

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. 423 of 2004 (A)

AGAINST THE JUDGMENT IN SC 280/2003 of
ADDITIONAL SESSIONS COURT (ADHOC-I), ERNAKULAM, DATED 13-02-2004

APPELLANT(S)/ACCUSED:

JOHNY, S/O. PAILY, PERAPARAMBIL VEEDU,
TRIPUNITHURA, THEKKUMBHAGAM DESOM, EASTERN SIDE OF
KANNAMKULANGARA.

BY ADVS.SRI.VARGHESE C.KURIAKOSE
SRI.JACOB SEBASTIAN
SRI.PRAVEEN K. JOY
SRI.M.A.RASHID

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
SUB INSPECTOR OF POLICE, HILL PALACE POLICE STATION,
BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA

BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

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

SS

K. RAMAKRISHNAN, J.

Crl. Appeal No.423 of 2004

Dated this the 18th day of September, 2015

JUDGMENT

Accused in S.C.No.280/2003 on the file of the Additional Sessions Court(Ad-hoc-I), Ernakulam, is the appellant herein. The appellant was charge-sheeted by the Sub Inspector of Police, Hill Palace police station in Crime No.411/2001 of that police station under Section 308 of the Indian Penal Code.

2. The case of the prosecution in nut shell was that, on 05.12.2001 at about 09.20 p.m., the accused on account of previous enmity towards PW1 and with a knowledge that his act is likely to cause death and with an intention to commit culpable homicide not amounting to murder, attacked PW1 with a broken soda bottle, while he was in front of the bar counter of Zodiac Bar situated in building No.20/745 of Thrippunithura Municipality and

caused injury to his left cheek, head and lower part of the ear and thereby he had committed the offence punishable under Section 308 of the Indian Penal Code.

3. After investigation, final report was filed before the Chief Judicial Magistrate Court, Ernakulam, where it was taken on file as C.P.No.9/2003. The Additional Chief Judicial Magistrate committed the case to Sessions Court, Ernakulam under Section 209 of the Code of Criminal Procedure (hereinafter called the 'Code'). After committal, the Sessions Court, Ernakulam had taken cognizance of the case as S.C.No.280/2003 and it was made over to Additional Sessions Court (Ad hoc-I), Ernakulam, for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 324 and 308 of the Indian Penal Code was framed and the same was read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, PWs 1

to 8 were examined and Exts.P1 to P5 and MO1 series were marked on the side of the prosecution. After closure of the prosecution evidence, the accused was questioned under Section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the prosecution evidence and he had further stated that, he had not committed any offence. While he was consuming liquor from the Zodiac Bar, PW1 came there and picked up quarrel with him and there was some scuffle occurred between them, in which the bottle kept in the counter fell down and PW1 somehow sustained injury. So he had not committed any offence. Since the evidence in this case did not warrant acquittal under Section 232 of the Code of Criminal Procedure, the accused was called upon to enter on his defence. The doctor who examined the accused was examined as DW1 and Ext.D1 discharge certificate was marked through him. After considering the evidence on record, the court below found the appellant not guilty under

Section 308 of the Indian Penal Code and acquitted him of that charge under Section 235(1) of the Code of Criminal Procedure. But court below found the appellant guilty under Section 324 of the Indian Penal Code and convicted him thereunder and sentenced him to undergo simple imprisonment for one year and also to pay a fine of ₹10,000/-, in default to undergo simple imprisonment for 6 months. It is further ordered that, if the fine amount is realised, an amount of ₹5,000/- be paid to PW1 as compensation under Section 357(1)(b) of the Code of Criminal Procedure. Aggrieved by the same, the present appeal has been preferred by the appellant/ accused before the court below.

5. Heard Sri.Varghese C. Kuriakose, counsel appearing for the appellant and Smt.Seena Ramakrishnan learned Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that, the court below has not believed the evidence of PW5,

though he was found to be a probable witness to prove the case of the prosecution. PWs 2 to 4 and 6 did not support the case of the prosecution as well. So there is only the evidence of PW1 regarding this incident. The court below also did not come to the conclusion that the prosecution has proved the case as stated by them, but come to the conclusion that there was a scuffle occurred between the parties and how the incident started has not been proved by the prosecution. But at the same time court below had relied on the evidence of PW1 and convicted the accused without corroboration which is unsustainable in law. Further the case of the defence is more probable as PW1 was the aggressor and it was on that day a case in which PW1 was attacked by the accused and another were acquitted and it was on the date of evening that the incident happened as well while he was in the bar. So it can be inferred from this that PW1 was the aggressor and it was he who had commenced the incident and as such without

corroboration of independent witnesses, it is not safe to rely on the evidence of PW1 alone to convict the accused for the offence. Further he has also argued that Ext.D1 will go to show that he also sustained injuries in the same incident and no attempt was made on the side of the prosecution to explain those injuries. On the other hand he had taken steps to prove that he also sustained injuries in the incident by examining DW1 and producing Ext.D1. Further the investigating officer /CW11 was not examined in this case. Since the weapon used for the offence has not been recovered, non-examination of the investigating officer and also non-explanation of the injuries sustained by the accused are fatal and that benefit must be given to the accused. So according to him, the court below was not justified in convicting the appellant for the offence alleged.

