

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 4TH DAY OF NOVEMBER 2015/13TH KARTHIKA, 1937

CRL.A.No. 2003 of 2003 (C)

AGAINST THE JUDGMENT IN SC 126/2000 of ADDL.SESIONS COURT (ADHOC)-II,
KOZHIKODE DATED 28-11-2003

APPELLANTS/ACCUSED 1 & 2 AND 4 TO 14:

1. BIJU, S/O. CHATHAN, KUNNATH VEEDU,
PALERI AMSOM, MUTHUVANNACHA.
2. SURESH BABU, S/O. LAKSHMANAN,
NELLIYOTTUKANDI, MUTHUVANNACHA.
3. M.C. BALAN, S/O. KUNHIKANNAN,
MALACHALIL HOUSE, MUTHUVANNACHA.
4. M.C. KUMARAN, S/O. KUNHIKANNAN,
MALACHALIL HOUSE, MUTHUVANNACHA.
5. GOVINDAN, S/O.KANNAN,
KOTHABRA VADAKKEYIL HOUSE,
MUTHUVANNACHA.
6. BHASKARAN, S/O. NARAYANAN NAMBIAR,
KAPPURATH HOUSE, MUTHUVANNACHA.
7. CHATHAN, S/O. KUNHAN, KUNNATH,
PALERI, MUTHUVANNACHA.
8. BALAKRISHNAN, S/O. GOPALAN NAIR,
MULLAMBATH, MUTHUVANNACHA.
- 9.GOPI, S/O. KUNHIRAMAN, KUNNIL,
MUTHUVANNACHA.
10. K.V. VIJAYAN, S/O. KUNHIRAMAN NAIR,
KIZHAKKAN VLIYATH, MUTHUVANNACHA.
11. NARAYANAN, S/O.KELAN, NARIKKALANGATTU,
MUTHUVANNACHA.
- 12.PRADEEPAN, S/O. GOPALAN NAIR,
MULLAMBATH, MUTHUVANNACHA.
13. SURENDRAN, S/O. POCKEN,
PALEL HOUSE, MUTHUVANNACHA.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENTS/STATE & COMPLAINANT:

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

2. THE CIRCLE INSPECTOR OF POLICE,
PERAMBRA.

R1.BY P.P.SRI. JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 04-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.2003 of 2003
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Dated this the 4th day of November, 2015

Accused 1, 2 and 4 to 14 in S.C.No.126/2000 on the file of the Additional Sessions Court, Fast Track-II, Kozhikode are the appellants herein.

2. The appellants along with one Pachar where charge sheeted by the Circle Inspector of Police, Perambra in Crime No.84/1999 of that police station alleging offences under sections 143, 147, 148, 341, 323, 324 and 307 read with section 149 of the Indian Penal Code.

3. The case of the prosecution in nutshell was that, on 26.3.1999, at about 8.30 p.m, the accused persons 14 in number formed themselves into an unlawful assembly, armed with deadly weapons like torch, cycle chain, stick and dagger on Kadiyangad Palam-Thekkedath Kadavu public road near Muhuvannacha L.P.School in Paleri amsom with the common object, committed rioting and attempted murder of CW4, Asokan and caused hurt to A1 to A3, Nishad, Dipeesh and Prakashan due to political enmity and to achieve that common object and members of the unlawful assembly, they had beaten CW4 Asokan and when Cws 1 to 3 interfered, they attacked

them as well and when CW4 tried to intervene, accused 5 and 4 shouted to kill him and caught hold of him and second accused had stabbed him with a knife on the left chest and caused grievous injury to him and thereby all of them have committed the above said offences.

4. After investigation, final report was filed before the Judicial First Class Magistrate Court, Perambra and it was committed to the Sessions Court by the learned Magistrate under section 209 of the Code of Criminal Procedure (hereinafter referred to as 'the Code'). After committal, the case was taken on file as SC.No.126/2000 on the file of the Sessions Court, Kozhikode and it was originally made over to the Assistant Sessions Court, Quilandy for disposal. Thereafter the case was withdrawn and made over to the Additional Sessions court, Adhoc-II, Kozhikode for disposal. During the pendency of the case, original third accused absconded and so case against him was split up and refiled as SC.No.203/2002. So case was proceeded against accused 1, 2 and 4 to 14 alone.

5. After hearing both sides, court below framed charge under the above said offences against the accused facing trial

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 13 were examined and Exts.P1 to P14, MO1 series, Mos II and III were marked on their side. After closure of the prosecution evidence, accused were questioned under sections 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 been falsely implicated in the case due to political enmity. CW4 was engaged in distillation of illicit arrack and this was opposed by the committee formed by the Marxist party and DYFI and they destroyed the unit made for distillation of illicit arrack and when they were conducting a procession in support of the same, Pws 1 and 9 to 11 and others who belong to Congress party attacked them and caused injuries to them and in order to escape from that incident, using political influence, a false case has been foisted against them. Since the evidence in this case did not warrant an acquittal under section 232 of the Code, the accused were called upon to enter on their defence. On the basis of the application filed by the accused persons, Pws 2 and 5 were recalled and Exts.D4 to D8 were marked.

