

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 27TH DAY OF OCTOBER 2015/5TH KARTHIKA, 1937

CRL.A.No. 552 of 2003 ()

SC 232/1999 of ADDITIONAL DISTRICT COURT (ADHOC), THRISSUR

APPELLANTS/ACCUSED

- 1.UNNIKRISHNAN @ KANNAN, AGED 26,
S/O. VANNARY VIJAYAN
NATTIKA VILLAGE AND DESOM.
- 2.SUDHEER @ SHUDHI, AGED 24,
S/O. AKATHEPARAMBIL NARAYANAN,
NEAR S.N COLLEGE, NATTIKA.
- 3.SAJEEV @ SAJI, AGED 21,
S/O. AKATHEPARAMBIL NARAYANAN,
NEAR S.N COLLEGE, NATTIKA.
- 4.RAJU, AGED 20,
S/O. KIZHAKKEAPPAT SANKARANARAYANAN,
NEAR S.N COLLEGE, NATTIKA.

BY ADVS.SRI.S.RAJEEV
SRI.N.K.UNNIKRISHNAN
SRI.C.VINODKUMAR

RESPONDENT/COMPLAINANT

1. STATE OF KERALA REPRESENTED
THROUGH, THE SUB INSPECTOR OF POLICE,
VALAPPAD, REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

ADDL R2 IMPEADED
SIDHARTHAN @ SIDHAN, AGED 48 YEARS,
CHARIYATHU HOUSE, NEAR S.N. COLLEGE,
NATTIKA, CHAVAKKAD.

[ADDL. R2 IMPEADED AS PER JUDGMENT DATED 27.10.2015 IN CRL.MA
NO.6935/2009]

BY PUBLIC PROSECUTOR SRI. JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
27-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SKV

'CR'

K.RAMAKRISHNAN, J.

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Crl. Appeal No.552 OF 2003

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Dated this the 27th day of October, 2015

JUDGMENT

Accused Nos.1 to 4 in SC 238/1999 on the file of the 3rd Additional Sessions Court (Adhoc-1) Thrissur are the appellants herein. The appellants were charge sheeted by the Circle Inspector of Police in Crime No.161/1996 of Valappad Police Station under Sections 324, 326, 341 and 307 read with Section 34 of the Indian Penal Code.

2. The case of the prosecution in nutshell was that on 18.8.1996 at about 9 am, while PW1 the injured a sympathizer of Congress Party was coming on his bicycle through the Tippusultan Road from north to south and when he reached near the SNDP School, the 1st accused stopped him by holding his bicycle and 4th accused wrongfully restrained him by holding him and 2nd accused

cut him with a sword on his right leg and the 3rd accused beat him with a G.I Pipe on his leg and when he fell down from the bicycle, he was dragged to near by bylane and from there 2nd accused shouted to kill him and they have indiscriminately inflicted injuries on him with weapons like swords and iron rods with an intention to commit murder and caused grievous hurt and thereby all of them have committed the offence under Sections 324, 326, 341 and 307 read with Section 34 of the Indian Penal Code.

3. After investigation, final report was filed before the Judicial First Class Magistrate's Court, Kodungallor where it was taken on file as CP 27/1999. After complying with the formalities, the learned Magistrate committed the case to Court of Sessions, Thrissur. After Committal, Sessions Court took cognizance of the case as SC 238/1999 and it was originally made over to Principal Assistant Sessions Court, Iringalakkuda for disposal. While the case was pending before that court, when the accused appeared before that court, after hearing both

sides, charge under Sections 324, 326, 341 and 307 read with Section 34 of the Indian Penal Code was framed and the same was read over and explained to them and they pleaded not guilty. Thereafter the case was withdrawn by the Sessions Court and made over to Additional Sessions Court (Adhoc-1) Thrissur for disposal.

