

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 11TH DAY OF AUGUST 2015/20TH SRAVANA, 1937

CRL.A.No. 254 of 2004 (B)

AGAINST THE JUDGMENT IN SC 217/2003 of ADDL.DISTRICT & SESSIONS FAST
TRACK COURT (ADHOC)-II, KOTTAYAM DATED 06-02-2004

APPELLANT(S)/ACCUSED 1 AND 2:

1. MANI ALIAS CHACRAPANI,
S/O.KESAVAN, ETTAKKATTIL HOUSE, MANIMALA KARA
ERUMELY NORTH.
2. SATHEESAN,
S/O.CHACRAPANI, ETTAKKATTIL HOUSE, MANIMALA KARA
ERUMELY NORTH.

BY ADVS.SRI.V.RAJENDRAN (PERUMBAVOOR)
SRI.GEORGE VARGHESE KIZHAKKAMBALAM

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY CIRCLE INSPECTOR OF POLICE
PERUMBAVOOR.

R, BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
11-08-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

acd

'C.R.'

P.D. RAJAN, J.

Crl.Appeal No.254 of 2004

Dated this the 11th day of August, 2015

JUDGMENT

The appellants, who are accused in S.C.217 of 2003 on the file of the Additional Sessions Judge, Kottayam (Fast Track)-II, challenge the judgment of conviction under Section 308 and 326 IPC and 324 IPC. The 1st appellant was sentenced to rigorous imprisonment for four years each u/s.308 & 326 IPC and to pay a fine of ₹4,000/- each in default, simple imprisonment for two months each. The 2nd appellant was sentenced to rigorous imprisonment for two years and to pay fine of ₹1,000/- u/s.324 IPC, in default simple imprisonment for one month. Being aggrieved by that judgment, the first and second accused preferred this

appeal.

2. The prosecution case is that on 5.1.2003 at 9.30 pm, the accused with the common intention of committing culpable homicide voluntarily caused grievous hurt, the first accused stabbed PW2 with MO1 knife, the second and third accused pelted stones towards PW2, first accused again stabbed PW1, PW3 and PW4 with MO1, as a result, PW2 sustained injury on his chest, PW3 sustained injury on the right shoulder, abdomen and right cheek, PW4 sustained injury on the right abdomen, left wrist and on head, the third accused hit on the head of PW5, with a stick on the Kannimala-Koratty road which is on the southern side of the house of PW7, Door No.17/103 (A) of Mundakkayam grama panchayat. In this incident, Mundakkayam Police registered a Crime No.5 of 2003 and after completing investigation, Sub Inspector of Police,

Mundakkayam laid charge before Judicial First Class Magistrate-I, Kanjirappilly, subsequently, the case was committed to Sessions Court.

3. During trial, prosecution examined PW1 to PW13 and marked Ext.P1 to P11 as documentary evidence. Mo1 knife was marked as material object. The incriminating circumstances brought out in evidence were denied by the accused while questioning them. They were also heard under Section 232 Cr.P.C. Accused examined DW1 and DW2 and marked Exts.D1 to D6 in support of their defence. Trial court convicted A1 under Section 308 and 326 IPC and convicted the second accused under Section 324 IPC and acquitted the third accused. The trial court found that no offence under Section 34 IPC has been proved against the accused.

4. The learned counsel appearing for the appellants

contended that there was no evidence to show that the second appellant pelted stone towards PW2 and the witnesses present there never saw the pelting of stone towards PW2 and there is no corresponding medical evidence to prove such overt act. A reading of evidence shows that A2 was arrayed as an accused by an after thought. When there is no medical evidence, the second appellant is entitled to get benefit of doubt. The first appellant was 65 years on the date of conviction and is seeking leniency in sentence.

5. As against the above submission, the learned Public Prosecutor contended that the injured are the eye witnesses and their evidence is wholly reliable, which is corroborating the prosecution case. There were only minor discrepancies in their evidence, which is not a ground to discard their evidence in total.

6. The crucial question to be considered in this case is whether the prosecution has proved the offence of attempt to commit culpable homicide beyond reasonable doubt. For constituting an offence u/s.308 IPC, prosecution has to prove firstly that the accused did the act. Secondly, he did the act with the intention or knowledge by such act, if he by that act causes death, he would be guilty of culpable homicide not amounting to murder. The evidence of PW1 shows that on 5.1.2003 at 9.30 pm, he heard the loud voice of his brother (PW2) from Kannimala -Koratty road, immediately he reached there at that time there was an altercation between PW2 and PW3. By this time, PW2 and one Santhosh (brother-in-law of PW1) proceeded to his house, A1 suddenly stabbed PW2 on the left armpit with MO1 knife, A2 and A3 standing on the side of the road pelted stones and one

stone hit on the left cheek of PW2. Again, A1 stabbed PW1 with MO1 on the middle of the chest and stabbed one Mathew, both of them sustained injuries, but Mathew fell down. People gathered there removed PW1 and PW2 to Government Hospital, Kanjirappilly, from there they were referred to Medical College Hospital, Kottayam subsequently they were admitted in the Sony Hospital, Erumeli from there police recorded Ext.P1 statement. PW1 identified the accused and MO1 knife in the street light and light from the near by houses.

