

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 29TH DAY OF OCTOBER 2015/7TH KARTHIKA, 1937

CRL.A.No. 723 of 2003 ()

SC 182/2000 of ADDL.SESIONS COURT (ADHOC-II), KOZHIKODE

APPELLANT/ACCUSED NO.1:

A.SURA @ SURENDRAN
S/O.KANARAN,
ANTHEYERI (H)
CHEKKAYAD AMSOM,
KURUVANTHERI DESOM,
VADAKARA TALUK

BY ADV. SRI.P.V.KUNHIKRISHNAN

RESPONDENT/COMPLAINANT

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

R1 BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
29-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SKV

K.RAMAKRISHNAN, J.

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Crl. Appeal No.723 OF 2003

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Dated this the 29th day of October, 2015

JUDGMENT

1st accused in SC 182/2000 on the file of the Additional Sessions Court (Fast Track-II) Kozhikode is the appellant herein. The appellant along with eight others were charge sheeted by the Circle Inspector of Police, Nadapuram in Crime No.200/1997 of Nadapuram Police Station for the offence under Sections 143, 147, 148 and 307 read with Section 149 of the Indian Penal Code.

2. The case of the prosecution in nutshell was that on 26.6.1997 at about 11.15 am the accused persons 9 in number formed themselves in an unlawful assembly armed with deadly weapons like chopper, sword etc. in Valayam-Chezhali public road with a common of object of committing riot and killing PW1 Nanu and trespassed into Amritha Bakery functioning in building No.III/490 of

Valayam Panchayath, run by PW2 where PW1 had come to purchase some bakery item and 1st accused as a member of that assembly and pursuant to the common object inflicted cut injury with a chopper on his head which he warded off and then he again inflicted injuries on him two or three times and at that time accused numbers two and three also cut him with a sword and chopper. When he fell down and others have guarded the place preventing him from going away from that place as members of the unlawful assembly and with the common object of committing murder of PW1 and and caused grievous injury to him and thereby all of them have committed the offence punishable under Sections 143, 147, 148 and 307 read with Section 149 of the Indian Penal Code.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court, Nadapuram and it was committed to the Sessions Court, Kozhikode where

it was taken on file as SC 182/2000 and originally the case was made over to Assistant Sessions Court, Vadakara for disposal and thereafter it was withdrawn and made over to Additional Sessions Court (Fast Track-II) Kozhikode.

4. When the case was pending before the Assistant Sessions Court Vadakara, since the 2nd accused did not appear, case against him was split up and it was decided to proceed against original accused Nos.1, 3 to 9 alone.

5. When the accused appeared before the court below, after hearing both sides, charge under Sections 143, 147, 148, 307 read with Section 149 of Indian Penal Code was framed and the same was read over and explained to them and they pleaded not guilty. In order to prove the case of the prosecution, PWs 1 to 20 were examined and Exts.P1 to P25, P3(a) and P6(a) and MO1 to MO6 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 not committed any offence and they have been falsely implicated in the case due to political rivalry. 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. DW1 a Doctor was examined and Ext.D4 was marked through him. Exts.D1 to D3 contradictions were marked through PWs2 and 11 and Ext.D5, D6, D7 and D8 marked through PW1. Exts.D9, 10 and 11 were marked on the side of the accused. Court below summoned CW1 and marked Ext.X1, the case sheet of PW1 as court document. After considering the evidence on record, the court below found accused Nos. 3 to 9 in the final report not guilty of the offence alleged and acquitted them of all the charges

levelled against them under Section 235(I) of the Code of Criminal Procedure. But the court below found the appellant, who is the 1st accused in the case not guilty for the offence under Sections 143, 147, 148 and 149 of the Indian Penal Code acquitted him of those charge under Section 235(1) of the Code but found him guilty under Section 307 of the Indian Penal Code and convicted him thereunder and sentenced him to undergo rigorous imprisonment for 5 years and also to pay a fine of Rs.20,000/- in default to undergo simple imprisonment for one year. Set off was allowed for the period of detention already undergone under Section 428 of the Code of Criminal Procedure. Aggrieved by the same, the present appeal has been preferred by the appellant/first accused before the court below.

6. Heard Shri. P.V. Kunji Krishnan, counsel for the appellant and Smt. Seena Ramkrishnan learned Public Prosecutor appearing for the State.