7. On the other hand, the learned Public Prosecutor submitted that the evidence of PW1 coupled with medical evidence will go to show that the defence

taken up by the accused is not probable. Further even his own doctor had deposed that the injury could be possible when he was attacking another person. Further there is no contradiction in the evidence of PW1. So non-examination of the investigating officer is not fatal. So under the circumstances, according to the learned Public Prosecutor, the prosecution has proved the case against the accused beyond reasonable doubt and the court below was perfectly justified in convicting the appellant for the offence alleged.

8. The case of the prosecution as emerged from the prosecution witnesses was that, on 05.12.2001 at about 09.20 p.m., while the accused was consuming alcohol from Zodiac Bar at Thrippunithura, PW1 came there and paid the cash for purchasing some liquor and while he was proceeding towards the counter for taking the liquor, the accused stopped him and picked up quarrel with him and thereafter he caught hold of his shirt. When he was about to wriggle out from him, he took a soda bottle from the

counter, broke the same by hitting against the counter and then attempted to stab him on his neck. Since he moved his neck, it fell on the left side of his ear and caused injuries. Thereafter there was scuffle occurred between them and he fell down and the accused ran away from the place. Thereafter he was taken to hospital from where PW7 had examined him and issued Ext.P5 wound certificate. While he was in the hospital, on getting information about the incident police came to the spot. Thereafter on the basis of Ext.P1 statement given by PW2, Ext.P5 first information report was registered as Crime No.411/2001 of Hill Palace police station against the appellant under Section 308 of the Indian Penal Code by PW8. The investigation in this case was conducted by CW11, who questioned the witnesses and prepared Ext.P7 scene mahazar and got Ext.P8 site plan prepared by the Village Officer and collected Ext.P5 wound certificate and produced before the court and completed the investigation and submitted final report.

9. Though PW2 had admitted that he had seen PW1 and the accused engaged in scuffle, but he did not state as to how the incident commenced and he also stated that he did not see the accused stabbing the injured as well. He had also admitted that he gave Ext.P1 statement as instructed by PW6 the Manager of the bar. According to him when he saw PW1 and the accused engaged in scuffle, he informed PW6 about the matter and when he returned after that, he saw PW1 lying in a pool of blood and the matter was informed to the police and thereafter steps were taken to remove PW1 to the hospital from there.

10. He had denied having stated in Ext.P1(a) and P1(b) in Ext.P1 statement as having witnessed the entire incident as stated by him in Ext.P1. So his evidence is not helpful to prove the actual incident. PWs 3, 4 and 5 are also workmen working in the same bar. They were also cited as witnesses to prove the entire incident, but they have also stated that they knew PW1 as well as the accused as they

used to take liquor from that bar. They have also stated that the accused was taking liquor from shop at that time and PW1 came and thereafter there was some scuffle occurred between them. On seeing that, they have also gone to the manager to inform about the incident and when they came back, they saw PW1 lying in a pool of blood. They have categorically stated that, they have not seen the accused stabbing PW1 and they do not know as to how the incident started as well. PW4 denied having stated in Ext.P3 and P3(a) in his 161 statement. So their evidence is also not helpful to prove the entire incident as such. PW6 was the manager of the bar. He also did not support the case of the prosecution and deposed that he came to know about the incident from his workers and at the time when he saw PW1 lying in the blood and he had made arrangements to take him to hospital. According to him, he was taken to Government Hospital first and after suturing the injuries he was taken to Medical Trust Hospital, Ernakulam for further

treatment.

11. PW7 is the doctor who examined PW1 and issued Ext.P5 wound certificate where he had noted that he sustained incised wound on the left side of ear and also a sutured wound having 10 cm, swelling on the cheek and another incised wound that too on the face. He had deposed that the injury could have been caused by stabbing with bottle. In the cross examination he had stated that if a broken bottle had used for stabbing a person with force, the person who stabbed also may sustain injuries. He had stated that the weapon used for committing the offence was not shown to him at the time when he was questioned by the investigating officer. So his evidence only will go to show that he had treated PW1 and issued Ext.P5 wound certificate.