4. In order to prove the case of the prosecution, PWs 1 to 13 were examined and Exts.P1 to P13 and MOs 1 to 10 were marked on the side of the prosecution. After closure of the prosecution evidence, the accused were questioned under Section 313 of the Code of criminal Procedure and they denied all the incriminating circumstances brought against them in the prosecution evidence. They have further stated that they have been falsely implicated in the case on account of political enmity. They have not committed any offence. Since the evidence in this case did not warrant an acquittal under Section 232 of the Code of Criminal Procedure, the accused were called upon to enter on their defence, but

no defence evidence was adduced on their side. After considering the evidence on record, the court below found the appellants guilty for the offences under Sections 341, 324, 326, 307 read with Section 34 of the Indian Penal Code and convicted them thereunder and sentenced them to undergo rigorous imprisonment for one year for the offence under Sections 324 read with 34 of the Indian Penal Code and further sentenced to undergo rigorous imprisonment for two years under Section 326 read with 34 of the Indian Penal Code and further sentenced to undergo rigorous imprisonment for four years and also to pay a fine of Rs.5,000/- each and in default to undergo rigorous imprisonment for one year each under Section 307 of the Indian Penal Code and further sentenced to pay a fine of Rs.500/- each and in default to undergo simple imprisonment for 15 days under Section 341 of the Indian Penal Code and directed the substantive sentence to run concurrently. It is further ordered that if the fine amount is realised, an amount of Rs.15,000/- be paid to

PW1 as compensation under Section 357(1)(b) of the Code of Criminal Procedure. Set off was allowed for the period of detention already undergone by them under Section 428 of the Code. Aggrieved by the same, the present appeal has been preferred by the appellants/accused before the court below.

5. During the pendency of the appeal, the defacto complainant filed Crl.M.A.6935/2009 to get impleaded as additional 2nd respondent and also filed an affidavit stating that the matter has been settled between the parties and he has no objection in acquitting the accused, as they are leading a harmonious life now. Since the defacto complainant is also an interested party, this court felt that the application can be allowed and he can be implead as additional 2nd respondent. But the question of acquitting the accused on the basis of compounding will not arise, as once the accused were convicted for grave offences, mere compounding is not a ground for acquitting the accused and it is for the court to consider whether the

offences are made out or not on the basis of evidence and dispose of the appeal on merit. But the harmony arrived at between the parties can be taken note of by this court while considering the question of sentence to be awarded, if ultimately this court confirms the order of conviction passed by the court below. With the above observation Crl.M.A No.6935/2009 is allowed in part and defacto complainant is impleaded as additional 2nd respondent in the matter.

6. Heard Sri. S. Rajeev, counsel appearing for the appellant and Shri Jibu P.Thomas, learned Public Prosecutor appearing for the State and Sri. Vinod Kumar counsel appearing for the additional 2nd respondent/defacto complainant in the matter.

7. The counsel for the appellants submitted that though the First Information statement was given by PW2 claiming to be an eye witness of part of the incident, he did not support the case of the prosecution. Further the presence of PW3 at the place of the occurrence is doubtful

as it was admitted by him that his brother's marriage was scheduled to be conducted on that day between 8.30 and 9.30 pm and his brother along with family members left the house to the temple only at 9 am and at that time, he was present in the house. Considering the distance from that house to the place of occurrence, it was not possible for him to reach, as according to the prosecution the incident occurred at 9 am. So the presence of PW3 at that place is doubtful. If his evidence is eschewed, then the evidence is that of only PW1, the injured. Further there is contradictions and omissions in his evidence. He had not stated to police at the first instance that any one had shouted to kill him and it was only a later development made by him, when he was examined before the court. So it cannot be said that they have attacked the injured with an intention to kill. Further most of the injuries were on the leg and except some fracture, the other injuries are only minor injuries, which are not fatal in nature. So, under the circumstances, the court below

was not justified in convicting the appellants for the offence under Section 307 of Indian Penal Code. According to PW1, along with PW2 one Ouseph and Mohanan had come, but they were not even questioned and they were not cited as witnesses and suppression of material witnesses will also go to show that the case of the prosecution is not genuine and in such circumstances, it is not safe to rely on the evidence of PW1 alone to convict the accused without corroboration from independent witnesses. So he prayed for acquittal of the accused. He had also submitted if for any reason, this court is not inclined to interfere with the conviction, he prayed for leniency on the ground that the matter has been settled between the parties and they are the first offenders and they are now leading a harmonious life. He had relied on the decisions reported in **Fireman Ghulam Mustafa v State of Uttaranchal (now Uttarakhand)** [2015 (2) KLD 621 SC] in support of his case.