7. The counsel for the appellant submitted that having disbelieved the evidence of PW5 and PW1 regarding the involvement of accused Nos. 3 to 9, court below was not justified relying on the evidence of PW1 alone to convict the 1st accused as the nature of injuries seen in the wound certificate could not have been caused by the 1st accused alone so as to convict him for the offence under Section 307 of the Indian Penal Code. Further there are serious lapses on the part of the investigation agency in conducting the investigation. There was delay in sending the First Information Report to the court and no statement of injured was recorded for the purpose of registering the crime, whereas the case itself was registered suo moto on the basis of some telephonic message said to have been received. No weapons alleged to have been used have been recovered as well. Further it was brought out in evidence that PW1 and PW5 were accused in several cases and there was

possibility of other persons attacking him and causing injuries to him on account of political enmity and under such circumstances, false implication of innocent persons cannot be ruled out. So under the circumstances, according to the learned counsel, the court below was not justified in convicting the appellant for the offence alleged and he is entitled to get acquittal, giving him the benefit of doubt.

8. On the other hand, the learned Public Prosecutor submitted that though the court below was not justified in acquitting the other accused persons, there is nothing wrong for the court to rely on the evidence of PWs1 and 2 to prove the involvement of 1st accused in committing the crime and the nature of injuries inflicted and the manner in which it was inflicted will go to show that it was done with an intention to commit murder. So the court below was perfectly justified in convicting the appellant for the offence alleged and no interference is

called for.

9. The case of the prosecution as emerged from the prosecution witnesses was as follows:

On 26.6.1997, at about 11.15 am, PW1 the injured came to the Bakery by name Amritha Bakery at the place of occurrence run by PW2 and he ordered for one article by name pottiappam and paid Rs.10/- towards the charge and when PW2 was about to give the balance, he heard some sound from behind, when he turned back, he saw the first accused coming with an umbrella inside the bakery and took the chopper from inside the umbrella and attempted to inflict cut injury on his head which he warded off and due to that three of his fingers have been chopped off. Thereafter he again attempted to inflict cut injuries on him after pushing him down and at that time accused Nos.2 and 3 in the final report also entered the bakery and all the three accused had indiscriminately inflicted cut injuries on him with chopper and sword in

their hands and other accused persons were standing outside, guarding the place preventing PW1 from going away from that place. When he made hue and cry, the accused persons left the place in a jeep. Thereafter PW2 and others came and took the injured to Nadapuram hospital first, from where he was seen by PW15 who issued Ext.P11 wound certificate and thereafter he referred him to Medical College hospital, as the injuries were grave in nature. Immediately he was taken to medical college hospital from where he was treated by DW1 and CW1 who issued Ext.D4 treatment certificate and prepared Ext.X1 case sheet respectively.

10. While PW16 who was the Sub Inspector of Police, Nadapuram was doing patrol duty at about 11.30 am, on that date, he got information from the police station that a Bharathiya Janatha Party sympathizer by name Nanu was attacked by Atheri Sura from Amritha Bakery at Valayam and immediately he went to that place

but he could not see any eye witnesses as the place was without any person on the road. But he saw the Bakery opened and found blood stains inside the bakery and varandha. Thereafter he came to the police station and suo moto registered Ext.P12 First Information Report as Crime No.200/1997 against the 1st accused alone for the offence under Section 307 of the Indian Penal Code. He deputed one police constable to guard the scene of occurrence and gave intimation to the Circle Inspector of Police.

11. PW18, the Circle Inspector of Police had taken charge of the investigation on the same day and he went to the place of occurrence and prepared Ext.P2 scene mahazar in the presence of PW3 and another and seized MOs2 to 6 including the detached thumb of PW1(MO5) found in the bakery after describing the same in Ext.P2 scene mahazar. He questioned the witnesses and recorded their statements. Though he made attempt to

trace out the weapons alleged to have been used for the commission of the offence, he could not succeed in his attempt. During the investigation, it was revealed that the accused Nos.2 to 9 also involved in the commission of offence. So he gave Ext.P14 report to include them as accused in the case and to include sections 143,147, 148 and 149 of the Indian Penal Code as well. He questioned other witnesses as well. On 2.3.1997 he arrested accused Nos. 4 to 8 from Valayam market at 4 am and questioned them. He arrested the 9th accused on 4.7.1997 from Valayam market and questioned him. He had also arrested the accused Nos.2 and 3 on 5.7.1997 and produced them before court along with Exts.P16 to 18 remand reports. He sent Ext.P22 advance search memos to court to conduct search of the house of accused Nos. 2 and 3 and conducted search in the presence of PWs 12 and 13 and prepared Exts.P23 and 24 search lists. But he could not collect any incriminating articles from their

