W. 10 - Manoj, C.W. 8 - Nipun and C.W. 9 - Vadakkeyil Viju. While the jeep reached near the rubber plantation of Muhammad Haji at Karkode, the accused No. 1 Arshad jumped in front of the jeep brandishing a sword. About 25 persons appeared from nowhere and rushed towards the jeep. The 2nd accused Girishan who was standing on the right side of the jeep threw a contraption at Shihab, the jeep driver. It struck Shihab on his head and exploded. He was thrown from the jeep on to the ground. The jeep lost control and crashed on to a telephone post and entered the adjacent rubber plantation and came to a standstill. While the persons sitting inside the jeep made a run for it through the front side of the jeep, another explosive device was thrown at the jeep by A15 - Mahendran which fell on the body of Ammukkutty Amma, who was sitting on the back seat of the jeep, and was unable, owing to old age, to scamper away to safety. Both Shihab and Ammukkutty Amma succumbed to the injuries sustained by them then and there. Hearing the commotion, several persons came to the scene and the assailants made good their escape.

3. P.W. 24, the Sub Inspector of police, Iritty, reached the scene immediately after the incident and took note of the situation. He took steps to remove the injured and the deceased to the Mattannor hospital. P.W. 24 did not accompany them. The bodies of the deceased Ammukkutty Amma and Shihab and also the injured persons were initially taken to the Mattannor hospital and from there, they were shifted to Thalassery, in an ambulance. It has come in evidence that the injured were taken to the Indira Gandhi Co-operative hospital, Thalassery, and the deceased were removed to the Government hospital, Thalassery.

4. Inquest over the dead body of Shihab was conducted by P.W. 16, the Additional Sub Inspector of Police, Thalassery, and he prepared Ext. P3 inquest report. It was P.W. 17, the Additional Sub Inspector of police, Iritty, who conducted inquest over the dead body of Ammukkutty Amma and prepared Ext. P2 inquest report. At the time of preparation of the inquest, MO11 series of clothes worn by Ammukkutty Amma were seized. MO10 series of clothes worn by the deceased Shihab were also seized by P.W. 16. Thereafter, the body was sent for autopsy and it was C.W. 40, the Surgeon attached to the Government hospital, Thalassery, who prepared Ext. P25 and P26 postmortem certificates of Shihab and Ammukkutty Amma respectively.

5. P.W. 1 to 4 were attended to by Dr. Syamala at the Indira Gandhi Co-operative hospital, Thalassery, and she issued Ext. P21 to 24 wound certificates after examining them. It has also come out that P.W. 1 was admitted in the Indira Gandhi Co-operative hospital, Thalassery, and P.W. 2 to 4, owing to the seriousness of the injuries sustained by them were referred to the Medical College hospital, Kozhikode, where they were attended by P.W. 14 who issued

Ext. P10 to P12 certificates.

6. Later in the evening, while undergoing treatment at the Indira Gandhi Co-operative hospital, Thalassery, P.W. 1 gave Ext. P1 FI statement at 11.00 p.m. on 23.5.2002 based on which Ext. P1(a) FIR was registered by P.W. 24.

7. C.W. 45, the C.I. of police, Iritty, took over the investigation of the case. By the time the trial commenced, he had left this world and therefore, his presence could not be secured. However, the steps taken during investigation were deposed to by P.W. 30, who took over investigation at a later stage. After taking over investigation, C.W. 45, went to the scene of crime on 24.5.2002 and prepared Ext. P4 scene mahazar. On 25.5.2002, at 7.30 p.m., he arrested Arshad (A1), Puthenpurayil Manoj (A3), Puthiyapurayil Byju (A7), K.V. Radhakrishnan (A12), K.V. Mahendran (A15). On the basis of Ext. P14(a) disclosure statement given by Arshad (A1), MO1 sword was seized as per Ext. P14 mahazar dated 26.5.2002. On the same day, based on Ext. P15(a) disclosure statement given by K.V. Mahendran (A15), a steel bomb was recovered from underneath the dog shed of his residential premises as per Ext. P15 mahazar. Based on Ext. P16(a) disclosure statement given by K.V. Radhakrishnan, MO3 chopper was seized as per Ext. P16 mahazar on 26.5.2002. Later, steps were taken to defuse the bomb seized from the premises of A15 and the same is borne out from Ext. P30 certificate. On 29.5.2002 the clothes worn by P.W. 2, 3 & 4 at the time of occurrence were seized as per Ext. P6 to P8 mahazar. The material objects were forwarded as per Ext. P31 and 32 forwarding notes and obtained Ext. P33 FSL report.

8. P.W. 29, who was in additional charge of the Iritty police station, took over investigation on 10.6.2002. He questioned certain witnesses and furnished Ext. P29 report identifying accused Nos. 23 to 25 as persons involved in the crime. Thereafter, he obtained custody of accused No. 2, 5, 9, 11 & 13 and questioned them. He conducted inspection of the jeep in which the deceased and the injured had travelled and prepared Ext. P17 mahazar. Later, on 5.11.2004, investigation was taken over by P.W. 28, the C.I. of Police, Iritty. He obtained Ext. P27 sanction from the Additional District Magistrate for prosecuting the accused under the Explosives substances Act, 1908 and the Arms Act, 1959. After completion of investigation charge was laid by P.W. 27 before the jurisdictional Magistrate.

9. The Court before which the final report was laid, took cognizance of the offence. Finding that the offences are exclusively triable by a Court of Sessions, the said Court committed the case to the Court of Sessions, Thalassery under Section 209 of the Code of Criminal Procedure after following the necessary procedure.

10. The Sessions Court, Thalassery, after hearing the prosecution and the accused, framed charge for the offence under Section 143, 147, 148, 324 and 302 read with Section 149 of the IPC, S. 3 & 5 of the Explosives Substances Act,

1908 and Section 27(1) of Arms Act, 1959. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution thereafter had P.W. 1 to 30 examined and had Exts. P1 to P33 marked. MO1 to MO12(y) were produced and identified. After close of the prosecution evidence, the incriminating materials arising in the evidence were put to the accused under Section 313(1)(b) of the Code. The accused denied the same. Apart from denying the incriminating circumstances stated that the explosion had taken place in a different manner. According to them, the explosive devices were carried in the jeep by the RSS activists who were travelling in the same on hartal day and the same had exploded when the jeep met with an accident and crashed into the electric post.