Ext.D9 was marked through PW13. Exts.D1, D2 series and D3 series contradictions were marked in the evidence of Pws 1, 9 and 11. DW1 was also examined on the side of the accused to prove the manner in which the incident occurred. After considering the evidence on record, the court below found the appellants guilty for the above said offences and convicted them thereunder and sentenced them to undergo rigorous imprisonment for three months under section 143 of the Indian Penal Code, rigorous imprisonment for six months under section 147, rigorous imprisonment for one year under section 148, rigorous imprisonment for one year under section 324, rigorous imprisonment for six months under section 323, simple imprisonment for one month under section 341 and rigorous imprisonment for three years and also to pay a fine of Rs.2,000/-, in default to undergo rigorous imprisonment for six months under section 307 of the Indian Penal Code read with section 149 of the Indian Penal Code and directed the substantive sentences to run concurrently. It is further directed that if fine amount is realized, an amount of Rs.5,000/- to PW11 and Rs.1,000/- each to be paid to Pws 1, 9 and 10 as compensation under section 357(1)(b) of the Code.

Aggrieved by the same, the above appeal has been preferred by the appellants/ accused 1, 2 and 4 to 14 in the lower court.

6. Heard Sri.T.G. Rajendran, counsel appearing for the appellants and Sri.Jibu P. Thomas, Public Prosecutor for the State.

7. Counsel for the appellants submitted that PW1 had given a go by to his statement in Ext.P1 and he had no case that he was questioned by the investigating officer on a subsequent stage. Further, there were contradictions, omissions and embellishments in the evidence of PW1, 9 to 11 regarding the manner in which the incident occurred. Further, all the witnesses, who were examined belong to a particular political party and it was admitted by them that, the incident occurred in front of the shop of one Sreedharan and shop was opened and it was from the petrol max light in the shop and the moonlight, they could identify the persons who committed the offence. Though PW13, the investigating officer, who conducted earlier part of the investigation had questioned the said Sreedharan and it was on the basis of locating the place of occurrence that the scene mahazer was prepared and he was not cited as a witness. Further even in Ext.P1, the presence of Ajayan and

Suresh were mentioned and they are not even been questioned and cited as witnesses. It is also brought out in evidence in respect of the same incident that another crime was registered as Crime No.83/1999 of the same police station and without conducting any proper investigation, the case was referred by the police. The investigating officer did not even collected the wound certificate of the injured in that case. Though it was admitted by PW13 that Crime Nos.83/1999 and 84/1999 were case and counter case and that was the reason why a common scene mahazer was prepared, registration of Crime No.83/1999 was not mentioned in any of the documents produced by the investigating officer. They have not produced the First Information Report, the wound certificate or the final report, if any, filed in that case so as to enable the court to find out the true genesis of the incident alleged by the witnesses. So under the circumstances, it is not safe to rely on the interested testimonies of the injured persons alone to convict the accused and this aspect has not been properly appreciated by the court below and the reason stated by the court below for convicting the appellants is unsustainable in law and they are entitled to get acquittal giving them the benefit of doubt.

8. On the other hand, learned Public Prosecutor submitted that court below had properly appreciated the evidence of PWs 1 and 8 to 11 and correctly came to the conclusion that the accused persons formed themselves into an unlawful assembly and as decried by accused 5 and 11, second accused had stabbed PW11 and when others intervened, they were also attacked and thereby all of them have committed the offences and rightly convicted them for the said offences and no interference is called for.

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

On 26.3.1993, at about 8.30 p.m , PW1 Nishad and PW9 Deepesh, PW10 Prakashan have got down from a bus and standing in front of the shop of one Sreedharan. At that time, a procession led by Congress party came and on seeing PW11 standing there, accused persons formed themselves into an unlawful assembly and he was attacked by the accused persons. On seeing them, Pws 1, 9 and 10 reached there and tried to intervene, at that time, some of the accused persons attacked them, when PW11 tried to intervene, accused 5 and 11 shouted to kill him and caught hold of him, at that time, second