8. On the other hand, the learned Public Prosecutor

submitted that the nature of injuries sustained, the nature of weapon used and the manner in which attack was made, all will go to show that there was an intention to commit murder of the injured. So under the circumstances, court below was perfectly justified in convicting the accused persons for the offences alleged. Further it is a political clash and showing undue leniency in sentence will give only wrong signal to the society. There is nothing to disbelieve the evidence of PW1 on this aspect. Further the court below had also appreciated the evidence of PW3 as a reliable witness as he had given reasons for not attending the marriage. So there is no necessity to interfere with the conviction and sentence passed by the court below.

9. The counsel for the additional 2nd respondent submitted that he has no objection in even allowing the appeal. They are now living a happy life and considering the age of the accused and also considering the fact that the matter has been settled between them, he does not

want to send them to jail.

10. The case of the prosecution as merged from the prosecution witnesses was as follows:

On 18.8.1996, at about 9 am, while PW1 the injured was proceeding in his bicycle with MO2 can for the purpose of measuring toddy to a shop at Thriprayar as he is a toddy tapper and when he reached the place of occurrence viz. near SNDP School, 1st accused came from the side lane and stopped him by holding the handle of the cycle and at that time 3rd accused came and caught hold of him and the 4th accused wrongfully restrained him and at that time 2nd accused cut him with a sword on his right leg and 3rd accused beat him with G.I. pipe on his right leg and due to the attack when he fell down, he was dragged to the side lane and from there 2nd accused shouted to kill him and all the accused persons inflicted injuries on his body indiscriminately and when PWs 1 and Ouseph and Mohanan came, the accused persons left the place with weapons in their hands. Thereafter the

persons gathered there took him to nearby hospital. But since they did not admit him, they had taken him to West Fort hospital Thrissur. There also he was not admitted and then he was taken to Aswini hospital where he was seen by PW6 and he issued Ext.P3 wound certificate.

11. On getting intimation regarding the admission of PW1 in the hospital, PW13 came to the hospital and recorded Ext.P1 statement of PW2, as statement of injured could not be recorded which was sent to the concerned Police Station and it was received by PW9 who registered Ext.P15 First Information Report as Crime No.161/1996 of Valappad Police Station against Kannan, Akatheparambil Naryanan's two children, Kizhakkeppat Sankaranarayanan's son auto driver alleging offence under Section 307 read with Section 34 of the Indian Penal Code.

12. The earlier part of the investigation was conducted by PW13 himself. He went to the place of occurrence and prepared Ext.P2 scene mahazar in the

presence of PW5 and another. He questioned the witnesses and recorded their statements. He had collected MO8, MO9 and MO12 from the place of occurrence and he had also seized MO1 and MO2 after describing the same in the scene mahazar. Further PW13 arrested the accused persons on 2.9.1996 at 12 noon and when he questioned them, they have stated individually that if they were taken, they will show the place where the weapons were concealed and on the basis of that statement, they went to the place and second accused had taken and produced MO5 which is seized as per Ext.P6 mahazar in the presence of PW10 and another and on the basis of statement given by the 3rd accused, he had seized MO7 iron rod as taken and produced by him as per Ext.P7 mahazar in the presence of PW10 and another. On the basis of statement given by 4th accused and as lead by him, he went to that place and seized MO6 iron pipe as taken and produced by him as per Ext.P8 mahazar in the presence of PW12 and another. Accordingly as per

the statement given by the 1st accused he went to that place as lead by him and seized MO4 sword as taken and produced by him as per Ext.P9 mahazar in the presence of PW12 and another. Thereafter he produced the same before court along with Ext.P10 property list after getting them identified by the witnesses and also showing to the doctor. He gave request to the court to send the material objects for chemical examination and they were sent for chemical analysis from the court and Ext.P11 report obtained. The further investigation in this case was conducted by PW8 who seized Ext.P12 case sheet of the injured as per Ext.P13 mahazar. As requested by him PW7, the Village Officer had prepared Ext.P4 sketch of place of occurrence on the basis of scene mahazar. The investigation was completed by his successor and final report was filed by him.

