

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 18TH DAY OF SEPTEMBER 2015/27TH BHADRA, 1937

CRL.A.No. 1799 of 2003 ()

AGAINST THE JUDGMENT IN SC 28/2000 of ADDITIONAL DISTRICT COURT (ADHOC-I), ERNAKULAM DATED 30-09-2003

AGAINST THE ORDER IN CP 1/1999 of J.M.F.C.-II, KOCHI

APPELLANTS/ACCUSED:

1. GEORGE JOPPAN @ SOBAN,
S/O. P.P. PAUL,
MADAPARAMBILVEETIL,
BINNY COMPNAY ROAD,
RAMESWARAM VILLAGE,
RESIDING AT BLF HOUSE,
CHITRAPUR, DELHI.

2. OMANA, W/O. DENCY,
C.C.23/1795,
MADAPARABILVEETIL,
BINNY COMPNAY ROAD,
RAMESWARAM VILLAGE,
PALLURUTHY

BY ADV. SRI.P.VIJAYA BHANU
BY ADV.SRI. VIPIN NARAYAN

RESPONDENT/COMPLAINANT:

STATE OF KERALA REP.BY THE
PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.

BY P.P.SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

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Crl.A.No.1799 of 2003
.....

Dated this the 18th day of September, 2015.

JUDGMENT

Both the accused in SC.No.28/2000 on the file of the Additional Sessions Court (Adhoc-I), Ernakulam are the appellants herein. The appellants were charge sheeted by the Sub Inspector of Police Kannur police station in Crime No.33/1998 of Kochi Kasaba police station under sections 341, 323, 324, 308 and section 34 of the Indian Penal Code.

2. The case of the prosecution in nutshell was that on 19.2.1998 during day time, the second accused and CW3 had altercation near public water tap in connection with taking of water. On the same day, at about 8.30 p.m when Pws 2 and 3 had gone to the water tap for taking water, the accused persons with an intention to commit culpable homicide not amounting to murder and with an intention to cause injury to them, with preparation wrongfully restrained Pws 2 and 3. The first accused fisted on the chest of PW2 and second accused caused injury on the forehead of PW2 by pelting a stone and at that time the first accused stabbed PW2 on his

abdomen with a knife causing grievous hurt and when PW1 rushed to the place to rescue PW2, he inflicted injury also to him on the abdomen part and near the nipple and the injury caused to PW2 is sufficient to cause his death and thereby they have committed the offences punishable under sections 341, 323, 324 and 308 read with section 34 of the Indian Penal Code.

3. After investigation, final report was filed before the Judicial First Calls Magistrate Court-II, Kochi, where it was taken on file as C.P.No.1/1999. Thereafter the learned Magistrate committed the case to court of Sessions, Ernakulam under section 209 of the Code of Criminal Procedure (hereinafter referred to as 'the Code'). After committal, the Sessions Court took cognizance of the case as SC.No.28/2000 and originally made over to the Additional Assistant Sessions Court (Adhoc-I), Ernakulam for disposal. Thereafter the accused appeared before that court and after hearing both sides, Additional Assistant Sessions Court, Ernakulam framed charge under sections 341, 323 , 324 and 308 read with section 34 against both the accused and the same was read

over and explained to them and they pleaded not guilty. Thereafter the case was withdrawn and made over to the Additional Sessions Court (Adhoc-I), Ernakulam for disposal.