11. Finding that the accused could not be acquitted under Section 232 of the Cr.P.C. they were asked to enter on their defence. On the side of the defence, D.W. 1 was examined and Ext. D1 to D12 were marked. While the matter was posted for hearing, the 1st accused failed to appear before Court in spite of issuance of coercive steps, and therefore, the Court below did not proceed to pass judgment as against him.

12. Insofar as accused Nos. 2 to 25 are concerned, who are the appellants herein, the Sessions Court placed implicit reliance on the evidence of P.W. 1 to 4, the injured witnesses who were present at the scene and along with the other evidence let in, and also the recovery of weapons at the instance of A2, A12 and A15, came to the conclusion that the prosecution was successful in bringing home the guilt in respect of the offence charged. Accused Nos. 3 to 11, 13, 14 and 16 to 25, against whom no overt acts were alleged were found to be members of the unlawful assembly and they were attributed with the common object to perpetrate the heinous offence. Accordingly accused Nos. 2 to 25 were found guilty of offences punishable under Section 302 read with Section 149 of the IPC and they were sentenced to undergo imprisonment for life and to pay a fine of Rs. 15,000/- each with a default clause. Accused Nos. 2 to 25 were also found guilty u/s. 143 of the IPC and were sentenced to undergo RI for three months each and to undergo RI for six months each u/s. 147 of the IPC and RI for one year each and to pay a fine of Rs. 5,000/- under Section 324 read with Section 149 of the IPC with a default clause. Accused Nos. 2, 12 & 15 were sentenced to undergo RI for one year each under Section 148 of the IPC and RI for three years each for the offence 27(1) of the Arms Act. Accused Nos. 2 & 15 were sentenced to undergo RI for three years each for the offence punishable under Section 3 of the Explosives Substances Act and RI for two years each under Section 5 of the Explosives Substances Act.

13. The appellants assails the conviction and sentence in this appeal.

14. Mr. P. Vijaya Bhanu, the learned Senior counsel appearing for the appellants challenged the findings of the learned Sessions Judge on various grounds. It was contended that the trial Court has not properly analyzed the evidence let in and reliance placed on the evidence of P.W. 1 to 4 to convict the appellants was misplaced. It was pointed out by referring to the evidence of the injured

witnesses that the procedure followed by the learned trial Judge for identifying the accused during the trial was injudicious, imprudent and perfunctory. It was contented that the so called identification of the accused persons who were in the dock could not be accepted. The learned Counsel would further submit that only accused No. 2, 12 and 15 were found guilty for the offense under S. 148 of the IPC and under Section 27(1) of the Arms Act. All accused except accused Nos. 2 and 5 were acquitted of the offences under Section 3 and 5 of the Explosive Substances Act. That being the case, conviction of accused Nos. 3 to 11, 13, 14 and 16 to 25 solely on the strength of the identification made by the witnesses in court by throwing the accepted procedure to the winds is unwarranted. To highlight the enormity of the failure on the part of the trial court in following a due procedure, the learned Senior counsel submitted that the prosecution attributes overt acts only against accused Nos. 1, 2 and 15. All the other accused, according to the learned Senior counsel, have been roped in on the ground that they were members of an unlawful assembly, the common object of which was to perpetrate the heinous act. No Test identification parade was conducted and therefore, dock identification ought to have been conducted scrupulously to avoid roping in of innocent persons. According to the learned Senior counsel, constructive liability u/s. 149 of the IPC cannot be stretched to lead to false implication of innocent bystanders.

15. The learned Senior counsel would submit that there has been undue delay in registering the FIR, as the FI statement alleged to have been recorded at 11.00 p.m. on 23.5.2002 has reached the Court only at 10.30 a.m. on 25.5.2002. This according to the learned counsel, would create serious doubt in the genuineness of the prosecution version as it is an admitted fact that the accused and the victims belonged to rival political parties and there was every chance of deliberation and implication of innocents. The long delay in the FIR reaching Court, according to the learned Senior counsel, is a telltale sign of false implication.

16. The learned counsel would further submit that it had come out in evidence that on the date of incident, the BJP had declared hartal owing to the death of Uthaman, an activist of the RSS, on the previous day. The case of the prosecution is that the victims and the deceased were returning after attending the funeral ceremonies of Uthaman. If that be the case, there was no reason or occasion for the members of a rival political party to waylay the jeep and throw explosive devices at the vehicle.

17. Referring to the evidence of P.W. 24, the S.I. of police, Iritty, it was pointed out by the learned Senior counsel that P.W. 24 had reached the scene of crime immediately after the explosion had taken place and he was instrumental in taking steps to transport the injured and the deceased to Mattannoor. It has come out in evidence that the said Officer did not accompany the injured as well as the deceased. If that be the case, after having had first hand knowledge about the commission of the cognizable offence involving the death of two persons,

there was no reason or logic as to why P.W. 24 did not take steps to get the crime registered without delay. This along with the two days" delay in the FIR reaching Court would seriously undermine the veracity of the prosecution case and would unmistakably point to the fact that innocent persons who were residing in the vicinity have been falsely implicated on the ground that they had shared the common object of the unlawful assembly is the submission of the learned Senior Counsel.

18. According to the learned Senior counsel, the incident was having serious political overtones and it was obvious that the long delay in sending FIR to Court was with a view to rope in innocent persons. The learned Senior counsel would further submit that a meticulous examination of the evidence of P.W. 1 to 4 would reveal that the provisions of S. 149 would not be attracted to those among the appellants, as their evidence before Court was not fool proof and against whom no specific overt acts are alleged.