13. Though PW2 was examined as eye witness to the incident regarding portion of the incident and to prove Ext.P1 statement given by him regarding the incident, he

did not support the case of the prosecution, though he admitted the signature in Ext.P1 First Information Statement. So his evidence is not helpful to prove the complicity of the accused persons in the commission of the crime. PW3 was cited as an eye witness to the incident as a chance witness to witness the incident while he was going to the temple in his bicycle and he was also proceeding in the opposite direction in which the injured was coming and at that time he happened to see the entire incident. But it was admitted by him in his evidence that his brother's marriage was scheduled to be conducted from the temple on that day between 8.30 am and 9.30 am and the marriage party including his brother had left the house only at 9 am and at that time he was in the house. Admittedly the place of occurrence is situated about more than one km away from his house. Further according to PW1 the injured, the entire incident happened within 6 to 10 minutes. Further even according to him, alleged eye witnesses to the incident, viz one

Raju, PW2, Ouseph and Mohanan came there and he did not know as to whether any other person has reached the place. He did not mention the name of PW3 as the person who came there and witnessed the incident.

14. It is true that the presence of all the eye witnesses present need not be mentioned by the injured as the time when he is giving statement to the police. But the probability of the witnesses present at that place in the circumstances has to be evaluated by the court from the evidence available on record. In this case, admittedly the marriage of the brother of PW3 was to be scheduled on that date between 8.30 and 9.30 am and marriage party left the house only at 9 am and at that time PW3 was there in that house. So under the circumstances, it is not possible for him to be at the place of occurrence and witness the incident as claimed by him at 9 am when according to PWI, the incident happened. So there is some force in the submission made by the counsel for the appellant that the presence of PW3 at the

place of occurrence and witnessing the incident as claimed by him is doubtful and he could only be a planned witness as he also belongs to the same party to which PW1 belongs.

15. Then the evidence is that of PW1 injured and another witness PW5 happened to see the accused persons with some weapon in their hands just prior to the incident near the place of occurrence. PW5 who had seen the accused persons with the weapons immediately after the incident. So his evidence can be relied on for the purpose of proving the fact that immediately after the incident, the accused persons left the place with weapons in their hands. He had also identified the weapons as MO4, MO5, MO6 and MO2 in the hands of A1, A2, A4 and A3 respectively. There is no enmity for PW5 to give any false evidence against the accused as well.

16. Then the evidence is that of PW1 alone to prove the incident. He had categorically stated that on that day he was coming in his bicycle and at that time,

the 1st accused had wrongfully restrained him by holding his bicycle and at that time, 3rd accused had caught hold of him and 2nd accused had inflicted injury with a sword on his leg and thereafter 3rd accused had beaten with him with iron rod and when he fell down, all the four accused had dragged him to the nearby lane. From there according to PW1, 2nd accused had shouted to kill and then others have inflicted injuries on him indiscriminately and when PW2 and others came, the accused persons ran away from the place with weapons in their hand and thereafter he was taken to hospital by the persons gathered there including PW2. He had admitted in the cross examination that reason for the incident was political rivalry. He had also admitted in his evidence that he did not mention to the police that 2nd accused had shouted to him to kill when he was questioned. So this statement was given by him before the court for the first time. Further it cannot be said that it was a pre-meditated attack as well. However there is nothing wrong

for the court to rely on the sole evidence of PW1 the injured, if his evidence is believable and trustworthy.