4. In order to prove the case of the prosecution, Pws 1 to 12 were examined and Exts.P1 to P12 and Mos I to III were marked on the side of the prosecution. After closure of the prosecution evidence, the accused were questioned under section 313 of the Code 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. In fact PWs1 to 3 have come to their house and attacked the second accused and when the first accused intervened, he was also attacked by them. In order to escape from the same, a false case has been foisted against them. Since evidence in this case did not warrant an acquittal under section 232 of the Code, the accused were called upon to enter their defence. DW1 was examined and Ext.D4 wound certificate of A2 was marked and Exts.D1 and D1(a), D2, D3 and D3(a) to (c) contradictions in the evidence of Pws 2 to 4 were also marked on the side of the defence. After

considering the evidence on record, the court below found the appellants guilty for the offences under sections 308, 324, 341 and 323 read with section 34 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for three years for the offence under section 308 of the Indian Penal Code and they were sentenced to pay a fine of Rs.5,000/- each under section 324 of the Indian Penal Code, in default to undergo simple imprisonment for six months each under section 324 of the Indian Penal Code and further sentenced to pay a fine of Rs.200/- each under section 341 of the Indian Penal Code and Rs.500/- each under section 323 of the Indian Penal Code. In default of payment of fine, the accused shall undergo simple imprisonment for seven days under section 341 of the Indian Penal Code and simple imprisonment for one month under section 323 of the Indian Penal Code. If the amount is realised, a sum of Rs.7,500/- be paid as compensation to PW2 under section 357(1)(b) of the Code. Aggrieved by the same, the present appeal has been preferred by the appellants/accused 1 and 2 before the court below.

5. Heard Sri. Vipin Narayan, counsel representing senior

counsel Sri. Vijaya Bhanu appearing for the appellants and Smt. Seena Ramakrishnan, Public Prosecutor appearing for the State.

6. Counsel for the appellants argued that from the nature of evidence adduced on the side of the prosecution it cannot be said that the prosecution has proved the case against the accused beyond reasonable doubt. There is contradiction in the evidence of Pws 1 to 4 regarding the incident. PW4 had even given a gobye to the statement given by him before the police when he was examined before court. If his statement before the police is accepted, then the case stated by Pws 1 to 3 cannot be believed. Further, the evidence of Pws 1 to 3 will not go to show that the second accused had come there with a knife even at the time when he came there. Further it will be seen from the evidence that there was no possibility for the accused coming there as claimed by the prosecution witnesses as the house of the accused was not even noted in the scene mahazar. If that be the case, the case of Pws 1 to 3 that on seeing them the accused persons jumped in front of them from their house cannot be possible and cannot be

believed as well. Further it will be seen from the evidence adduced on the side of the accused that the second accused also sustained severe injuries and those injuries were not explained by the prosecution. Further, on the basis of the complaint given by the second accused, the case was taken on file by the magistrate and committed to the sessions court and it is not known as to what happened to that case. The court below ought to have tried both the cases as case and counter and disposed of simultaneously especially when the case committed to the sessions court as directed by this court as per order in Crl.MC.No.3510/2000. So, it cannot be said that the prosecution has proved the case against the accused beyond reasonable doubt and genesis of the incident has been suppressed by the prosecution and that benefit must be given to the accused. Further, the counsel had also argued that at any rate section 308 of the Indian Penal Code is not attracted. There is no intention or knowledge for the first accused to inflict such injury which is likely to cause his death so as to make the offence in the case of death a culpable homicide and according to him, the accused are entitled to get acquittal. He

had also argued that at any rate the second accused cannot be convicted for the offence under sections 308 and 323 of the Indian Penal Code and offence under section 341 of the Indian Penal Code was not made out.

7. On the other hand, the learned Public Prosecutor submitted that the evidence of Pws 1 to 4 will go to show that prosecution has proved the case against the accused beyond reasonable doubt and serious injury has been caused to the abdomen inflicted with a knife and the doctor deposed that if it is not treated, he would have died. So according to the learned Public Prosecutor, the court below was perfectly justified in convicting the appellants for the offence alleged.