19. Smt. S. Hyma, the learned Public Prosecutor, ably and efficiently controverted the contentions raised by the learned Senior counsel and argued that the evidence of P.W. 1 to 4 was cogent, convincing and trustworthy. According to the learned prosecutor, the learned Sessions Judge had rightly relied on their evidence to hold that the prosecution case was proved to the hilt. It was further submitted that Ext. P25 and 26 postmortem certificates of the deceased revealed that they had died as a result of a bomb blast. P.W. 1 to 4 were present in the jeep along with the deceased and they were also injured in the same transaction. They are having acquaintance with the accused and they have absolutely no reason to implicate innocent persons. The injured witnesses had properly identified the accused in Court and there is no rhyme or reason to doubt their version. More over, deceased Ammukkutty Amma is the grandmother of P.W. 1, and he would be the last person to shield the actual culprits. It was pointed out by the learned Public Prosecutor that accused Nos. 1, 2 & 15 are attributed specific overt acts and all the other accused, having armed themselves with deadly weapons, were acting as members of an unlawful assembly in prosecution of its common object. Merely because no overt acts are alleged against the other accused is no reason to bring them out of the umbrella of S. 149 of the IPC. The prosecution had succeeded in demonstrating through the eye witness accounts of P.W. 1 to 4 and the attendant circumstances that the members of the unlawful assembly against whom no overt acts are alleged had shared the common object of the unlawful assembly and it was in furtherance of the common object that the terrorizing acts were committed by accused Nos. 1, 2 & 15. The learned Public Prosecutor highlighted the grave nature of the crime committed and the deadly weapons which was used which led to the murder of an old lady and an innocent jeep driver. According to the learned Public Prosecutor, the trial Court had appreciated the oral and documentary evidence in its proper perspective and there was no reason warranting any interference.

20. The death of Shihab and Ammukutty Amma, in pursuance to a bomb blast

incident is undisputed. According to the prosecution, it was the appellants who had perpetrated the ghastly crime whereas the appellants content that the explosive devices were carried in the Jeep driven by deceased Shihab by the RSS activists who were traveling in the car and the same had exploded when the vehicle met with an accident.

21. Ext. P2 is the inquest report prepared by P.W. 17 over the dead body of Ammukutty Amma and Ext. P3 is the inquest report prepared by P.W. 16 over the dead body of Shihab. It details the nature of injuries sustained by the deceased. Dr. K. Aboobacker, the assistant surgeon attached to the General Hospital, Thalasseri, had conducted autopsy over the body of the deceased. As his presence could not be secured, Ext. P25 and P26 were marked through P.W. 26, his predecessor, who was acquainted with the signature of Dr. Aboobacker.

22. Ext. P25 reveals the following ante-mortem injuries

External injuries:

- (i). A contusion in the middle of forehead 1 x 2 c.m. in circular shape.
- (ii). Four contused abrasion above right eyebrow each 1 x 1 c.m. horizontally spaced with 1 c.m. distance between each, 1 1/2 c.m. from hair line of eye brow
- (iii). Lacerated wound, circular shaped, 1 c.m. in diameter with loss of skin and exposing fat 2 c.m. deep, 2 c.m. above the knee on right side, front part.
- (iv). Contused abrasion 0.5 c.m. in diameter, 4 c.m. below right knee, on the front of right leg.
- (v). Multiple linear abrasion over right ankle, outer aspect extending to the right foot 3 c.m. to 4 c.m. in length.
- (vi). Linear abrasion 0.5 x 3 c.m. over left ankle outer aspect vertically placed.
- (vii). Linear abrasion in left foot outer aspect 4 c.m. in length.
- (viii). Lacerated wound extended from right shoulder to left shoulder with tissue loss, 32 c.m. long - 18 c.m. in vertical measurement from the root of the neck, partially charred in patches, exposing muscle.
- (ix). Lacerated wound in the back of the head 18 x 16 c.m. with loss of skin, parts of muscles lost, skull bone fractured into fragments, few fragments lost with brain exposed parts.

23. Ext. P26 postmortem report in respect of Ammukutty Amma reveals the following injuries.

External injuries

- (i). Lacerated wound on right side outer aspects of chest, circular shaped 8 c.m. below the axilla, 3 c.m. deep, 2 c.m. diameter.

(ii). A lacerated wound, circular shape with ragged edges, 8 c.m. diameter, 14 c.m. below right axilla, on the outer aspect of right side chest communicating with chest cavity, 4 pieces of metallic objects recovered from this wound.

(iii). A lacerated wound, circular shaped 3 c.m. diameter, 2 c.m. deep on inner aspect of right arm, 4 c.m. below axilla exposing fat margins, burned with multiple contused abrasion around it.

(iv). A lacerated wound, 1 c.m. in diameter, circular shaped, 6 c.m. below axilla on right side outer aspect of chest, 3 c.m. deep, exposing fat.

(v). A contusion 2 x 2 c.m. on the middle of right buttock.

24. The forensic surgeon opined that the injury could be caused in a bomb explosion. The only question asked by the defence in cross examination is whether the blast could have occurred and injuries sustained if the bomb kept in the vehicle exploded in the event of an accident.

25. The evidence adduced by the prosecution would unmistakably reveal that the deceased succumbed to the injuries that they had sustained in a bomb blast on the fateful day and that it was a clear case of homicide.

26. After having heard the rival submissions, we are of the view that the issues which arise for consideration is whether the prosecution has succeeded in proving that there was unlawful assembly with a common object. The next question is whether the prosecution has succeeded in proving that the act of any of the members of the unlawful assembly is in furtherance of the common object of the unlawful assembly. The next question is whether the prosecution has adduced legal evidence to show the identity of the members of the unlawful assembly. The final question will be as to whether the findings arrived at by the learned Sessions Judge in respect of the offence charged are justified. We shall consider all these issues together.

27. For proving the incident, the prosecution heavily relies on the evidence of P.W. 1 to 4. P.W. 1 would say that he is an auto rickshaw driver and the unfortunate incident had occurred on 23.05.2002 at 5.15 p.m. He along with Prakashan (C.W. 2), Sasidharan (C.W. 11), Velayudhan (C.W. 11), Abhilash (C.W. 3), M.N. Biju (C.W. 7), Ammukutty Amma his grandmother, K.P. Santhosh (C.W. 6), Manoj (C.W. 10), Nipun (C.W. 8), Vadakkayail Biju (C.W. 9) comprising 13 persons in all, were returning in the jeep driven by deceased Shihab from Chavasserry to Karcod after attending the funeral ceremony of Uthaman, who was stabbed to death on the previous day. Ammukutty Amma was his grandmother and she was residing at Karkod. After the vehicle had traversed the Kalanthode curve, Arshad (A1), jumped in front of the vehicle brandishing a sword. At that time, about 25 persons came from either sides of the road towards the jeep. Gireeshan (A2) threw some contraption at the jeep which exploded when it hit the body of Shihab. Shihab was thrown to the road. The vehicle lost its control and it swerved towards the left and after crashing onto a

telephone post, entered the neighboring rubber plantation and came to a standstill on hitting a tree which stood there. All the person sitting inside the jeep except for deceased Ammukutty Amma ran for their life. While they were on their heels he heard the sound of another blast. The said explosive device fell on the body of deceased Ammukutty Amma and it exploded. The witness went and stood behind the shop room of Paithal, which was not open at that time. The assailants were armed with swords and steel bombs. After taking a look at his grandmother, who was lying injured in the Jeep, they decamped. Thereafter, P.W. 1 along with others returned back to the jeep. Hearing his cries, several people of the locality came to the scene. He then stated as follows:-