17. Further there is no case for the accused that they were not known to the injured. Further the incident occurred at day time and there was no difficulty for the PW1 to identify the accused persons as the persons who attacked him as well. Merely because there was some discrepancy regarding the over-tact or the manner in which the injured was attacked etc. were not a ground to disbelieve his evidence on this aspect. Court below was perfectly justified in relying on the evidence of PW1 the injured, for the purpose of convicting the accused persons relying on the decision reported in **State v Cheyyanni** [1980 KLT 107] and **State of Kerala v Padmanabhan Nair** [1989 (2) KLT SN 34 page 29].

18. The evidence of PW1 will go to show that the accused persons attacked him with dangerous weapons like sword and iron rod which he had identified them as MOs4 to 6. Further the recovery of these weapons on the

basis of alleged statement given by the accused was also proved through the evidence of investigating officer PW13 coupled with evidence of PWs10 and 12. It is true that PW12 is the brother-in-law of PW1. That alone is not a ground to disbelieve his evidence regarding the recovery effected. The weapons alleged to have been used are dangerous weapons.

19. It is seen from Ext.P3 wound certificate that he sustained the following injuries:

- (1) incised wound 9 x 0.5 cm on the right eye brow.
- (2) incised wound 6x0.5 cm from right side of nose to right upper lip.
- (3) incised wound 1.5 x 0.5 cm below right knee
- (4) 3 incised wounds 2.5 x0.5 cm, 1 cm x 0.5 cm, 0.5 x 0.5 cm respectively on upper part of the right leg.
- (5) incised wounds 1 x 0.5 cm on the lower 1/3 of right leg.
- (6) incised wound 1x.25cm on left knee.
- (7) 3 incised wounds 1.5 x 0.5 cm, 2.5 cm and 1 x .5 cm on upper part of left leg.
- (8) 2 incised wounds 1x 0.5cm and .5x0.5 cm on

middle of left leg.

- (9) Irregular abrasions on left knee, right leg and right ankle.
- (10) pain and swelling on right leg, right knee, right front and left wrist.
- (11) incised wound 2 x .5 cm on right palm.
- (12) incised wound 1 cm x 0.5 cm on right ring finger. X-ray shown fracture fibula right leg at the 2 sides. Fracture tip of radius at left wrist. The patient was out in the ICU.

20. Except the fracture of fibula right leg and wrist, other injuries are not grave injuries. It is true that Pw6 the Doctor had deposed that if the injuries not attended will result in death, but none of the injuries were on the vital part of the body. It is true as rightly observed by the court below and also has been held in **Bappu Alias Babu v State of Maharashtra and Another** [2004 SCC (Crl.) 1794] that it is not the nature of injuries that has to be looked into by the court, but the manner in which the injuries were inflicted and also the intention of the assailants in inflicting the injury are relevant for the

purpose of coming to the conclusion as to whether there was any intention on the part of assailants to commit murder on the injured, so as to come to the conclusion as to whether offence under Section 307 of Indian Penal Code is attracted or not. From the nature of injury sustained, it cannot be said that assailants had got an intention to commit murder of the victim, because all the injuries were inflicted on the lower part of leg and most of them are incised wounds but not having great depth as well. There is only one injury on that face that too is not a grave injury. So under the circumstances, as found by the Apex court in the decision reported in **Fireman Ghulam Mustafa v State of Uttaranchal (Now Uttarakhand)** [2015 (2) KLD 621 SC], it cannot be said that those injuries were inflicted by the assailants with an intention to commit murder. Further PW1 had no case before the Police when he was questioned that any of the assailants had shouted to him to kill and they had the intention to kill him as well. So under the

circumstances, the finding of the court below that the appellants have committed offence under Section 307 of the Indian Penal Code appears to be unsustainable in law and the same is liable to be set aside and the appellants are entitled to get acquittal of the charge levelled under Section 307 of the Indian Penal Code.