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

On 19.12.1998 during day time there was some incident occurred between the second accused and CW3 while they were trying to take water from the public tap. During night at 8.30 p.m when PW2 came, PW3 informed about the same and thereafter PWs2 and 3 went to the tap for taking water and PW1 was sitting in the varadna of the hosue where Pws 2

and 3 were residing. When they reached the public water tap, accused 1 and 2 came there and first accused fisted on the chest of PW2 and second accused pelted with a stone on PW2 and thereafter the first accused stabbed him with MO1 knife on his abdomen. On seeing this, when PW1 rushed there, first accused gave a stab injury on PW1 also on the abdomen and near the nipple. Thereafter PW1 was taken to hospital where he was seen by PW5, who issued Ext.P2 wound certificate and he was treated him and issued Ext.P3 discharge certificate. On getting intimation regarding the incident, PW10 went to hospital and recorded Ext.P1 statement of PW1 and came back and handed over the same to PW8 who registered Ext.P7 First Information Report of Kochi Kasaba police station as Crime No.33/1998 originally for the offences under sections 341, 323 and 324 read with section 34 of the Indian Penal Code alone. The investigation in this case was conducted by PW11 who went to the place of occurrence and prepared Ext.P6 scene mahazer. He arrested both the accused and on the basis of the alleged confession statement given by the first accused, he had recovered MO1 knife as per Ext.P8 recovery mahazer in the

presence of witnesses. As requested by PW11, PW7 village officer had prepared Ext.P5 sketch plan of the place of occurrence. He had seized MO III shirt worn by PW2 at the time of incident as produced by his father as per Ext.P9 mahazer. He questioned the witnesses and recorded their statements. During investigation it was revealed that the accused have committed the offence punishable under section 308 of the Indian Penal Code also. So he added that section by filing Ext.P12 report. The counter case registered was also investigated by him and he submitted Ext.P11 refer report in that case. He had obtained Exts.P10 and P11 certified copies of the First Information Report and final report in Crime No.36/1998. He completed the investigation and submitted final report.

9. Prosecution relies on the evidence of Pws 1 to 4 and Ext.P1 and also the medical evidence Exts.P2, P3 and P4 and Pws 5 and 6 and the recovery of MO1 as deposed by PW11, the investigating officer to prove their case. PW1 is an injured in this case and it was he who had given Ext.P1 statement on the basis of which Ext.P7 crime was registered. In Ext.P1 he

had stated that in the morning there was some incident occurred in respect of taking of water from the public tap between the second accused and PW3, who is the wife of his brother Antony, that is PW2. They were residing in the same house. He came back to his house after work at 6.30 p.m and it was informed by the inmates of the house that some altercation occurred between his mother Cicily, brother's wife Sindu and second accused. They also told that both the accused have abused them. His brother PW2 came after work and thereafter he went to the road along with his wife to take water. When they reached near the public tap, both the accused came there and stopped them and first accused fisted on the chest of PW2 and second accused took a stone and pelted against PW2's wife which hit on PW2. When he went there to prevent the act, first accused took a knife and stabbed on the rib side of his brother and when he tried to interfere, he stabbed him also which hit his abdomen side above umbilicus. When they made hue and cry, persons gathered there and accused persons left the place. Thereafter they have taken the injured PW1 to hospital at Karivelippadi and from

there taken to the Government Hospital, Ernakulam.

10. The informant was examined as PW1 and he deposed in tune with the statement given by him in Ext.P1. PW2 is the other injured. He had also deposed that when he came home after work at 8.30 p.m, he heard about the incident occurred in the morning regarding taking water. So he along with his wife went near to the tap and at the time the accused persons came and attacked and he was stabbed by the first accused and the second accused pelted stone, which caused injury to him. But PW3 also deposed about the same thing. Though there were some contradictions in the evidence of Pws 2 and 3, they cannot be said to be the very material contradictions in the evidence of Pws 2 and 3 so as to disbelieve their case as such. Further PW,4 an independent witness was examined to prove the incident, who came there to go his relative's house and he happened to see the incident. It is true that he had given a gobye to his statement said to have been recorded under section 161 of the Code which were marked as Exts.D3 and D3(a) to D3(c). As per that statement, Pws 1 to 3 were coming together and it was at that time the incident occurred.

But when he was examined before court, he denied the same and he had deposed in tune with the statement given by Pws 1 to 3. Though he was cross examined at length, there was nothing to brought out to give false evidence against accused persons.