"A1, A2, A3, A4, all were there A14, A1, A2, A3, A4, A5, A7, A6, A8, A9, A10, A11, Radhakrishnan with beard, A12, A13 are persons known to me. In addition there were persons who could be identified by sight. They are A15, A17, A16. Others are not known to me."

28. He further deposed that P.Ws. 2, 3 and 4 had also sustained injuries in the incident. Police arrived at the scene without delay in a jeep and the deceased as well as the injured were removed to the government hospital Mattannur. They were then taken to the Indira Gandhi Hospital at Thalasseri. Due to the seriousness of the injuries sustained by P.Ws. 2 to 4, they were shifted to the Medical college hospital Calicut. He later came to know that Shihab and his grandmother had died. He identified his signature in Exhibit P1 FI statement. He identified MO1 sword as the one used by the 2nd accused. According to P.W. 1 the accused are members of the Marxist party and he and others are activists of the RSS.

29. The learned Senior counsel highlighted that the witness had not stated as to who had thrown the second explosive device which hit deceased Ammukutty Amma. Much criticism was levelled against the procedure adopted by the learned Sessions Judge in getting the accused identified in court. According to the learned Senior counsel, all that is evident from the deposition is that an omnibus statement is seen recorded without specifically pin pointing each of the accused as persons who were present at the scene of crime. We notice that all that the learned Sessions Judge has noted in the deposition is the rank number of certain accused without reference to their name except for A12 - Radhakrishnan. It is not recorded specifically in the deposition of P.W. 1 that the accused was specifically identified by the witness and that the learned Sessions Judge was satisfied with the same. We shall consider this matter in more detail after evaluating the evidence of the other occurrence witnesses.

30. We shall now turn to the evidence of P.W. 2. In his evidence, P.W. 2 has testified that the incident had occurred at 5.00 - 5.15 p.m. on 23/05/2002. He along with Sasi (C.W. 5), Velayudhan (C.W. 11), Shiju (P.W. 1), Abhilash (C.W. 3), M.R. Biju (C.W. 7), Biju (C.W. 9), Nipun (C.W. 8), Santhosh (C.W. 6), Harish (C.W. 4) and Ammukutty Amma were returning back in Jeep driven by Shihab after attending the funeral ceremonies of Uthaman who was murdered on the

previous day. He also stated in tune with the evidence of P.W. 1 that after traversing the curve in the road, the first accused jumped in front of the vehicle brandishing a sword. About 25 persons came towards the vehicle armed with deadly weapons from either sides of the road. P.W. 2 advised the driver to keep on driving without stopping the vehicle. At that time the 2nd accused threw some device at the vehicle from the right side which exploded on hitting Shihab. The vehicle lost control as shihab was thrown off the vehicle. It crashed on to the telephone post and then hit on a tree and came to a standstill. They tried to flee and while they were running, they heard the sound of another explosion. Ammukutty Amma was alone in the Jeep. The accused were armed with swords and choppers. He along with others took refuge behind the shop of paithal. He had sustained injuries as he was sitting behind the driver. After about 15 minutes police reached the scene and they removed the injured to the hospital. Two persons had died and P.W. 2 and Abilash were treated at the Medical College Hospital. He was admitted as inpatient for two weeks. He stated that the persons involved are A14, A4, A7, A9, A20, A8, A24, A12, A15, A17, Ambu Ravi, A21, A22, A25. A1 had brandished a sword and A12 was holding a billhook. He identified MO3 and stated that the weapon held by the accused was similar. He also identified his clothes and stated that it was due to political enmity that the bomb was thrown at them. He further stated that the injured persons are RSS activists and the accused were members of the Marxist party.

31. As in the case of P.W. 1, P.W. 2 only mentions the rank number of some of the accused as those present at the scene. The evidence would reveal that he specifically mentions the name of A1 as the person who jumped in front of the vehicle brandishing the sword and accused No. 2 as the person who had thrown the explosive device at the Jeep. He also states specifically that he had seen A12 holding a Billhook. The learned Sessions Judge has merely noted the rank number of the accused and it does not appear from the recorded deposition that the witness had specifically pointed out the particular accused he was referring to from among the 25 accused who were standing in the dock.

32. P.W. 3 Abhilash, is yet another witness, who was present inside the Jeep and who sustained injuries in the incident. His version of the incident corroborates the version of P.W. 1 and 2. He also stated that A1, A2, A3, A4, A5, Thadi Radhakrishnan (A12), Sreedharan (A16), Mahendran (A15), Devan Master (A14), A.K. Sasi (A8), Praveen (A24), Prakasan (A17), A.K. Ravi (A9), Chandran (A23), Rajan (A19), Pradeep (A18), Dilip (A6) were among the accused who were present. He stated that A16 (Sreedharan), A1 and A12 were holding swords. He deposed that it was A15 who had thrown the bomb at the vehicle which caused the 2nd explosion. He along with P.W. 1, P.W. 2 and Harish sustained injuries when the bomb thrown by A2 had exploded. Ammukutty Amma was sitting on the back side of the Jeep and they came out from hiding from behind the shop of Paithal only when the assailants had left the scene.

