

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 14TH DAY OF OCTOBER 2015/22ND ASWINA, 1937

CRL.A.No. 1746 of 2003 ()

SC 62/2001 OF ADDITIONAL DISTRICT COURT (ADHOC), MANJERI

CP 40/2000 of JUDICIAL FIRST CLASS MAGISTRATE COURT, PARAPPANANGADI

APPELLANT(S)/ACCUSED NOS.1,2,5 AND 6:

1. **CHERIYA BAVA, S/O. KASIM KUTTY,
ARAYANDEPURAKKAL, PARAPPANANGADI,
ALUNGAL, MALAPPURAM DISTRICT.**
2. **HAMZA KOYA, S/O. KASIM KUTTY,
-DO - DO-**
3. **YUNUS SALIM, S/O. CHERIYA BAVA,
-DO - DO-**
4. **ABID, S/O. CHERIYA BAVA,
-DO - DO-**

BY ADV. SRI.BABU S. NAIR

RESPONDENT/STATE:

**THE STATE OF KERALA, REPRESENTED BY
THE SUB INSPECTOR OF POLICE,
PARAPPANANGADI POLICE STATION - THROUGH
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM - 31.**

R1 BY PUBLIC PROSECUTOR SRI. JIBU P. THOMAS

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 14-10-2015, ,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

SKV

K.RAMAKRISHNAN, J.

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Crl. Appeal No.1746 OF 2003

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Dated this the 14th day of October, 2015

JUDGMENT

Accused Nos. 1,3,5 and 6 in SC No.62/2001 on the file of the Additional Sessions Court (Adhoc-1) Manjeri are the appellants herein. The appellants along with original 2nd accused in the final report and 4th accused in the case were charge sheeted by the Sub Inspector of Parappanangadi Police Station in Crime No.114/1995 of Parappanangadi Police Station under Sections 143, 147, 148, 447, 341, 323, 324, 307 read with Section 149 of Indian Penal Code.

2. The case of the prosecution in nut shell was that on 11.6.1995 at about 6 pm, the accused persons formed themselves in an unlawful assembly with deadly weapons with a common object of committing offence of attempt to commit murder, criminally trespassed into the property of PW5, the father of the PWs1,2 and 4 and husband of PW3 and in furtherance of their common object inflicted

injuries on PW1 with stick on his forehead and when PW2 came there. 1st accused beaten him and when he fell down, the original 2nd accused in the final report stabbed him on his back with a knife caused grievous injuries and when PW5 reached there they were attacked with pelting of stone and caused injury to them and thereby all of them had committed the offence punishable under Section 143, 147, 148, 447, 341, 323, 324, 307 read with Section 149 of the Indian Penal Code.

3. After investigation, final report was filed showing the original 2nd accused as absconding before the Judicial First Class Magistrate Court, Parappanangadi, where it was taken on file as CP 40/2000. After committal, the case against original accused Nos.1, 3 to 7 who were arrayed as accused Nos.1 to 6, alone was committed to Sessions Court under section 209 of the Code of Criminal Procedure and the Sessions Judge, Manjeri had taken cognizance of the case as SC 62/2001

and it was originally made over to Assistant Sessions Court, Tirur, for disposal. Thereafter it was withdrawn by the Sessions Judge and made over to Additional Sessions Court (Adhoc-I) Manjeri for disposal.

4. When the accused against whom case was committed, appeared before that court, after hearing both sides, charge under Sections 143, 147, 148, 323, 324 and 307 of the Indian Penal Code were framed and the same was read over and explained to them and they pleaded not guilty. In order to prove the prosecution PWs1 to 10 were examined and Exts.P1 to P10 and MO1 were marked on their side. 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 they have not committed any offence and they are innocent of the same. In fact, PWs1 to 4 and one Kunjumon had

criminally trespassed into the their property and attacked accused Nos. 1 to 4 and caused injury to them. They have been falsely implicated in the case on account of long standing enmity between them. 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 was examined on the side of the accused and Exts.D1 to D7 were marked with consent. After considering the evidence on record, the court below found the accused Nos. 3 and 4 not guilty of any of the offences alleged and acquitted them for all the charges under Section 235(I) of the Code of Criminal Procedure. But court below found accused Nos.5 and 6 not guilty of offences under Sections 143, 147, 148, 149, 324 and 307 of the Indian Penal Code and acquitted them of that charge under 235(1) of the Code of Criminal Procedure and found them guilty for the offence under Section 324 of the Indian Penal Code.