11. It is true that there was another case registered as Crime No.36/98 as evident from Ext.P10 First Information Report and it will be seen from Ext.P11 refer report that after investigation, it was referred by the police. It is also in a way admitted that on the basis of the protest complaint filed by the second accused, on getting the refer notice, a case was taken on file as C.C.No.798/1998 of Judicial Magistrate of the First Class -II, Kochi under sections 341, 323, 354 and 447 read with section 34 of the Indian Penal Code against father and mother of PW2, wife of PW2 and PW2 and as per order of this court in Crl.M.C.No.3510/2000, it was directed to be committed and accordingly the case was also committed to the Additional Assistant Sessions Court, Kochi. When the counsel for the appellants submitted that it is not known as to what happened to that case, a report has been called for by this court from the

Additional Sessions Court(Adhoc-I), Ernakulam which is now functioning as Additional Sessions Court-VII and the Additional Sessions Judge sent a report stating that that was also tried along with this case simultaneously and that case ended in acquittal.

12. Since there is a case and counter case in respect of the same incident, then presence of accused and their involvement in the incident cannot be denied by them. Further, the evidence of DW1 and Ext.D1 wound certificate will go to show that the injury sustained by her is minor in nature. It cannot be said that the prosecution has not produced records relating to counter case and it was produced and marked as Ext.P10 and Ext.P11 in this case and marked through PW11. So it cannot be said that the material documents have been suppressed so as to suppress the genesis of the prosecution case giving benefit of doubt to the accused for acquittal.

13. It will be seen from the evidence that PWs2 and 3 went to the water tap for taking water and they were not armed with any weapon. So it cannot be said that they went there for the purpose of committing any crime as one claimed

by the counsel for the appellants. At the same time, it is seen from the evidence of Pws 1 to 4 that when Pws 2 and 3 reached near the water tap, the accused persons came there and without any provocation from the side of Pws 2 and 3, first accused fisted on the chest of PW1 and when PW2 came there, he took a knife and stabbed PW2 on his abdomen and thereafter when PW1 intervened, he had stabbed him also and thereafter when people gathered, they ran away from the place. Though the prosecution had a case that accused 1 and 2 have come there together, it cannot be said that the second accused had shared the common intention of causing any grievous hurt to any one with the first accused and there is no evidence forthcoming from the side of the prosecution that she was aware of the first accused carrying any weapon as well with him. Probably when she came to know that Pws 2 and 3 had come there to take water from the disputed tap, she might have come there for the purpose of preventing taking of water and at that time the first accused joined her and attacked Pws 1 and 2. At the most, the evidence adduced on the side of the prosecution will go to show that when things

were going on, she had taken a stone and pelted the same against PW2 and hit on his forehead and caused injury. So, at the most he might have committed the offence punishable under section 324 of the Indian Penal Code alone. Further there is no evidence adduced by the prosecution to prove that accused persons were restrained the injured persons from moving in any direction. The allegation was that they came from the side and started attacking them. If that be case, there is no question of any wrongful restraint of Pws 1 to 3 or Pws 2 and 3 by both the accused persons from moving to any direction. So under the circumstances, the conviction entered by the court below against the appellants for the offence under section 341 of the Indian Penal Code is not sustainable in law and the same is liable to be set aside.

14. As regards the offence under section 324 of the Indian Penal Code is concerned, an injury was caused to Pws 1 and 2 by the first accused and it cannot be said that the knife is not a dangerous weapon. So the court below was perfectly justified in convicting the first accused for the offences under section 324 of the Indian Penal Code and also justified in convicting

him for the offence under section 323 of the Indian Penal Code. It cannot be said that the second accused has shared the common intention. So she cannot be convicted for the offence under section 323 of the Indian Penal Code which was committed by the first accused.