33. The next witness examined by the prosecution to prove the incident is P.W. 4,

K. Balakrishnan. The same version given by the other witnesses in respect of the incident is reiterated by P.W. 4 as well. According to P.W. 4, A1, A2, A3, A7, A6, A9, A8, Sahadevan Master (A14) Thadi Radhakrishnan (A12), Mahendran (A15) A.K. Praveen (A 24), Theyyam Kettunna Chandran (A20), Vinod (A25) were among the accused. They are persons who are known to him. A1 and A12 were carrying swords. Others were also carrying weapons. He sustained injuries in the incident. After the assailants had left the scene he along with others came out from the place of hiding and found that Ammukkutty Amma and Shihab had sustained injuries in the incident. All the injured were shifted to the Mattannur Hospital and then to the Indira Gandhi Hospital Thalasserry. He along with Prakashan and Abhilash, were shifted to the Medical College Hospital for treatment. He identified MO1 as the weapon used by Accused No. 1 and MO3 as the weapon held by A12. He also deposed that the accused and the victims were members of rival parties and while the accused were RSS activists the victims owe allegiance to the Marxist party.

34. The prosecution examined P.W. 25 - Dr. Sunil Kumar and P.W. 27 - Dr. Ramnath to prove the wound certificates issued by Dr. Syamala, while the injured were admitted in the Indira Gandhi Co-Operative Hospital, Thalasserry. Exts. P21 to P23 would reveal the injuries sustained by P.Ws. 1 to 4 in the bomb explosion at 4.30 p.m. on 23.5.2002 at Thillankeri. P.Ws. 2 to 4 were shifted to the Medical College Hospital, Kozhikkode, where they were attended by P.W. 14 - Dr. Alex Ommen, who has issued Ext. P10 to P12 discharge certificates. The above certificates supports the claim of the witnesses that they were present in the vehicle driven by deceased Shibu and that they had sustained injuries in the same incident.

35. The learned Senior counsel unleashed a vehement attack on the evidence of P.W. 1 to 4 and submitted that prejudice of an irreparable variety had been caused to the appellants. Referring to the evidence of the alleged ocular witnesses, it was argued that the evidence will not prove the presence of the accused at the scene of crime. Admittedly, the witnesses were activists of the RSS and in their evidence they have roped in innocent villagers who had nothing to do with the crime and the learned Sessions Judge without sparing any effort to ascertain the identity of the individual accused has entered into a finding of conviction against them. Grave exception was taken to the callous manner in which the evidence was recorded by the learned Sessions Judge. Merely referring to the rank number of the accused and without certifying in the deposition that the individual accused were identified by the witness in a manner known to law, according to the learned counsel, cannot be said to be proper.

36. We have considered the contentions of the learned counsel and the learned Public Prosecutor. As contended by the learned Public Prosecutor we have no doubt that the prosecution has successfully established that the incident had taken place involving explosive devises and Shihab and Ammukkutty Amma have lost their lives. In respect of the origin, development and culmination of the

incident, there cannot be much of a dispute. P.W. 1 to 4 have spoken in unison about the incident and also about the participation of a group of people. The Court below has meticulously analyzed the evidence of these witnesses and did not find any reason to doubt their version of the incident. After analyzing the evidence of the witnesses we also do not find any reason to doubt their version of the incident which took place on 23.5.2002 which led to the death of Shibu and Ammukkutty Amma.

37. In so far as the participation of accused Nos. 1, 2, 12 and 15 is concerned, there cannot be much dispute. All the witnesses have stated about the presence of A1 - Arshad, who is not before us. It was Arshad who had in front of the jeep brandishing a sword at the commencement of the incident. In so far as the overt act committed by the 2nd accused/the 1st appellant herein, there is a consistent version. All the witnesses have stated that it was the 2nd accused who had thrown the explosive device at Shihab which resulted in his instantaneous death. P.W. 3 is the only witness who deposed about A15 who, according to him, had hurled the explosive device at Ammukkutty Amma from the left side of the Jeep which resulted in her instantaneous death. Though the other witnesses have only stated that they had heard the sounds of a second explosion, as they were running for their life, they did not state that they had seen A15 throwing the said bomb at Ammukutty Amma. But P.W. 3 has stated in unmistakable terms that he had occasion to turn back while running and identified the 15th accused as the person who was seen throwing the explosive device. After having re appreciated the evidence of P.Ws. 1 to 4 meticulously we have no reason to doubt the evidence of P.W. 3. P.W. 2 and P.W. 3 have stated that they had seen A12 among the accused and he was holding a sword. This was reiterated by P.W. 3 and P.W. 4 as well. The witnesses have also named A12 as Thadi Radhakrishnan.

38. There is also the recovery of weapons at the instance of accused No. 1, 12 and 15. In pursuance to Ext. P16(a) confessional statement given by A12, MO3 chopper was recovered from the bushes near to the place of occurrence. In pursuance to Ext. P15(a) confessional statement of A15, a steel Bomb was recovered from the firewood shed attached to the house of A15. The said bomb was diffused by P.W. 12 police constable attached to the Bomb squad and this fact is evident from Ext. P9 mahazer.

39. The learned Sessions Judge has held that though the prosecution has an allegation that all the accused were armed with deadly weapons, they were not able to prove that except for A1, A2, A12 and A15, none of the other accused were carrying any weapon. In view of the above, clinching evidence as against A1 (Puthiyapurayil Murikkanchery Arshad), A2 (Vayalali Girishan), A12 (K.V. Radhakrishnan), and A15 (K.V. Mahendran) we are of the view that the prosecution has conclusively established their presence and participation in the incident.

40. Insofar as the other accused are concerned, the prosecution alleges that they were members of the unlawful assembly and they had entertained a common

object. It is therefore, necessary for the prosecution to lead evidence pointing to the conclusion that all the appellants had done or had committed some overt act in prosecution of the common object of the unlawful assembly. But active participation in actual violence is not necessary; persons who by words or by signs or otherwise, encourage violence are equally members of the unlawful assembly. It is to be noted that mere presence in the assembly does not make a person a member of unlawful assembly and no such person could be convicted of any offence with the aid of S. 149.