Accused Nos. 1 and 2 were found guilty for the offence under Sections 307, 324, 323 read with Section 149 of the Code and convicted them thereunder. After hearing on the question of sentence, court below sentenced the accused Nos.1 and 2 to undergo rigorous imprisonment for 5 years and also to pay a fine of Rs.10,000/-each, in default to undergo simple imprisonment for three months each under Section 307 of the Indian Penal Code and further sentenced to undergo rigorous imprisonment for two years each and also to pay a fine of Rs.1,000/- each in default to undergo simple imprisonment for one month each under Section 324 of the Indian Penal Code and no separate sentence was awarded under Section 323 of the Indian Penal Code. The substantive sentences were directed to run concurrently. Accused Nos. 5 and 6 were sentenced to undergo rigorous imprisonment for one year each and also to pay a fine of Rs.1,000/- each and in default to undergo simple imprisonment for one month

each. Set off was allowed for the period of detention already undergone by them. It is further ordered that if the fine amount is realised, an amount of Rs.20,000/- was directed to be paid to PWs1 and 2 as compensation under Section 357(I) (b) of the Code of Criminal Procedure. Aggrieved by the same, the above appeal has been preferred by the appellants/accused Nos.1,2, 5 and 6 in the case who are original accused Nos.1, 3, 6 and 7 in the final report.

5. Heard Smt. Smitha Babu counsel representing Sri. Babu S. Nair counsel for the appellants and Sri. Jibu P. Thomas learned Public Prosecutor appearing for the State.

6. Learned counsel for the appellants submitted that the evidence of PWs 1 to 5 cannot be believed in toto. PWs1 and 2 could not have seen the entire incident as claimed by them after they were inflicted with injuries they were taken to hospital by the persons came there

and it was only thereafter that PWs 3 to 5 had reached there. So there is no possibility for them to see the entire incident as claimed by them. Further the evidence of PWs 3 to 5 are also contradictory to each other regarding the accused persons attacking PW5 in the incident. As according to PWs 3 and 4, PW5 came only after the incident. Further there was no over-tact alleged against the present 2nd accused in the case except stating that all the accused have committed offence. Further no conviction was entered by the court below for the offences under Section 143, 147 and 148 of the Indian Penal Code and in such circumstances, it is not proper to invoke Section 149 of the Indian Penal Code to convict the accused Nos.1 and 2 in the case for the offence under Section 307 of the Indian Penal Code.

7. Further, even going by the evidence, it cannot be said that there was any sharing of common intention between accused Nos.1 and 2 to commit offence of

attempt to commit murder on PW2. Further the evidence is not believable regarding the involvement of accused Nos.5 and 6. So under the circumstances, the court below was not justified in convicting the appellants for the offences alleged and they are entitled to get acquittal. If for any reason this court found that the offence under Section 307 of the Indian Penal Code is attracted, it cannot be said to have committed by the 2nd accused in this case, who was the original 3rd accused in the final report. The benefit that has been given to 3rd accused in the case ought to have been given to the 2nd accused also. She had also argued that the sentence imposed was harsh.

8. On the other hand, the learned Public Prosecutor submitted that the evidence of PWs 1 to 5 as well as independent witness PW6 will go to show that all the accused persons had involved in the commission of crime and they have committed the offence. The court

below was perfectly justified in convicting the appellants for the offences alleged.