house. On 25.7.1997 he had seized MO1 lunky as produced by the wife of the injured as per Ext.P5 seizure mahazar. Nadapuram Sub Inspector had arrested the 1st accused on the evening of 24.1.1998 and he had produced him before the court on 25.1.1998 along with the remand report. He had produced the articles seized before the court along with Exts.P19 to P21 property lists. He sent Ext.P25 forwarding note to send the articles seized for chemical examination and they were sent from court and chemical analysis report was prepared by PW17, and he issued Ext.P13 chemical analysis report which shows that all the articles contained human blood. Further investigation in this case was conducted by PW19, his successor. He questioned some of the witnesses and collected the wound certificate of the injured and produced the same before court. Further investigation in this case was conducted by PW20, his successor. On the basis of the requisition given by PW18, PW7 prepared

Ext.P6 and P6(a) sketch plans of the place of occurrence. PW20 completed the investigation and submitted final report.

12. PW5 was examined as an eye witness to the incident and PWs8 and 10 were examined to prove that they came to know about the incident and also to prove that the accused persons escaped from the place in a jeep. But they did not support the case of the prosecution. PW11 was examined to prove that he had seen accused Nos 1 to 3 escaping from the place in a jeep KLL 4198 owned by father of PW14 and he had seen the 1st accused holding a chopper in his hand and it was he who along with others took him the injured to the hospital.

13. PW5 though examined as an eye witness to the incident, the court below had disbelieved his evidence on the ground that there was no possibility for him to be there as claimed by him as a chance witness to witness

the incident and there was no occasion for him to come there as well and it was also the reason given by the court below for disbelieving him that he and 1st accused were accused in several cases and both belonged to BJP.

14. PW2 is the owner of the bakery from where the incident occurred. He had deposed that PW1 had come to his shop on that date and ordered for pottiappam and while he was about to give the balance, he heard some sound and 1st accused entered the shop with a chopper and cut PW1 with a chopper on his head which was warded off by him and thereafter due to fear he went inside the inner room of the shop and when he came outside, saw PW1 lying on the shop with bleeding injuries. Thereafter he along with PW11 and others took him to the hospital. Though he was examined to prove the entire incident, since he did not support the case of the prosecution fully, he was declared hostile by the prosecution. But he had stuck to his evidence regarding

the 1st accused coming to the shop with his chopper and inflicting injuries on PW1 due to that he sustained loss of finger of one of the hands. So to that extent his evidence can be relied on by the court.

15. PW11 had deposed that while he was coming, he saw accused Nos 1 to 3 running away from the place and 1st accused holding the chopper in his hand and they entered the jeep and left the place in that jeep. Though he was cross examined at length, nothing was brought out to discredit his evidence regarding the factum of the 1st accused holding the chopper in his hand and escaping from the place of occurrence. So to that extent his evidence also can be relied and the court below was perfectly justified in relying on his evidence on this aspect.

16. Then the evidence of PW1 alone is there to prove the case of the prosecution. He had also deposed that he came to the bakery of PW2. While he was

purchasing a bakery item by name pottiappam, the 1st accused came with an umbrella in his hand and took away the sword and then inflicted injury on him. He had further stated that he attempted to inflict cut injury on his head, but when he ward off, three fingers of his hand were chopped off on account of the same. Thereafter he pushed him inside the shop and when he fell down, he attempted to inflict cut injuries on his body which he had ward off and those attacks fell on his hands and due to the same, his thumb finger was also chopped off. He had also deposed that thereafter accused Nos. 2 and 3 also entered and inflicted injuries on him. But to that extent court below had not believed his evidence as he had not mentioned their names either to doctor who prepared Ext.P11 wound certificate or in Ext.X1 case sheet where he had given the names of accused Nos.8 and 9 along with 1st accused. In Ext.D5 plaint filed by him also, he had given the names of accused Nos.1 and 9 and one

Kanaran and he had deposed that he had not given their names to the advocate and he could have collected the same and shown them as defendants in the case and since he felt that he could not succeed in the case on account of the mistake committed by the counsel, he did not prosecute the case which ended in dismissal of the case evidenced by Ext.D7. So it was the reason why the court below had come to the conclusion that there is no consistent evidence adduced on the side of the investigation agency or prosecution regarding the involvement of accused Nos. 2 and 3 and that benefit was given to them.