accused stabbed him with a knife and all the accused persons have beaten him also. When they made hue and cry, people gathered there, at that time, they ran away from the place. They were taken to Perambra hospital, from where they were seen by Pws 2 and 3 and issued Exts.P2 to P5 wound certificates of Pws 11, 1 and 9 respectively. Since injuries of PW11 were serious, he was referred to Medical College Hospital from where, he was seen by PW3, who issued Ext.P6 discharge certificate and proved Ext.X1 case sheet relating to the nature of injury sustained and treatment given to PW11. On getting intimation regarding admission of injured in Perambra hospital, PW13 went to the hospital and recorded Ext.P1 statement of PW1 and registered Ext.P8 First Information Report as Crime No.84/1999 for above said offences against 14 accused persons. Thereafter he questioned the witnesses and recorded their statements. Accused 1 to 11 surrendered before him and he arrested them and produced before court. He gave Ext.P11 report to add section 307 of the Indian Penal Code. He also gave Ext.P12 report to add sections 341 and 323 of the Indian Penal Code as well. He conducted search of the house of second accused and seized MOII knife as per Ext.P10 search

list in the presence of Pw 7 and others. He went to the place of occurrence and prepared Ext.P9 scene mahazer in the presence of PW6 and seized MoI series and MOIII broken soda bottle from that place. He produced the articles seized before court along with Exts.P13 and P14 property lists. Since section 307 of the Indian Penal Code was added, he had submitted the file to PW12, the Circle Inspector of Police for conducting investigation. He verified the investigation conducted by PW13. He questioned the witnesses and recorded their statements. He collected the wound certificates and completed investigation and submitted final report.

10. Pws 1 and 9 to 11 are the injured in this case and PW8 is said to be an independent witness. In Ext.P1 statement, PW1 had stated that on 26.3.1999 while he was standing there after getting from a bus, at about 8.30 p.m ,and talking with Pws 9 and 10, they saw Congress party workers consist of accused 1 to 14 and others were conducting a procession and when they reached in front of the shop of one Sreedharan, accused 1 to 14 attacked Asokan, PW11 and when they also intervened, they were also attacked by them. He had not given the details of the incident and the overtact alleged by each

accused persons in Ext.P1 statement. It is true that Ext.P1 First Information Statement need not contain the encyclopedia of all the minute details of the incident and it need only contain necessary particulars to draw an inference of commission of a cognizable offence and give the picture regarding the manner in which the incident occurred. Merely because details were given later when they were questioned again alone is not a ground to disbelieve the case of the witnesses on that ground. But PW1 had no case that he was questioned by the investigating officer after he gave Ext.P1 statement. He had denied having stated in Ext.D1 when he was questioned by the investigating officer regarding the manner in which the incident occurred. Further, he had pretended ignorance about the case registered on the basis of the statement given by the 7th accused and he also pretended ignorance about the injury sustained by any of the accused persons in the incident. He denied the suggestion that when Congress party workers were conducting a procession, Pws 1 and 9 to 11 have attacked the Congress party workers and also caused damage to the statue of Indira Gandhi and caused injury to the congress workers. It will be seen from Ext.P1

that presence of one Suresh and Ajayan were mentioned as the person who immediately reached the place of occurrence on hearing the hue and cry. But, quite surprisingly, those persons were not even questioned by the investigating officer and there was no explanation forthcoming from PWs13 and PW12, the investigating officers, who conducted investigation, in this case for this lapse.

11. It is true that PW11 had sustained some grave injuries. He was treated in the Medical College Hospital and he underwent laprotomy operation as well. But that alone is not sufficient to come to the conclusion that the incident had occurred as claimed by them, if it is not established by the prosecution by adducing proper evidence. It will be seen from the evidence of Pws 1 and 9 to 11 that there are material contradictions in the evidence regarding the manner in which the incident occurred, how the overtact has been committed by each accused persons as stated by them before court and before the investigating officer. Further, there are material omissions regarding the manner in which the incident occurred as stated by them before court and those aspects were not mentioned by them when these witnesses were questioned by

the investigating officer. Further they have given a go bye to the 161 statement given by them before the investigating officer regarding the manner in which the incident occurred and they have given a different story regarding the manner in which the incident occurred when they were examined before court. All of them have admitted that they were known to each other and they belong to a particular political party namely Communist Party of India (Marxist). It was also brought out in evidence that PW8, an alleged eye witness, was examined in the case that he also belongs to that political party and he is a worker of that party. He had also pretend ignorance about the manner in which the incident occurred and he had further stated that he did not know whether there was any incident occurred in which the injured in this case had attacked the accused in this case causing injury to them and whether any case has been registered in respect of the same incident. It will be seen from the evidence of PW2, the doctor who prepared Exts.P2 to P5 wound certificates of Pws 11, 1, 9 and 10 respectively that on the date of examination of these witnesses, he had examined accused 2, 14, 9, 7, 8 and 3 and issued Exts.D4 to D8 wound certificates and Bhaskaran was referred to the Medical College