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

On 11.6.1995, during evening, there was some incident occurred between the son of PW1 and son of the 1st accused and thereafter the accused Nos.1 and 2 and original 2nd accused Siddique were found going through the path way in the property which was questioned by PW1 and thereafter all the accused went to their house and accused Nos. 1 to 3 in the final report came with stick, iron rod and knife and attacked PW1 and 1st accused attacked PW1 with a stick and when he sat down with injuries PW2 Basheer and his brother came there and at that time 1st accused had beaten him and when he fell down the 2nd accused in the final report had sat on his back and stabbed him two or three times. On hearing their hue and cry, PWs 3 to 5 reached there and they

were also attacked by the accused persons and they were injured by way of pelting of stones by accused Nos. 4 and 5 and others. PWs 1 and 2 were taken to hospital immediately by the persons gathered while PWs 3 and 4 were taken to hospital by PW5. They were seen by PW10 from the Government hospital where they were taken first and issued Exts.P3 to P8 wound certificates of PW2, PW1, PW4 and PW5 respectively. Since the injuries of PW2 were grave, he was removed to medical college hospital from where he was treated evidenced by Ext.P5 case sheet.

10. On getting information regarding the admission of injured in the hospital, PW8 went to the hospital and recorded Ext.P1 statement of PW1 and came to Police station and gave the same to the Assistant Sub Inspector of Police who registered Ext.P8 First Information Report as Crime No.114/1995 of Parappanangadi Police Station against seven accused persons including the

appellants originally for the offences under Sections 143,147,148,447,323, 324 read with Section 149 of the Indian Penal Code. Thereafter the investigation in this case was conducted by the Assistant Sub Inspector of Police. He went to the place of occurrence and prepared Ext.P2 scene mahazar, in the presence of PW7 and another and he questioned the witnesses and recorded their statements. At the time of preparing the scene mahazar he had seized MO1 stone which is said to have been used for injuring the injured and sent the same to court along with Ext.P9 property list. The investigation conducted by the Assistant Sub inspector of Police was verified by PW8 the Sub Inspector of Police and he completed the investigation and submitted final report.

11. PWs 1to 5 are the injured in this case. PW6 is the independent witness to the incident. It will be seen from the evidence of PW1 that while accused Nos.1 to 3 in the final report were going through the pathway through

their property after some incident occurred between the children of 1st accused and PW1, he asked as to why they were going through their property and they asked as to what he would do if they did so and came back with weapons and 1st accused had beaten him with a stick. He sat down on account of injuries and at that time PW2 came there and he was attacked by accused No.1 and the original 2nd accused in the final report. According to him, when PW2 fell down on his back, original 2nd accused in the final report by name Siddique sat on his back and stabbed him with knife two or three times. By the time PWs 3 to 5 reached there, PWs 1 and 2 were taken to hospital. Though he had stated that he had seen the accused persons attacking PWs 3 to 5, from the nature of evidence adduced, it is quite improbable that he would have seen the incident after they were taken to hospital as it will be seen from the evidence of PW6, the independent witness that immediately when they saw

PWs1 and 2 in pool of blood, they were taken to hospital. PW2 also deposed that when he reached there on hearing the cry of PW1, he saw the accused persons beating PW2 when he interfered, 1st accused had beaten him and when he fell down he was beaten by Siddique, the original 2nd accused in the final report. He sat on his back and stabbed him with a knife on his back. At that time, he saw PWs3 and 4 coming and they were also attacked by the accused persons. But he had not stated anything about the present 2nd accused who is the 3rd accused in the final report. Even PW1 did not state anything about the 2nd accused of doing any over-tact either on himself or on PW2. They have only stated that he came along with accused Nos.1 and original 2nd accused in the final report viz. Siddique. Court below also came to the conclusion that since involvement of other accused persons as claimed by PWs 1 and 2 could not be inferred from the circumstances they were exonerated for the

offences under Sections 143,147,148,149 and also Section 324 of the Indian Penal Code. Court below invoked Section 149 Indian Penal Code for the purpose of convicting the accused Nos. 1 and 2 in this case. Once the court found that there is no evidence that there was any unlawful assembly made out, on the basis of common object, there was no conviction of any of the accused persons for the offence under Sections 143,147 and 148 of Indian Penal Code, the conviction based on 149 Indian Penal Code cannot be attracted as there was no unlawful assembly found by the court below. At the most, they can be convicted, if there is evidence of sharing common intention with the aid of Section 34 of the Indian Penal Code.

12. As regard the 2nd accused in this case who was the 3rd accused in the final report is concerned, there is absolutely no evidence to prove any over-tact said to have been done by him on any of the injured persons.