7. The evidence of PW2 shows that on the date of the incident at 9.30, his brother in law Rajan and PW3 obstructed an autorikshaw in which PW2 and PW6 were travelling and they got down at the place of occurrence. Hearing the sound of PW2, Pw1 and his brother-in-law Santhosh came there and they separated PW 2 and PW6.

After this, PW2 proceeded 10 feet towards his house, A1 came there and stabbed him with MO1 knife below the left armpit, thereafter, stabbed on the chest of PW1. A2, who was standing on the side of the road pelted a stone on the right cheek of PW2. Again first accused stabbed PW3 Mathew. PW2 stated that there was a quarrel between PW3 and A3 before one month of this incident about calling of nickname. In cross examination, he answered that he sustained injury by pelting stone, but he has not stated to the Police who pelted the stone, and that injury was not disclosed to the Doctor.

8. According to PW3 on that day while he was returning from Erumeli with his brother-in-law and reached at the place of occurrence, PW2 and PW6 came there in an autorickshaw. He gave hand signal to stop the autorickshaw and it was stopped, he talked with PW2. At

that time, the brother of PW6 came there and both of them proceeded further. Hearing the talk of PW3 with Pw2, Pw1 and his brother-in-law, came there and joined with PW2. Suddenly, the 1st accused came there with MO1 knife, PW2 asked him where he was going with the knife in the night, without responding to the question, A1 stabbed PW2 on the left armpit with MO1 knife. PW2 cried aloud, PW1 came upon the side of PW2, again, the first accused stabbed on the chest of PW1 with MO1, thereafter, he stabbed PW3, with MO1, as a result, PW3 sustained injury on the right shoulder, right side stomach and left side and left side elbow. A2 and A3 standing on the side of the road, pelted stones towards PW2, hearing his cry, his father (PW5) and wife came there. A3 beat his father with a stick. During cross examination of PW3, Exts.D1 and D1(a) were marked by the defence counsel.

9. PW4 was present at the place of occurrence and supported the evidence of PW1, PW2 and PW3. His evidence shows that he arrived at the place of occurrence with PW3. When PWs 1 and 2 proceeded towards their house, A1 came there and stabbed PW2, thereafter, stabbed PW1 and PW3. A2 and A3 standing there pelted stone. A1 stabbed PW4 on his nose, head and on the left hand. In order to avoid the repetition of the same version given by the other injured witnesses, I am not reiterating his entire oral evidence.

10. PW5 is not an eye witness to the main incident, but his evidence shows that on hearing cry of his son, he went to the road and found his son lying on the road with injuries. A3 beat on the head with a stick and he sustained head injury.

11. The evidence of PW6 shows that on the date of

incident at 9 p.m., he arrived at the place of occurrence with PW2 in an autorickshaw. On seeing PWs 3 and 4, he stopped the vehicle and interacted with them. He found A1 standing near the place of occurrence with a knife. During cross examination, Ext.D3, D3(a) and D3(b) were marked in the trial Court. The evidence of PW7 shows that his house situates 30 metres away from the public road, which is electrified.

12. The admissibility of evidence and credibility of a witness depends on various factors, even the evidence given by a single witness would be sufficient to convict an accused person if the evidence is trustworthy evidence. On the other hand, if the evidence given by a dozen of witnesses which is not trustworthy would not be enough to sustain a conviction. A scrutiny of the evidence of the injured witnesses shows their knowledge of facts and

there is no ground to reject their direct evidence. PW1, 2 and 4 sustained stab injury with MO1 and the testimonies given by the these witnesses show their direct knowledge of the facts pertaining to the incident. They gave statements to the Police about the manner in which the incident took place and the Police is the authority legally competent to investigate the case. The statements given to the Police Officer, being the earliest statements made by the witness, with regard to the occurrence, are valuable materials for testing the veracity of the witnesses. The statements given to the Police were confronted by the defence counsel during cross examination. The questions put to the witnesses in cross examination in order to elicit their means of knowledge ensure their presence at the place of occurrence. There is no inconsistency in their oral testimony to create any

doubt in their credibility. While dealing with several injured and large number of offenders, it is usual to adopt the test that conviction could be sustained only if it is supported by plurality of witnesses to give a consistent story about the incident. Considering the quality and quantity of evidence, I am of the opinion that no circumstances are brought out to discard the direct evidence in this case.