15. The evidence of PW5 doctor will got to show that PW2 had sustained a stab injury 2cm x 1cm penetrating into the abdominal cavity through which omentum was coming out of 10 cm left to umbelicus and he sustained incised wound 4 x 1 cm over lateral half of left eye brow, lacerated injury 2x.5x1cm above the medial end of the left eye brow. It is also seen from the evidence of PW5 that he was treated in the hospital and Ext.P3 discharge certificate was given and he was treated by doctor Basil Alias and laprotomy was done. It shows that peritonal cavity contained large quantity of blood and a small nich on the exterior surface of the stomach, a small penetration on the posterior surface of the stomach and he had also opined that injury No.1 can be caused by using weapon like MO1 knife. Even though the court below had not believed the recovery as such, it has come to the

conclusion that injury No.1 can be caused by using a weapon like MO1 knife or sharp edged weapon.

16. Further PW5 had stated that doctor who issued Ext.P3 discharge certificate is no more and he can identify the signature and handwriting. Further he had also stated that if the patient did not get proper medical attention, injury No.1 may prove fatal. So it is clear from the evidence that the injury was inflicted with a dangerous weapon like knife at a vital part which even penetrated the posterior aspect of the stomach causing collection of blood in the peritoneal cavity and nich to the same. It cannot be said that the person who inflicted injury had no knowledge that it is likely to cause death of a person as well.

17. In order to attract section 308 of the Indian Penal Code, the prosecution has not only to prove that an act was committed by the accused but also that act was done with an intention or knowledge that he shall be guilty of capable homicide not amounting to murder and that it was a culpable homicide does not amount to murder if the act is done with an intention or knowledge referred to in section 300 of the Indian

Penal Code but under circumstances which would bring the case within one of the exception mentioned in that section or if the act is done with an intention or knowledge referred to in section 299 but not falling under Clauses 2 and 4 of section 300 of the Indian Penal Code.

18. In this case, if the injured was not treated, then injury would have been fatal and it might have resulted in his death and that will become a culpable homicide. But since he had no intention to commit murder and had knowledge that it is likely to cause his death and with that intention he had inflicted that injury on a vital part, then it will fall under clauses mentioned under section 299 of the Indian Penal Code making it as a culpable homicide which may resulting in not amount to murder, if death has occurred. So under the circumstances, the court below was perfectly justified in coming to the conclusion that the first accused had committed the offence punishable under section 308 of the Indian Penal Code as well.

19. The court below had considered the injury sustained by the second accused as mentioned in Ext.D1 wound

certificate proved though DW1 doctor and came to the conclusion that it cannot be said that it was sustained by her in the course of the incident as claimed by her and also the time at which she went to the hospital and gave statement etc will go to show that this was intended by her to escape from the consequences of the incident occurred as claimed by the prosecution and rightly came to the conclusion that she is not entitled to get benefit of private offence so as to exculpate from the criminal act alleged against her. But at the same time, the evidence is not sufficient to come to the conclusion that she had shared the common intention of the first accused to commit grave offence of 308 so as to convict her also for the offence invoking section 34 of the Indian Penal Code along with the first accused. There is no finding recorded by the court below that the second accused had shared the common intention with the first accused for inflicting such injuries or she had knowledge about the weapon being carried by the first accused when they came to the place of occurrence which resulted in the incident. So under the circumstances, the finding of the court below that the second accused had

committed the offence punishable under sections 308 and 323 of the Indian Penal Code by invoking section 34 of the Indian Penal Code is unsustainable in law and she is entitled to get acquittal of those charges giving her the benefit of doubt. This Court has already found that accused 1 and 2 have not committed the offence punishable under section 341 of the Indian Penal Code and conviction and sentence imposed by the court below on that account also is not sustainable in law and the same is also liable to be set aside and they are entitled to get acquittal of charge. So in view of the finding arrived at by this court, the first accused is liable to be convicted for the offences under sections 324 and 308 of the Indian Penal Code while the second accused is liable to be convicted for the offence under section 324 of the Indian Penal Code and the other findings of the court below regarding other offences against the accused persons are set aside to that extent alone and on all other aspects order of conviction passed by the court below against the appellants are confirmed and first accused is convicted for the offences under sections 324 and 308 of the Indian Penal Code while the second accused is convicted for the

offence under section 324 of the Indian Penal Code.