12. The evidence of PW1 is that, according to him on that day he came to the bar hotel late and at that time he saw the accused sitting in the bar and consuming

alcohol and when he was about to move towards the counter, he was stopped by the accused and there was some scuffle occurred between them and during the course of scuffle, the accused took a soda bottle and broke the same and stabbed him at his neck, but since he moved, it hit on the side of the left ear. Due to that he fell down and became unconscious. It was admitted by him in the cross examination that there was an earlier incident occurred in the same bar in which he was attacked by the same accused and others and a case was registered in respect of the same and after trial it ended in acquittal and the judgment of that was pronounced on that day. He had no case that on account of that enmity or with a preparation to attack him, the accused was waiting there. It cannot be said to be a premeditated incident as well. The lower court also came to a conclusion that there is no evidence adduced on the side of the prosecution as to how the incident commenced and who was the aggressor. Especially when it is not a

premeditated incident and the accused came to the bar earlier and consuming alcohol and considering the fact that in the previous case in which he attacked PW1 ended in acquittal on that day, it cannot be said that he will be waiting for PW1 to come there and with an intention to attack him. In the absence of any evidence adduced on the side of the prosecution as to who was the aggressor and who was responsible for commencing the incident, it is not safe to rely on the evidence of PW1 alone regarding the manner in which the incident occurred as stated by him without corroboration from independent witnesses.

13. It is true that, the court shall not always insist for corroboration of independent witnesses and the injured will be the best person to speak about the incident as well and there is nothing wrong to rely on the evidence of the injured to convict the accused as well. But in all those cases, there will be some evidence to show or the evidence given by PW1 will be in tune with the statement given by

him before the police and there is no possibility of any other manner in which the incident occurred which have to be inferred by the court, then in such cases court can rely on the injured witnesses alone to convict the accused. But when the court below itself has come to the conclusion that the incident had not happened or commenced as stated by PW1 and the incident occurred while there was scuffle ensued between PW1 and the accused, then it is not safe to rely on the evidence of PW1 alone to convict the accused without corroboration of the fact regarding the person who commenced or who was the aggressor and how the incident started and ended.

14. Further in this case it is seen from Ext.D1 discharge certificate issued by DW1 that the accused also sustained some injuries in the same incident and on the same day he went to the hospital and got admitted in the hospital as well. The weapon used for committing the offence was not recovered. It is true that it is not always

necessary that the weapon of offence has to be recovered for the purpose of proving the incident and non-recovery of the same is fatal always. But in a case where there was some doubt regarding the manner in which the incident started and who was the aggressor, then non-recovery of the weapon will be having some relevance. Further during scuffle the persons hitting against the counter where the bottles were kept, they falling down and when these people falling down on the glass sustaining injury also cannot be ruled out. Further in this case the accused also sustained some injuries and he was also treated for the same and the court below had come to the conclusion that there is no evidence to prove as to who was the aggressor, how the incident had started, then non-examination of the investigating officer in such cases is relevant and that will cause prejudice to the accused as well and he is the only person who can answer the questions as to why he had not effected the recovery of the weapon alleged to have been

used for the commission of the offence and also conducting any investigation regarding the manner in which accused sustained injuries as well.

15. It is true that the prosecution need not prove as to how the accused sustained injuries, if the injuries are minor in nature. But at the same time, if there is a possibility of accused also sustaining injuries in the scuffle, then even if that is of minor injury, sometimes it may have to be explained by the prosecution to rule out the possibility that PW1 was not the aggressor and accused was the aggressor and it was he who had started the incident and completed the same. So in such circumstances, the finding arrived by the court below that prosecution has proved the case against the accused beyond reasonable doubt and convicting him for the offence under Section 324 of the Indian Penal Code appears to be unsustainable in law and it cannot be said in the absence of corroborating evidence of independent witnesses supporting the case of the

prosecution that the prosecution is proved beyond reasonable doubt that the accused had committed the offence and the consequential conviction entered by the court below that accused had committed the offence under Section 324 of the Indian Penal Code is unsustainable in law and the same is liable to be set aside. The accused is entitled to get acquittal of the charge leveled against him giving him the benefit of doubt. Since this court had found that accused is entitled to get acquittal, the sentence imposed is also not proper and the same is also set aside.

In the result, the appellant succeeds and the appeal is allowed. The order of conviction and sentence passed by the court below against the appellant under Section 324 of the Indian Penal Code is set aside and he is acquitted of the charge levelled against him giving him the benefit of doubt. He is set at liberty. The bail bond executed by him will stand cancelled. If any portion of the fine amount has been remitted by the appellant before the court

below, court below is directed to refund the same to him on making application for that purpose.

Office is directed to communicate this judgment to the concerned court, at the earliest.

Sd/-

K. Ramakrishnan, Judge

// True Copy//

P.A. to Judge

ss