13. The fact may be further analysed on the basis of medical evidence, which is corroborating the ocular evidence of PW1 to 4. The evidence of PW8 shows that while he was working at Taluk Hospital, Kanjirappilly, on 5.1.2003 at 11.30 p.m. he examined Mathew aged 38 years and issued Ext.P3 wound certificate in which he noted the following injuries:

(1) incised wound 10 c.ms, long bone deep on the anterior aspect of right shoulder.

(2) incised penetrating wound on the right side of abdomen with intestine protruding out.

(3) incised wound 1 x 0.5 c.m. on the right cheek.

First aid given (not readable) stable, referred to Medical College Hospital, Kottayam. The alleged cause of injury was ഇററക്കാട്ട് സജി കുത്തിയതിൽവച്ച് by 10 p.m. on 5.1.2003 at Kannimala.

14. On the same day, at 11.25 p.m., PW8 examined Sali, (PW2), aged 39 years and issued Ext.P4 wound certificate and noticed the following injuries:

1) "L" shaped lacerated wound 5.5 cms long muscle deep, elevating a flap over the right cheek, and

2) Incised wound 1.5x0.5cms over the posterior axillary fold on the left side. Depth not measured. Haemodynamically stable, first aid given, referred to Medical College Hospital, Kottayam for expert Dr. The alleged cause of injury was കുത്തുകിട്ടിയതിൽവച്ച് by 10 p.m. on

5.1.2003 at Kannimala.

15. On the same day, at 11.20 p.m., PW8 examined one Rajendran, (PW1) and issued Ext.P5 wound certificate. In Ext.P5, he noticed "incised wound 3x1 cm, situated vertically in the epigastrium, depth not measured. First aid given. Referred to MCH Kottayam for expert management. The alleged cause of injury was കുത്തുകിട്ടിയതിൽവെച്ച് by 10 p.m. on 5.1.2003 at Kannimala."

16. The Assistant Professor in ENT, Medical College Kottayam was examined as PW9, who deposed that on 6.1.2003 at 1 a.m., he examined one Abraham Mathew (PW4) aged 42 years, issued Ext.P6 wound certificate and noted following injuries:

- (1) Lacerated wound 3x0.5 cms dorsum on nose with fracture nasal bone.
- (2) Lacerated wound dorsal aspect of left wrist 4x0.5cms and

(3) Lacerated wound 2x0.5cms in the scalp over the occipital region. D-ray nasal bone showed fracture nasal bone. X-ray of para nasal sinus was normal. The alleged cause of injury was കണ്ടാൽ അറിയാവുന്ന ഒരാൾ മുകളിൽ ഇടിക്കുകയും കത്തി വെച്ച് വെട്ടുകയും ചെയ്തതിൽവെച്ച് on 5.1.2003 at 8 p.m. at എരുമേലി . My opinion could be as alleged. There injuries can be produced with MO1 knife shown to me. Injury No.1 is grievous injury.

17. The doctor from the Sony Memorial Hospital, Erumely was examined as PW10. He deposed that on 6.1.2003 at 7.45 a.m., he examined Rajendran V.G. and issued Ext.P7 wound certificate. The following injuries were noted:

Sutured wound 5cms long central chest close to epigastrium following a stab.

He also deposed that the patient was initially treated in Medical College, Kottayam. The said injury could be caused by MO1 and the injury is likely to cause death.

18. The medical evidence shows that the injuries in

Exts.P1 to P5 could be caused by MO1 knife. The injury Nos.1 and 2 in Ext.P3, injury No.2 in Ext.P4 and the injury in Ext.P5 are likely to cause death. PW8 admitted that patients did not disclose any injury due to hit by a stone. The depth and size of injury No.2 in Ext.P3 was not mentioned. But, injury No.3 in Ext.P3 could be caused due to contact with hard surface. Similarly injury No.1 in Ext.P4 could be caused by a contact with hard object. Analysing the medical evidence, it is found that injuries caused by MO1 knife are dangerous. Therefore, the fact that the injury Nos.1 and 2 in Ext.P3, injury No.2 in Ext.P4 and injury in Ext.P5 are likely to cause death, which can be caused by MO1 knife, is relevant. Incised injury penetrating wound on the right side of abdomen with intestine protruding out is a dangerous injury. If that injury is not properly treated, it can lead to serious

complications, which may result in death. There is no dispute with regard to stab injuries and reading of evidence shows that accused inflicted injuries to the victims (2) that the said act was committed with the intention or knowledge to commit culpable homicide not amounting to murder and (3) the act was committed under such circumstances, if the accused by that act had caused death, he would have been guilty of culpable homicide, which itself is sufficient to attract the ingredients stated u/s.308 IPC.