41. In the decision reported in *Gangadhar Behera v. State of Orissa* (, AIR 2002 SC 3633) 21 persons were prosecuted for the offence punishable under Section 302 read with Section 149 of the IPC. The trial Court acquitted six of them and convicted others under Section 302 read with Section 149 of the IPC and Section 148 as well as under Section 307 read with Section 149 IPC and sentence was imposed on them. 15 convicted persons appealed to the High Court. The High Court upheld the conviction of ten and acquitted the rest of the accused. The matter was carried before the Apex Court. One of the contentions taken before the Apex Court was that the ingredients of Section 149 were not satisfied because the witnesses have not stated the specific role played by the accused and the omnibus statement and that is not sufficient to fasten liability under Section 149 of the IPC. It was held that the emphasis under Section 149 was common object and not common intention. The crucial question, according to the Apex Court, was whether the said persons entertained one or more of the common objects as specified in Section 141. It was held that the proposition that unless the overt act is proved against a person, who is a member of the unlawful assembly he cannot be held liable was not acceptable. It was held as follows:

The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word "object" means the purpose or design and, in order to make it "common" it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression "in prosecution of common object" as appearing in Section 149 have to be strictly construed as equivalent to "in order to attain the common object". It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he

shares the community of objects, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly.

[24]. "Common object" is different from a "common intention" as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The "common object" of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behavior of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot eo instanti.

[25]. Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplished the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is that object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be called out, it may reasonably be collected from the nature of the assembly, arms it carries and behavior at or before or after the scene of incident. The word "knew" used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of "might have been known". Positive

knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within first offences committed in prosecution of the common object would be generally, if not always, with the second, namely, offences which the parties knew to be likely committed in the prosecution of the common object. (See Chikkarange Gowda and Ors. v. State of Mysore , 1956 Cri. L.J. 365)

42. In Subal Ghorai and Others v. State of West Bengal (, 2013 (4) SCC 607), the Apex Court while considering the scope and ambit of constructive liability u/s. 149 of the IPC observed as follows:

But this concept of constructive liability must not be so stretched as to lead to false implication of innocent bystanders. Quite often, people gather at the scene of offence out of curiosity. They do not share common object of the unlawful assembly. If a general allegation is made against large number of people, Court has to be cautious. It must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly. Unless reasonable direct or indirect circumstances lend assurance to the prosecution case that they shared common object of the unlawful assembly, they cannot be convicted with the aid of Section 149 of the Indian Penal Code. It must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all stages. The court must have before it some materials to form an opinion that the accused shared common object. What the common object of the unlawful assembly is at a particular stage has to be determined keeping in view the course of conduct of the members of the unlawful assembly before and at the time of attack, their behavior at or near the scene of offence, the motive for the crime, the arms carried by them and such other relevant considerations. The criminal court has to conduct this difficult and meticulous exercise of assessing evidence to avoid roping innocent people in the crime. These principles laid down by this Court do not dilute the concept of constructive liability. They embody a rule of caution.

43. Recalling the discussion with regard to the presence, participation and fixation of identity of the accused, we hold that the evidence of P.W. 1 to 4 are convincing as regards the incident and there is no reason to doubt their version as regards the involvement of accused Nos. 1, 2, 12 and 15. But we are

distressed to note that in the case of the other accused, the learned Sessions Judge has adopted a very callous approach. Undoubtedly, substantive evidence is the identification of the accused by the witness before the Court. But in the instant case, the deposition of the witnesses only reveals that the learned Sessions Judge has merely recorded the rank number of the accused in the charge and no effort is seen undertaken to certify in the deposition, with exactitude and certainty, that the person referred by witness as one of the members of the unlawful assembly which perpetrated the horrendous act is the person who was standing in the dock. We are unable to discern for certain as to whether the witness was referring to the particular accused whose name finds a place in the charge or to some other person. Obviously the witness will not be aware of the rank number of the person standing in the dock in the array of the accused. There is absolutely no clue available from the deposition either, as the Court has not recorded this aspect in the evidence as to the manner in which the particular accused was identified. The Apex Court as well as this court, time and again, have reminded the trial Courts, the importance of recording in the deposition the most cardinal fact that the witness has specifically identified the accused as the person who was involved in the crime, so that the complicity and presence of the accused at the scene of crime could be fixed with exactitude. This is all the more important in a case of this nature where most of the accused are attempted to be roped in on the reason that they were members of the unlawful assembly and they had shared the common object. Unfortunately, there is no specific endorsement in the deposition of the eye witnesses that the accused numbering 25 standing in the dock were identified by the witness in any acceptable manner known to law and the court was satisfied by the identification. In other words, it does not appear from the evidence that the accused was specifically pointed out by their name or specific feature and an endeavor was made by the Court to individually fix each of the accused as being present at the scene of crime so that their complicity as members of an unlawful assembly in prosecution of the common object could be fixed. We have to mention that the identification of the accused in Court, which was conducted in an omnibus and perfunctory manner, cannot be held to be reliable to establish the complicity of accused Nos. 3 to 11, 13, 14 & 16 to 25 and to hold them vicariously liable for the offence u/s. 302 r/w. 149 of the IPC.

44. We are afraid that it would result in travesty of justice if we were to hold the accused guilty against whom no specific overt acts are alleged and in respect of whom the identification of court is extremely sketchy in view of the deficiencies noted above. We note that there are only general allegations against them and we hesitate to convict all of them on such vague evidence. In spite of a meticulous search we are unable to find any reasonable circumstances to lend assurance to hold those accused guilty. From that point of view we are of the view that it will only be safe to convict the accused No. 2 - Vayalali Girisan (appellant No. 1), accused No. 12 - K.V. Radhakrishnan (appellant No. 11) and Accused No. 15 - K.V. Mahendran (appellant No. 14) whose presence is not only

consistently mentioned from the stage of F.I.R. but also against whom overt-acts are attributed. So far as the other appellants are concerned, for the above stated reasons we set aside the convictions and sentences passed against them and direct that they shall be set at liberty forthwith if not required in any other case.

45. In view of the acquittal of all the accused, except A1, A2, A12 and A15, the question is whether the conviction of the remaining accused under Section 302 read with Section 149 of the Indian Penal Code can be sustained under law.