Mere presence alone is not sufficient to attract the offence involving Section 34 Indian Penal Code. Even PWs 3 to 5 also did not state anything about the 2nd accused except stating that all the accused have prevented them and beaten them and accused No.4 and 5 pelted with stone. When they were cross examined they were not able to say the nature of over-tact alleged against each accused person quite naturally when group of persons attacked, it may not be possible for them to pin point the over-tact attributed against each accused. But they can at least say as to the part played by the accused persons in the commission of the crime. Mere vague allegation of their presence alone is not sufficient to convict them for the offence alleged even invoking under Section 34 of the Indian Penal Code. The court below had given the benefit of doubt of these aspects to accused Nos. 3 and 4 and they were acquitted of all the charges. So under the circumstances, finding of the court below that 2nd accused

in this case had shared the common object or common intention to commit any of the offence along other accused so as to convict him for the offence under Sections 307, 324 and 323 of the Code, is unsustainable in law and the same is liable to be set aside and he is entitled to get acquittal of the charge levelled against him giving him the benefit of doubt as he is also entitled to get the same benefit which was extended by the court below to accused Nos. 3 and 4. So conviction entered by the court below against the 2nd accused in this case, who is the 3rd accused in the final report for the offences under Sections 307, 324 and 323 read with Section 149 of the Code is unsustainable in law and the same is liable to be set aside and he is entitled to get acquittal of those charges giving him the benefit of doubt. So the conviction entered against the 2nd accused in the case is set aside and he is acquitted of the charge giving him the benefit of doubt.

13. As regard the 1st accused is concerned, the evidence of PWs1 and 2 will go to show that he had taken active part in inflicting injury to PW1 on his forehead with a stick and also beaten PW2 as well. Further when the 2nd accused in the final report viz, Siddique had sat on the back of PW2 and stabbed him with knife, he did not prevent him to do as well. If really he had not shared the common intention of causing such injury to him, he would have prevented him from doing the same which he had not done. Further he was the aggressor in attacking PW1 and also first attacked PW2 when he came there to prevent further attack on PW1 as well. So under the circumstances, the court below was perfectly justified in coming to the conclusion that 1st accused is liable to be convicted for the offence under Section 307 Indian Penal code along with the original 2nd accused on the basis of the evidence available and rightly convicted him for the offences under Sections 307, 324 and 323 of the Indian

Penal code. I do not find any reason to interfere with the finding arrived at by the court below against 1st accused on this aspect.

14. As regards the conviction against the accused Nos.5 and 6 are concerned, they reached the place while the incident was going on. Even according to the prosecution witnesses, they did not attack PWs 1 and 2. Even according to PW6 the independent witnesses, he had not seen the accused Nos.5 and 6 causing any injury to any of the other injured persons. But he had only seen the accused No.1 and original 2nd accused in the final report, attacking and causing injury to PWs 1 and 2 and found them with bleeding injuries and lying there with bleeding injuries. But it will be seen from his evidence that he had immediately taken PWs1 and 2 to hospital. So there is no possibility for him to witness the incident happened after PWs 1 and 2 were taken to hospital. Even as per the evidence of PW 5, it will be seen that he

reached there after PWs 1 and 2 were taken to hospital. It was at that time PWs 3 to 5 were attacked and sustained injuries, according to the prosecution by pelting stones by accused Nos. 5 and 6. But it will be seen from the evidence they were not able to say as to who had pelted the stones. The doctor who examined these witnesses did not state that injuries could have been caused by pelting of stone. In the absence of evidence adduced on the side of the prosecution that they sustained some injury or suffered some pain on account of any over-tact said to have been committed by accused Nos. 5 and 6, it is not possible to come to a conclusion that they have caused voluntary hurt to PWs 3 to 5, so as to convict them for the offence under Section 323 of Indian Penal Code as found by the court below and they are entitled to get acquittal on the charge levelled against them giving them the benefit of doubt. So the finding of the court below that accused Nos. 5 and 6 have

committed the offence punishable under Section 323 of the Code is also, under the circumstances, unsustainable in law and the same is also liable to be set aside and they are entitled to get acquittal of the charge levelled against them giving them the benefit of doubt.