19. In this context, I may refer the decisions of the Apex Court in Tukaram Gundu Naik v. State of Maharashtra [1994 Crl.L.J. 224], wherein it was held as follows:

"7.In our view the accused can be attributed only knowledge that by inflicting such injuries he was likely to cause death and an attempt to commit such an offence would be one punishable under Section 308, I.P.C. Section 308 lays down that such an offence is punishable with

imprisonment which may extend to three years or with fine or with both and if hurt is caused, the assailant can be punished with imprisonment of either description which may extend to seven years or with fine or with both."

A close scrutiny of the evidence of PWs 1 to 4 shows that the 1st appellant assaulted with specific knowledge, which was deposed by the witnesses independently, which constitute the actus reas in committing the offence. The intention of the 1st appellant can be gathered from the circumstances like the nature of weapon used by the 1st appellant, the words used at the time of the act, the motive of the 1st appellant and the part of the body, where the injury sustained, above all, the nature of injury. The injuries caused by the 1st appellant are sufficient in the ordinary course of nature to cause death. Therefore, it is true that the above act was with the knowledge. But, the trial Court observed that there was no common intention

among the accused while committing the offence.

20. The motive for committing a crime is a relevant fact of which witness can give evidence to prove. The absence of motive is also a relevant circumstance for assessing the evidence in a case. In certain cases, motive is irrelevant when there is positive, clear and reliable evidence available against the accused. In this context, I have considered whether any motive is proved in this case. PW3 stated that there was a quarrel with A3 with regard to calling of his nickname, which was compromised by PW1 and PW3. PW4 stated that on the date of incident, at 7 p.m., they enquired about this incident to A3, due to this enmity, A1 to A3 assaulted them. Even though these witnesses deposed about motive, nothing has been stated by other witnesses about the previous enmity. If the motive is not proved, it will not affect the credibility of

the direct evidence, since the motive is not an essential ingredient for the alleged offence. Relied Gurucharan Singh v. State of Punjab [AIR 1963 SC 340]. From the evidence of PWs 1 to 4, it is clear that there was enmity between the appellants and the injured and due to that enmity, the incident had occurred.

21. The case was registered by PW12 at Mundakkayam Police Station. According to PW12 on 7.1.2003 at 9.30 p.m., he arrived at Soni Hospital, Erumeli recorded Ext.P1 statement of PW1, thereafter registered Crime No.5/2003 u/ss.308, 324 r/w.34 IPC and Ext.P9 is the FIR. Ext.P1(a) and (b) are the body notes of PW 1 and PW2. At about 5 p.m., he arrived at the place of occurrence and prepared Ext.P8 mahazar. On the same day, at 8 p.m., A2 was arrested from Kannimala, on 8.1.2003, he was produced before Court. On 13.1.2003, A1

surrendered at the Police Station with MO1 knife, which was taken into custody, after preparing Ext.P10 mahazar. The independent witnesses present there attested the mahazar. A3 surrendered before Mundakkayam Police on the same day along with A1, and the accused were produced before Court. PW11 admitted signature in Ext.P8. PW13 admitted the signature in Ext.P10 mahazar. After completing investigation, PW12 laid charge before Court. He admitted the presence of street light at the place of occurrence, which was not mentioned in Ext.P8.

22. Self preservation is the prime instinct of every human being. The vigilance of each individual on his own behalf is absolutely necessary in certain occasions which lead to right of private defence of his own body. Now the question is whether the accused exercised such right of private defence in this case. While questioning of the 1st

accused u/s.313 Cr.P.C. he admitted that there was no enmity with PWs 1 to 4. On 5.1.2003 night while he was proceeding to his house, PWs 1 to 4 were standing on the road and quarrelling. On seeing him, they assaulted him as a result, he sustained serious injuries. Friends of PWs 1 to 4 intervened and thus he escaped from there. Hearing his cry, his children came there and PW1 to PW4 attacked them also as a result, he sustained serious injuries and he was admitted in the Government Hospital, Kanjirappally. To substantiate this contention, DW1 was examined. The evidence of DW1 shows that on 9.1.2003, while he was working at Taluk Hospital, Kanjirappally, he issued Ext.D5 discharge card of Saji Ettakkad, aged 25 years. As per Ext.D5, Saji was admitted in the hospital on 5.1.2003 and discharged on 9.1.2003. There was multiple injury due to the assault, but those injuries were not noticed in Ext.D5.