17. It is true that the weapons of offence said to have been used have not been recovered. It is not a case where no attempt was made by the investigating officer to trace out the weapon of offence. He had questioned the accused but he could not get any details regarding the place where the weapons were concealed. Though he

conducted search of the house of accused Nos. 2 and 3, he could not get the weapons of offence used for the commission of offence. So under the circumstances, it cannot be said that the investigating officer had not taken any steps to recover the weapon of offence alleged to have been used for the commission of offence.

18. Further it will be seen from the evidence of PW15 Doctor who issued Ext.P11 wound certificate and DW1 Assistant Professor attached to the Medical College Hospital who gave Ext.D4 treatment certificate and CW1 another Assistant Professor attached to Medical College Hospital, Calicut who produced and proved Ext.X1 case sheet, that the injuries were made on vital part of the bodies and on account of the injury portion of 3 fingers were chopped off and thumb of one of the hands of the injured was completely amputated which was taken from the place and identified as MO5. Further the court below had relied on the catena of decisions of the Supreme

Court and relied on interested testimony of the injured alone to convict a person against whom evidence was adduced and rightly came to the conclusion that the evidence given by PWs1, 2 and 11 will be sufficient to rope in 1st accused for the commission of the offence. Further it was brought out in the evidence of doctors who examined PW1, that all those injuries were grave injuries and he is likely to die on account of the injuries, if not properly attended. Further the manner in which the injuries were inflicted and also the nature of weapon used for commission of the offence, it can be inferred that the intention of the assailant was to commit murder which is punishable under Section 307 of the Indian Penal Code. So under the circumstances, the court below was perfectly justified in coming to the conclusion that the prosecution has proved beyond reasonable doubt that the 1st accused who is the appellant herein had committed the offence punishable under Section 307 of the Indian Penal

Code and rightly convicted him for the said offence. I do not find any reason to interfere with the same.

19. The counsel for the appellant submitted considering the age of the accused and also considering the fact that the incident occurred in the year 1997 and the 1st accused had no criminal back ground, the sentence imposed is harsh and he prayed for leniency.

20. The Supreme Court has considered the question of sentencing policy and come heavily on the subordinate courts for showing undue leniency of providing meagre sentence as according to the Apex Court it will only give a wrong signal to the society and cause loss of confidence to the public in the criminal delivery justice system. But at the same time, the antecedent of the accused and the possibility of reformation etc, can be taken into account by the court for showing leniency in awarding sentence. Further increasing the fine and awarding suitable compensation out of the fine also can be taken into

account by the court while considering the question of reducing the substantive sentence of imprisonment. But at the same time, it cannot be unduly reduced as well. In this case 1st accused was aged only 49 years at the time when the case was committed to the Sessions court. It cannot be said that there is no possibility of reformation in him as well. So considering these aspects, this court feels that reducing the substantive sentence to three years rigorous imprisonment and increasing the fine amount to Rs.50,000/- and retaining the default sentence of six months and directing to pay 40,000/- to PW1 as compensation out of the fine amount under Section 357 (1)(b) Code of Criminal Procedure will be sufficient and that will meet the ends of justice as far as both parties are concerned. So the sentence imposed by the court below is set aside and modified as follows:-

The appellant is sentenced to undergo rigorous imprisonment for 3 years and also to pay a fine of

Rs.50,000/- and in default to undergo simple imprisonment for six months. If the fine amount is realised, the court below has to pay Rs.40,000/- to PW1 as compensation under Section 357 (1) (b) of the Code of Criminal Procedure. The period of detention already undergone in this case will be given set off under Section 428 of the Code of Criminal Procedure.

So the appeal is allowed in part. The order of conviction passed by the court below against the appellant under Section 307 of the Indian Penal Code is confirmed. But the sentence of 5 years rigorous imprisonment and fine of Rs.20,000/- and directed to pay the amount of Rs.20,000/- to PW1 as compensation are set aside and the same is modified as follows:

The appellant is sentenced to undergo rigorous imprisonment for 3 years and also to pay a fine of Rs.50,000/- and in default to undergo simple imprisonment for six months. If the fine amount is

realised, the court below is directed to pay an amount of Rs.40,000/- 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 him.

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

Sd/-

K.RAMAKRISHNAN, JUDGE

SKV