21. But considering the nature of injuries sustained including the fracture and dangerous weapons were used to commit the offence the court below was perfectly justified in convicting the appellants for the offences under Sections 341, 324 and 326 read with Section 34 of the Indian Penal Code and the finding of the court below to that extent do not call for any interference. Considering the fact that this court has found that the appellant is entitled to get acquittal under Section 307 of the Indian Penal Code, the sentence imposed by the court below against the appellants for that offence is also liable to be set aside.

22. As regards the sentence imposed for other

offences, this court will have to consider the question of settlement arrived at between the parties and the fact that they are living in harmony after forgiving all the happenings that resulted in the incident. But at the same time showing undue leniency in imposing the sentence will only result in loss of faith for the society in criminal justice delivery system itself. Considering these aspects, this court feels that reducing the period of detention behind the bars and imposing substantial amount as fine and awarding compensation out of the fine will be sufficient and that will meet the ends of justice. Further in this case, there is no case for the prosecution that the appellants have got any previous criminal background and the possibility of their reformation on account of the settlement also cannot be ruled out. These things can be taken note of by the court as mitigating circumstances to show leniency in imposing the sentence after taking into consideration about the settlement arrived at between the parties as well. So this court feels that the sentencing the

appellants to undergo rigorous imprisonment for six months each and also to pay a fine of Rs.10,000/- each and in default to undergo rigorous imprisonment for two months each for the offence under Section 326 of the Indian Penal Code and Section 324 of the Indian Penal Code and further sentenced to pay a fine of Rs.500 and in default to undergo simple imprisonment for 15 days under Section 341 of the Indian Penal Code will be sufficient and that will meet the ends of justice. If the fine amount is realised then directing to pay compensation of Rs.25,000/- out of the fine amount to the injured PW1 under Section 357 (I) (b) of the Code of Criminal Procedure will be sufficient to meet the interest of the victim as well. So the sentence imposed by the court below for the offence under Sections 326 and 324 read with Section 34 of the Indian Penal Code alone is set aside and the same is modified as follows:

The appellants are sentenced to undergo rigorous imprisonment for six months each and also to pay a fine

of Rs.10,000/- each and in default to undergo rigorous imprisonment for two months each for the offence under Section 326 of the Indian Penal Code and Section 324 of the Indian Penal Code and further sentenced to pay a fine of Rs.500 and in default to undergo simple imprisonment for 15 days under Section 341 of the Indian Penal Code. If the fine amount is realised Rs.25,000/- out of the fine amount is directed to be paid to the injured PW1 as compensation under Section 357 (I) (b) of the Code of Criminal Procedure. Set off is allowed for the period of detention already undergone by him under Section 428 of the Code. The substantial sentence are directed to run concurrently.

In the result the appeal is allowed in part. The order of conviction and sentence passed by the court below against the appellants under Section 307 of the Indian Penal Code are hereby set aside and they are acquitted of that charge giving them the benefit of doubt. The order of conviction passed by the court below

against the appellants under Sections 341, 324 and 326 read with Section 34 of the Indian Penal Code and sentence imposed against the appellants under Section 341 of the Indian Penal Code are hereby confirmed. But the sentence imposed by the court below against the appellants under Sections 324 and 326 of the Indian Penal Code are set aside and the same is modified as follows:-

The appellants are sentenced to undergo rigorous imprisonment for six months each and also a fine of Rs.10,000/- each and in default to undergo rigorous imprisonment for three months, each for the offence under Section 324 and 326 of the Indian Penal Code respectively and further sentenced to pay fine of Rs.500 and in default to undergo simple imprisonment for 15 days under Section 341 of the Indian Penal Code. Substantive sentence are directed to run concurrently. Set off was allowed for the period of detention already undergone by him under Section 428 of the Code of

Criminal Procedure. If fine amount is realised, the court below is directed to pay Rs.25,000/- to PW1 as compensation under Section 357 (I) (b) of the Code of Criminal Procedure.

Office is directed to communicate this order to the concerned court immediately.

Sd/-
K.RAMAKRISHNAN, JUDGE

SKV