On the same day, he examined one Chakrapani (A1) and issued Ext.D6 certificate. He deposed that on 9.1.2003, A1 was brought with the history of alleged assault and multiple injury. But, the nature of injuries are not mentioned in Ext.D5 and D6.

23. Dw2 is the autorickshaw driver, who was present at the place of occurrence on 5.1.2003. He deposed that on that day at 9 p.m., PW2 and PW6 hired his autorickshaw. When he reached in front of the house of one Karanthanam Thampi, PWs 1, 3 and 4 stopped his vehicle. They pushed PW2 and he fell down on the road. Even though Dws 1 and 2 were examined, there is no probability in their defence versions and hence, they are not entitled to get the right of private defence. Therefore, I reject the same.

24. In this background, I have examined as to what

offences were proved against the appellants. There is no direct evidence with regard to the pelting of stone by A2. Even though PWs 1 and 2 stated about the pelting of stone, their versions show that the 2nd appellant was found standing near the place of occurrence, after pelting of stone alone. But, it was not mentioned, who pelted stone against PW2. When he was admitted in the Medical College Hospital, he did not disclose about the pelting of stone to the Doctor and no injuries recorded in the wound certificate. When there is no medical evidence in support of pelting of stone, the probability is that, when PW2 while getting down from the autorickshaw, there was an altercation, at that time, his body might have contacted with hard object and sustained that injury. This new version about pelting of stone creates a doubt in the credibility of that overt act. When there are two versions

one with regard to the commission of the crime and another, which is supporting the defence, the second accused is undoubtedly entitled to get the benefit of doubt. Another important aspect in a criminal trial is that an accused is entitled to the benefit of every reasonable doubt and the other is an off shoot of the same principle. If an accused offers a reasonable explanation of his conduct, then, even though he cannot prove his assertion, they should be accepted unless the circumstances indicate they are false. On that ground, I extend the benefit of doubt to the 2nd appellant, for which, I rely the decision in Aher Raja Khima v. State of Saurashtra [AIR 1956 SC 217].

The totality of the evidence shows that the prosecution proved offence u/s.308 and 326 IPC beyond reasonable doubt, against 1st accused which was rightly appreciated by the trial Court. The injuries inflicted by the 1st accused

are serious, which is sufficient to attract offence u/s.308 IPC. The Doctor, who treated stated that the injuries are serious, which is sufficient in the ordinary course of nature to cause death. Therefore, the conviction against the 1st accused u/s.308 and 326 IPC are only to be confirmed, but the conviction and sentence against the 2nd accused u/s.324 IPC are liable to be set aside.

25. The question of sentence is always a judicial discretion and the proper exercise of that discretion is generally a difficult matter. The sentence should neither be too lenient nor disproportionately severe. Therefore, the measure of the sentence is usually governed by the nature of offence committed and the circumstances in which it was committed. The learned counsel appearing for the appellants contended that the 1st appellant is aged 77 years and some leniency may be shown in the sentence.

Apex Court in Hazara Singh v. Raj Kumar and others [2013

(9) SCC 516] held as follows:

" 9. We reiterate that in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The Court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment."

Considering the facts and circumstances of the case, I am of the opinion that sentence should always operate as a corrective machinery. It is duty of the Court to impose proper sentence rejecting undue sympathy which ensure public confidence in the criminal justice system. The

principle while imposing a sentence is that the accused must realise that the crime committed by him has created a major threat in the community.

26. In the result, the conviction of the 1st appellant u/s.308 IPC and 326 IPC are confirmed. The conviction of the second appellant u/s.324 IPC is set aside and he is acquitted and set at liberty. Considering the nature of the offence and the manner in which it was committed, I modify the sentence as follows:

a) The 1st accused/ 1st appellant is sentenced to rigorous imprisonment for three years and to pay fine of ₹1lakh, u/s.308 IPC in default of payment of fine, rigorous imprisonment for one year.

b) He is also sentenced to imprisonment for two years u/s.326 IPC.

c) The sentence shall run concurrently.

d) The period of detention undergone by the 1st accused /1st appellant during enquiry, trial and investigation shall be set off against the terms of imprisonment. The first appellant is directed to appear before the trial Court forthwith, failing which the Additional District and Sessions Judge, Kottayam is directed to issue Non Bailable Warrant against him.

The Crl.Appeal is partly allowed.

P.D. RAJAN, JUDGE.

acd