Hospital as he sustained some multiple injuries. There is no explanation forthcoming from the side of the prosecution as to how these accused persons had sustained injuries as well. Further, it was admitted by PW13 that on the basis of the statement given by the 7th accused, Bhaskaran in this case, he had registered a case as Crime No.83/1999 of the same police station alleging offences under sections 143, 147, 148 and 324 read with section 149 of the Indian Penal Code against several accused persons including Pws 1 and 9 to 11. But a reading of the evidence of PW13 will go to show that, he had prepared Ext.P9 scene mahazer as a common scene mahazer and that too was prepared in Crime No.83/1999, which was marked as Ext.D9. So, it is clear from the evidence of PW13 that there was an incident occurred in respect of which, case and counter case have been registered and both the sides have sustained injuries in the incident. But, quite surprisingly, the First Information Report and wound certificates in Crime No.83/1999 were not produced in this case and nothing was mentioned about the same as well in the final report filed in this case though it was mentioned by PW13 that, that case was referred by him. He had also pretended ignorance as to

whether any notice has been issued to the informant regarding the refer report filed as well. So all these things create suspicion regarding the manner in which the investigation was conducted in this case.

12. Further, it was brought out in the evidence of PW8, the alleged independent eye witness cited by the prosecution, that the incident occurred in front of the shop of one Sreedharan and the shop was opened and all the witnesses have deposed that it was from the petrol max light in the shop and moonlight that they could witness the incident. It was also admitted by PW8 that Sreedharan can witness the incident from his shop and he had also stated that Sreedharan has no allegiance to any political party. So he would be the best independent witness, who would have given the true picture of the incident that happened in this case. PW13, though admitted in his evidence that he had questioned Sreedharan and it was he who had pointed out the place of occurrence on the basis of which Ext.P9 scene mahazer was prepared and according to him, he ought to have been cited as a witness in the case, had stated that he did not know the reason why he was not cited as a witness. So material independent witness, who could have

thrown better light regarding the true genesis of the incident, that had taken place in this case has been suppressed by the prosecution. Willful suppression and keep out of the reach of court of such a material witness will lead to an inference that the real genesis of the incident has been suppressed before court.

13. It is also seen from the evidence of PWs12 and 13 that name of the two independent witnesses namely Ajayan and Suresh, who had rushed to the place while the incident was going on was mentioned in Ext.P1 statement given by PW1 but no attempt was made to question them and record their statements and cite them as witnesses in the case as well. No explanation forthcoming from the side of the investigating agency for their laches in the investigation as well.

14. It is true that court can rely on the evidence of injured witnesses alone to base conviction of the accused persons. But if there are contradictions, omissions and material omissions made in their statements, then it is also settled law that it is not safe to rely on their evidence alone to convict the accused persons without seeking corroboration from the independent witnesses. In this case, PW8 cannot be treated to

be an independent witness. He had categorically stated that he is a sympathizer of CPI (Marxist party) and he did not intervene in the incident and he did not take any steps to take the injured in the hospital though they knew the injured persons personally. So his presence at the place of occurrence itself is doubtful. So non examination of the available independent witnesses throws suspicion about the genuineness of the prosecution case and that benefit must be given to the accused. The reason stated by the court below for non examination of Sreedharan by the investigating officer appears to be not correct in view of the evidence given by PW13 on this aspect. Further, It will be seen from the wound certificate of PW11 that he sustained only two injuries as per Exts. P2 and X1 and P6 discharge certificate. But, according to the prosecution witnesses, he was attacked with a torch and also indiscriminately beaten with stick and iron-rod, but no corresponding injuries were noted in neither of the medical documents and that also throws suspicion regarding the manner in which the incident occurred as claimed by the prosecution witnesses. So, under the circumstances and in view of the discussions made above, the finding of the court below

that the prosecution has proved beyond reasonable doubt that the accused persons have formed themselves into an unlawful assembly with deadly weapons and with a common object of murdering CW4 (PW11), inflicted injuries on him and when Cws 1 to 3 intervened, they were also attacked by them and thereby all of them have committed the offences punishable under sections 143, 147, 148, 341, 323, 324 and 307 read with section 149 of the Indian Penal Code is unsustainable in law and the same is liable to be set aside. The appellants are entitled to get acquittal of the charge levelled against them giving them the benefit of doubt. In view of my finding that the accused are entitled to get acquittal, the sentence imposed by the court below is not proper and the same is also set aside.

In the result, the appeal is allowed and the order of conviction and sentence passed by the court below against the appellants for the offences under sections 143, 147, 148, 341, 323, 324, 307 read with section 149 of the Indian Penal Code are hereby set aside and the appellants are acquitted of the charge levelled against them giving them the benefit of doubt. Bail bonds executed by them will stand cancelled. The court below is directed to return the fine amount, if any, remitted by

the appellants to them on making necessary applications in that regard.

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

Sd/-
K. RAMAKRISHNAN, JUDGE.

/true copy/

P.S to Judge

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