20. As regards the sentence is concerned, the first accused was sentenced to undergo rigorous imprisonment for three years under section 308 of the Indian Penal Code and also sentenced to pay a fine of Rs.5,000/- under section 324 of the Indian Penal Code, in default to undergo simple imprisonment for six months under section 324 of the Indian Penal Code and further sentenced to pay a fine of Rs.500/-, in default to undergo simple imprisonment for one month under section 323 of the Indian Penal Code and the second accused was sentenced to pay a fine of Rs.5000/- in default to undergo simple imprisonment for 6 months under section 324 of the Indian Penal Code and further sentenced to pay a fine of Rs.500/- in default to undergo simple imprisonment for one month under section 323 of the Indian Penal Code. As regards the sentence imposed for the offences under sections 324 and 323 of the Indian Penal Code for both the accused cannot be said to be excessive as only fine was imposed as punishment, which does not warrant any interference at the hands of this court.

21. Counsel for the appellant submitted that at the time of committing the offence the first accused was a bachelor aged 23 years and now he is married and having two children. Further, the prosecution has no case that he has got criminal background and it also cannot be said to be a pre meditated incident as well and he has no previous enmity with the injured as well. It is also seen from the evidence that he was working somewhere outside Kerala and he came to his relative's house for short leave and it was at that time the incident occurred. So considering this aspect, this court feels that sentencing to pay some amount as fine and ordering compensation to the injured out of that fine and reducing substantive sentence will be sufficient and that will meet the ends of justice. So considering the circumstances this court feels that sentencing the first accused to undergo simple imprisonment for six months and also to pay a fine of Rs.10,000/-, in default to undergo simple imprisonment for six months more under section 308 of the Indian Penal Code and directing the entire amount of Rs.10,000/- be paid to PW2 as compensation under section 357(1)(b) of the Code instead of

Rs.7,500/- fixed by the court below will be sufficient and that will meet the ends of justice. So the first accused is sentenced to undergo simple imprisonment for 6 months and also to pay a fine of Rs.10,000/-, in default to undergo simple imprisonment for 6 months more under section 308 apart from the fine imposed for the offences under sections 323 and 324 of the Indian Penal Code.

In the result, the appeal is allowed in part. The order of conviction and sentence passed under sections 308 and 341 of the Indian Penal Code read with Section 34 of the Indian Penal Code as against the second accused is set aside and she is acquitted of those charge giving her the benefit of doubt. The order of conviction and sentence passed against her under section 324 of the Indian Penal Code is hereby confirmed. The order of conviction and sentence passed against the first accused for the offence under section 341 of the Indian Penal Code is set aside and he is acquitted of that charge giving him the benefit of doubt. The order of conviction passed against him for the offence under sections 308, 324 and 323 of the Indian Penal Code and fine imposed for the offence under

sections 323 and 324 of the Indian Penal Code are hereby confirmed. The sentence imposed for the offence under section 308 of the Indian Penal Code as against the first accused is set aside and same is modified as follows:

The first accused is sentenced to undergo simple imprisonment for six months and also to pay a fine of Rs.10,000/-, in default to undergo simple imprisonment for six months more. If fine amount is realized, an amount of Rs.10,000/- be paid to PW2 as compensation instead of Rs.7,500/- fixed by the court below under section 357(1)(b) of the Code. Sentence of fine with default sentence passed against the 2nd accused is confirmed. Sentence of fine imposed with default sentence against the second accused is confirmed. Set off is allowed for the period of detention, if any already undergone by the first accused in this case under section 428 of the Code.

Office is directed to communicate a copy of this judgment to the court below at the earliest.

Sd/-

K. RAMAKRISHNAN, JUDGE.

/true copy/

P.S to Judge

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