46. In *Amar Singh Vs. State of Punjab* (, AIR 1987 SC 826), seven accused were charged for murder under S. 302 read with S. 149 of the IPC. Two out of the seven accused were acquitted by the trial court and on appeal the High Court acquitted one more accused. In spite of that, the High Court convicted four of the remaining accused under S. 302 read with S. 149 of the IPC and sentenced them to life imprisonment. The four convicted accused appealed before the Hon'ble Supreme Court and contended that conviction u/s. 149 was not maintainable. This contention was accepted and the Apex Court observed as follows:

".....as the appellants were only four in number, there was no question of them forming an unlawful assembly within the meaning of S. 141 of the IPC. It is not the prosecution case that apart from the said seven accused persons, there were other persons who were involved in the crime. Therefore, on the acquittal of three accused persons, the remaining four accused, that is, the appellants, cannot be convicted under S. 148 or 149 IPC for any offence, for the first condition to be fulfilled in designating an assembly as an unlawful assembly is that such assembly must be a five or more persons as required under S. 141 of the IPC. In our opinion, the conviction of the appellants under S. 148 & 149 of the IPC cannot be sustained."

47. Similar views were taken by the Apex Court in *Maina Singh V. State of Rajasthan* (, AIR 1976 SC 1084) and in *Nagamalleswara Rao* (supra), wherein it was held that in a given case if the charge disclosed only named persons as accused and the prosecution witnesses confined their testimony to them, it would be permissible to conclude that others, named or unnamed, acted conjointly with one of the charged accused, if there was other evidence to lead to that conclusion but not otherwise.

48. Faced with such a situation it has to be considered whether it would be legal to seek the aid of Section 34 of the IPC in view of the acquittal of the co accused. In *Mohan Singh v. state of Punjab* (, AIR 1963 SC 174), the Constitution Bench of the Hon'ble Supreme Court considered the question as to whether accused could be convicted u/s. 302 read with Section 34 of the IPC when Section 149 of the IPC could not be invoked as against them for reason of acquittal of the named co-accused. The Apex Court held as follows in Para. 13 of the judgment.

"That inevitably takes us to the question as to whether the appellants can be convicted under S. 302/34. Like S. 149, S. 34 also deals with cases of constructive criminal liability. It provides that where a criminal act is done by

several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The essential constituent of the vicarious criminal liability prescribed by S. 34 is the existence of common intention. If the common intention in question animates the accused persons and if the said common intention leads to the commission of the criminal offence charged, each of the persons sharing the common intention is constructively liable for the criminal act done by one of them. Just as the combination of persons sharing the same common object is one of the features of an unlawful assembly, so the existence of combination of persons sharing the same common intention is one of the features of S. 34. In some ways the two sections are similar and in some cases they may overlap. But, nevertheless, the common intention which is the basis of S. 34 is different from the common object which is the basis of the composition of an unlawful assembly. Common intention denotes action in concert and necessarily postulates the existence of a prearranged plan and that must mean a prior meeting of minds. It would be noticed that cases to which S. 34 can be applied disclose an element of participation in action on the part of all the accused persons. The acts may be different; may vary in their character, but they are all actuated by the same common intention. It is now well settled that the common intention required by S. 34 is different from the same intention or similar intention. As has been observed by the Privy Council in *Mahbub Shah v. Emperor*, (, 72 Ind App 148 : AIR 1945 PC 118), common intention within the meaning of S. 34 implies a pre arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre arranged plan and that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case."

49. The same principle was laid down by the Apex Court in *Babu and Another v. State rep. by Inspector of Police, Chennai and Another* (, 2013 (4) SCC 448), wherein relying on *Dhanna and Others Vs. State of M.P.* [, 1996 (10) SCC 79], the Apex Court held that, where the Court finds that the strength of the assembly was insufficient to constitute into "unlawful assembly", but the remaining persons who participated in the crime had shared common intention as the main perpetrators of the crime, the Court can take the aid of S. 34 of the IPC even if the said section was not specifically mentioned in the charge.

50. In *Pal Singh v. State of Punjab* (, 2014 (3) SCALE 36), this aspect of the matter was considered in extenso by the Apex Court and it was held as follows:-

11. In *Dhari and Ors. v. State of Uttar Pradesh* : , AIR 2013 SC 308, this Court re-considered the issue whether the Appellants therein could be convicted under Sections 302 r/w 149 Indian Penal Code, in the event that the High Court had convicted three persons among the accused and the number of convicts has thus remained less than 5 which is in fact necessary to form an unlawful assembly as described under Section 141 Indian Penal Code. This Court considered the earlier

judgments in *Amar Singh v. State of Punjab* , AIR 1987 SC 826; *Nagamalleswara Rao (K.) v. State of A.P.* : , AIR 1991 SC 1075, *Nethala Pothuraju v. State of A.P.* : , AIR 1991 SC 2214; and *Mohd. Ankoos v. Pubic Prosecutor* : , AIR 2010 SC 566, and came to the conclusion that in a case where the prosecution fails to prove that the number of members of an unlawful assembly are 5 or more, the court can simply convict the guilty person with the aid of Section 34 Indian Penal Code, provided that there is adequate evidence on record to show that such accused shared a common intention to commit the crime in question. (See also: *Jivan Lal v. State of M.P.* : , (1997) 9 SCC 119; *Hamlet v. State of Kerala* : , AIR 2003 SC 3682; *Fakhruddin v. State of M.P.*: , AIR 1967 SC 1326; *Gurpreet Singh v. State of Punjab* : , AIR 2006 SC 191; and *S. Ganesan v. Rama Raghuraman and Ors.* , AIR 2013 SC 840).

51. It is well settled that common intention within the meaning of the section implies a pre-arranged plan and postulates that the criminal act was done pursuant to a pre-arranged plan. The said plan may also develop on the spot during the commission of the offence; but the crucial circumstance is that the said plan must precede the act constituting the offence. If that be so, before a Court can convict a person u/s. 302 read with S. 34 of the IPC it should come to a definite conclusion that the said person had prior concert with one or more other persons, named or un-named, for committing the said offence.

52. In the case on hand, there is concrete evidence about the participation of accused Nos. 1, 2, 12 and 15 and we have concluded that the prosecution has successfully established their role in the heinous act. We are of the view that in view of the above settled pronouncements of the Apex Court that the acts were perpetrated in pursuance of a prearranged plan and there cannot be any obstacle in holding them guilty for having committed offense u/s. 302 r/w S. 34 of the IPC. In so far as accused No. 2 and 15, there is convincing evidence that they had thrown the two explosive devices causing the instantaneous death of Shihab and Ammukkutty Amma.