15. So the accused Nos.2,5 and 6 in the case who are the original accused Nos. 3, 6 and 7 in the final report are also entitled to get acquittal of the charge levelled against them giving them the benefit of doubt as found by this court in the view of the discussions made above, and the finding of the court below that they committed the offence alleged for which they have been convicted unsustainable in law and the same are liable to be set aside and they are also acquitted of the charges levelled against them giving them the benefit of doubt.

16. In view of the fact that this court has found the accused Nos.2(No.3 in the final report) and 5 and 6 (original accused Nos.6 and 7 in the final report) are

entitled to get acquittal of the charge levelled against them viz, under Sections 324, 307, 323 read with 149 of Indian Penal Code, the sentence imposed is also not proper and the same is also set aside.

17. As regards the 1st accused is concerned, court below was justified in coming to the conclusion that he had committed the offence punishable under Sections 307, 324, 323 of the Indian Penal Code and that finding does not call for any interference except to the extent of Section 149 of Indian Penal Code, he is convicted for offence invoking under Section 34 of the Indian Penal Code. As regards the sentence is concerned, the court below had sentenced him to undergo rigorous imprisonment for five years and also to pay fine of Rs.10,000/- in default to undergo simple imprisonment for three months under Section 307 of the Code and further sentenced to undergo rigorous imprisonment for two years and also to pay fine of Rs.1,000/- in default to

undergo simple imprisonment for one month under Section 324 of the Indian Penal Code and no separate sentence was awarded for the offence under Section 323 of the Indian Penal Code. Considering the over-tact alleged by the 1st accused this court feels that some leniency can be shown in the sentence awarded under Section 307 of the Indian Penal Code and reducing the substantive sentence to three years, enhancing the fine of Rs.20,000/- and retaining default sentence will be sufficient and that will meet the ends of the justice, while confirming the sentence imposed under Section 324 of the Indian Penal Code.

So the sentence of the 1st accused is modified as follows:

First accused is sentenced to undergo rigorous imprisonment for three years and further sentenced to pay a fine of Rs.20,000/- in default to undergo simple imprisonment for two years under Section 307 of the

Indian Penal Code and further sentenced to rigorous imprisonment for two years and also to pay a fine of Rs.1,000/- in default to undergo simple imprisonment for one month under Section 324 of the Indian Penal Code.

In the result the appeal is allowed in part. The order of conviction and sentence passed by the court below against the 2nd accused under Sections 324, 307 and 323 of the Code and conviction and sentence passed against accused Nos.5 and 6 under Section 323 of the Indian Penal Code are hereby set aside and they are acquitted by the charge levelled against them giving them the benefit of doubt. They are set at liberty and the bail bond executed by them stand cancelled. The fine amount if any remitted them is directed to be returned to them by the court below on making necessary application for that purpose.

The order of conviction against the 1st accused under Sections 307, 324 and 323 of the Indian Penal

Code and sentence imposed under Section 324 of the Indian Penal Code and default sentence of three months simple imprisonment for non payment of fine under Section 307 of the Indian Penal code imposed are hereby confirmed. But the substantive sentence of 5 years rigorous imprisonment imposed under Section 307 of the Indian Penal Code is reduced to three years rigorous imprisonment and fine is enhanced to Rs.20,000/-. So the sentence imposed against the 1st accused is modified as follows:-

1st accused is sentenced to undergo rigorous imprisonment for 3 years and also to pay a fine of Rs.20,000/- in default to undergo three months simple imprisonment under Section 307 of the Indian Penal Code and further sentenced to undergo rigorous imprisonment for two years and also to pay a fine of Rs.1,000/- in default to undergo simple imprisonment for one month under Section 324 of the

Indian Penal code. No separate sentence is awarded for the offence under Section 323 of Indian Penal Code and the substantive sentences are directed to run concurrently. Set off is allowed for the period of detention already undergone by them. If the fine amount is realised, the same be paid to PWs1 and 2 in the ratio of 12,500/- and 7,500/- respectively by the court below.

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

K.RAMAKRISHNAN, JUDGE

SKV