53. The next question is whether any prejudice would result if the accused Nos. 2, 12 and 15 are convicted with the aid of S. 34 of the IPC. In *Dhaneswar Mahakud and Ors. v. State of Orissa* (, AIR [2006] SC 1727), the Apex Court had held that even if the accused has not been charged with the aid of Section 34 Indian Penal Code and instead charged with the aid of Section 149 Indian Penal Code, they can be convicted with the aid of Section 34 Indian Penal Code when evidence shows that there was common intention to commit the crime and no prejudice or injustice has been caused to the accused therein. Even the conviction of the accused u/s. 302 Indian Penal Code simpliciter is permissible if the Court reaches the conclusion on the basis of material placed before it that injuries caused by the accused were sufficient in the ordinary course of nature to cause death and nature of the injuries was homicidal.

54. In *Darbara Singh v. State of Punjab* (, AIR 2013 SC 840), the Hon"ble Supreme Court considered a similar issue and came to the conclusion that the

accused has to satisfy the court that if there is any defect in framing the charge it has prejudiced the cause of the accused resulting in failure of justice. It is only in that eventuality the Court may interfere. The Court elaborated the law as under:

"Failure of justice" is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth. There would be "failure of justice"; not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be over emphasized to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under the Indian criminal jurisprudence. "Prejudice" is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under criminal jurisprudence, then the accused can seek benefit under the orders of the court. (Vide: Rafiq Ahmed @ Rati v. State of U.P. (, AIR 2011 SC 3114); Rattiram v. State of M.P. (, AIR 2012 SC 1485); and Bhimanna v. State of Karnataka (, AIR 2012 SC 3026).

54. Evidence reveal the active participation of the accused No. 1, 2, 12 and 15. The accused No. 1 is not before us. There is ample evidence that accused Nos. 1, 2, 12 & 15 had participated in the incident and in that view of the matter, it will be extremely difficult to say that they had not shared the common intention to do away with Ammukkutty Amma and Shihab. As held by the Apex Court, the mere fact that there is no charge mentioning S. 34 of the IPC will not matter. Therefore, in the light of the fact that the number of assailants now available before Court is only four, out of which one is not before us, the offence falling within the ambit of S. 143, 147, 148 and 149 do not survive. The finding of the Court below that accused are guilty of the offence u/s. 302 read with Section 149 of the IPC and S. 143, 147, 148 of the IPC are not sustainable.

55. The conclusion therefore, is that the prosecution has successfully established the presence and participation of accused Nos. 1, 2, 12 and 15 in the incident. Even though the prosecution had an initial case that there were 25 named persons, on evidence this Court has already extended the benefit of doubt to all of the accused except A1, A2, A12 and A15. In the absence of any finding in that regard and in the absence of evidence that other persons might have been involved, S. 149 of the IPC cannot be applied.

56. We therefore, extend the benefit of doubt to accused Nos. 3 to 11, 13, 14 and 16 to 25 and hold that they are entitled to the benefit of doubt as their identity could not be established beyond doubt. The appeal preferred by the

accused Nos. 2, 12 and 15 are dismissed confirming the conviction and sentence.

57. Accordingly, the Criminal Appeal is allowed in part as follows:

(a) The Appellant No. 2 (Puthiyapurayil Manoj)-A3, appellant No. 3 (Meethalepurayil Jayarajan)-A4, appellant No. 4 (Aniyeri Balakrishnan)-A5, appellant No. 5 (Manoli Dileep)-A6, appellant No. 6 (Puthiyaprayil Byju)-A7, appellant No. 7 (A.K. Sasi)-A8, appellant No. 8 (A.K. Raveendran)-A9, appellant No. 9 (Chennipparambath Pramod)-A10, appellant No. 10 (K. Arun Kumar)-A11, appellant No. 12 (K.V. Mahesh)-A13, appellant No. 13 (Koyyadan Sahadevan Master)-A14, appellant No. 15 (Kalam Veetil Sreedharan)-A16, appellant No. 16 (Chalil Prakashan)-A17, appellant No. 17 (A.K. Pradeesh)-A18, appellant No. 18 (Chooriyii Rajan)-A19, appellant No. 19 (A.K. Pradeepan)-A20, appellant No. 20 (K. Ravindran @ Ambu Ravi)-A21, appellant No. 21 (K. Rajeevan)-A22, appellant No. 22 (Chennipparambath Chandran)-A23, appellant No. 23 (A.K. Praveen)-A24, and appellant No. 24 (Kooli Vinod)-A25 are found not guilty of the offence charged. They are acquitted. It is submitted that the appellants have executed bonds and were released on bail as directed by this Court. In such circumstances, the bail bonds executed by the appellants stand cancelled and they are set at liberty.

(b) The conviction and sentence of appellant No. 1 (Vayalali Girishan)-A2, appellant No. 11 (K.V. Radhakrishnan)-A12, and appellant No. 14 (K.V. Mahendran)-A15 are confirmed on all counts except in so far as their conviction under Section 302 read with Section 149 is altered to one under Section 302 read with Section 34 of the IPC; the conviction under Section 324 read with Section 149 of the IPC is altered to one under Section 324 read with Section 34 of the IPC. The accused Nos. 2, 12 and 15 are held not guilty of the offence punishable under Section 143, 147 and 148 of the IPC. The conviction and sentence passed under Section 27(1) of the Arms Act against accused No. 2, 12 and 15 is confirmed. The conviction and sentence passed under Section 3 and 5 of the Explosive Substances Act against accused Nos. 2 and 15 is also confirmed.

(c). For the offence Section 302 read with Section 34 of the IPC, accused Nos. 2, 12 & 15 are sentenced to undergo imprisonment for life and to pay a fine of Rs. 15,000/- each in default to undergo rigorous imprisonment for six months each.

(d). For the offence under Section 324 read with Section 34 of the IPC they are sentenced to undergo rigorous imprisonment for one year each and to pay a fine of Rs. 5000/- each and in default to undergo simple imprisonment for a period of two months. The sentences shall run concurrently. They shall be entitled to set off for the period they have been in custody in this case as provided u/s. 428 of the Code of Criminal Procedure, subject to the orders passed by appropriate authority u/s. 432/433 of the Code of Criminal Procedure.