

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 7TH DAY OF OCTOBER 2015/15TH ASWINA, 1937

CRL.A.No. 744 of 2004 ()

**AGAINST THE JUDGMENT IN SC 303/2001 of ADDL.SESSIONS.COURT (ADHOC-II)
KASARAGODE DATED 30-04-2004**

APPELLANT(S)/IST ACCUSED:

**T.NARAYANAN, S/O.DAMODARAN,
CHALIYIL VEEDU, POOTHANGANAM, BELUR VILLAGE.**

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENT(S)/COMPLAINANT & STATE:

- 1. THE SUB INSPECTOR OF POLICE,
HOSDURG.**
- 2. STATE OF KERALA REP: BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.**

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

VS

K.RAMAKRISHNAN, J.

Criminal Appeal No.744 of 2004

Dated this the 7th day of October, 2015

JUDGMENT

The accused in SC.No.303/2001 on the file of the Additional Sessions Court (Ad Hoc)-II, Kasaragod is the appellant herein. The appellant along with 3 others were chargesheeted by the Circle Inspector of Police, Hosdurg in Crime No.541/1999 of Hosdurg Police Station under Sections 326 and 307 read with Section 34 of the Indian Penal Code.

2. The case of the prosecution in a nutshell was that on 16.10.1999 at about 5.15 a.m., while PW1, the defacto complainant who is also a sympathiser of Communist Party of India(Marxist), was engaged in delivery of newspapers and when he reached in front of the house of one K.V.Narayanan, the accused persons, belong to Bharathiya Janatha Party, attacked him with a common intention to kill him on account of their political

enmity. The first accused had inflicted cut injury on him with a sword, while accused Nos.2 to 4 had inflicted injuries on his leg by beating him with sticks and caused grievous injury to PW1 and thereby all of them have committed the offence punishable under Sections 326 and 307 read with Section 34 of the Indian Penal Code.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-I, Hosdurg, where it was taken on file as CP.No.45/2000. After complying with the formalities, the learned Magistrate committed the case to Sessions Court, Kasaragod under Section 209 of the Code of Criminal Procedure(hereinafter called 'the Code'). After committal, the case was taken on file by the Sessions Judge as SC.No.303/2001 and it was earlier made over to Assistant Sessions Court, Hosdurg for disposal. Thereafter, the case was withdrawn by the Sessions Judge and made over to Additional Sessions Judge (Ad Hoc)-II, Kasaragod, for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Sections

326 and 307 read with Section 34 of the Indian Penal Code was framed 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 10 were examined and Exts.P1 to 13 and MOs 1 to 7 were marked on their side. 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 had further stated that they have not committed any offence and they are innocent of the same. They have been falsely implicated in the case, on account of the political enmity. Since the evidence in this case did not warrant an acquittal under Section 232 of the Code, the accused were called upon to enter their defence. But no defence evidence was adduced on their side. After considering the evidence on record, the court below found accused Nos.2 to 4 not guilty of the offences alleged and acquitted them of those charges giving them the benefit of doubt under Section 235(1) of the Code. But the court below found the

appellant guilty under Sections 307 and 326 read with Section 34 of Indian Penal Code and convicted him thereunder and sentenced him to undergo rigorous imprisonment for three years and also to pay a fine of Rs.5,000/- in default to undergo simple imprisonment for two months under Section 326 of the Indian Penal Code and further sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.5,000/-, in default to undergo simple imprisonment for two months under Section 307 of the Indian Penal Code and directed the substantive sentences run concurrently. It is further ordered that if the fine amount is realised, the same be paid to PW1 as compensation under Section 357(1)(b) of the Code. Set off was allowed for a period of detention already undergone under Section 428 of the Code. Aggrieved by the same, the above appeal has been preferred by the appellant/accused before the court below.

5. Heard Sri.T.G.Rajendran, counsel appearing for the appellant and Sri.Jibu P.Thomas, learned Public

Prosecutor appearing for the State.

6. The counsel for the appellant submitted that except the interested testimony of PW1, there is no other evidence to connect the appellant with the alleged commission of the offence. Court below had disbelieved the evidence of PW1 as regards the involvement of accused Nos.2 to 4. He had different versions before the doctor, at the time of giving First Information Statement and at the time when he was examined before the court, regarding the manner in which the incident occurred and also the overact alleged to have been committed by the accused persons. Before the doctor, he had no case that the first accused was present at the place of occurrence. He has given the cause of injury as three unidentifiable persons had attacked him. But in the First Information Statement, four persons came and attacked from behind and he identified one Narayanan who was an Autorikshaw driver, as the person who had inflicted the cut injury with sword(വാൾ - വാൾക്കത്തി). He had further stated that when he made hue and cry that Narayanan was killing him, all the

four accused persons ran away from the place and the persons in a nearby Mosque came first and as informed by them, his son came later and he was taken to hospital. He had not mentioned as to how he had identified one of the assailants as Narayanan, in the First Information Statement given by him.

7. But according to him, he gave the names of all the persons and he identified the accused persons by means of torch, at the time when he was questioned later by the investigating officer, which cannot be believed. Further, no attempt was made to identify the assailants by the injured, on a later occasion, as part of the investigation. So under the circumstances, the appreciation of evidence made by the court below as regards identity of accused Nos.2 to 4 will be equally applicable to accused No.1 also and the possibility of false implication, after two days of the incident when he gave Ext.P1 statement, cannot be ruled out and as such, according to the learned counsel, the prosecution has failed to prove beyond reasonable doubt the identity of

the first accused as the person who among the assailants had inflicted the grave injuries on PW1, so as to convict him for the said offence and he prayed for acquittal of the accused.

8. On the other hand, the learned Public Prosecutor submitted that merely because he had not given the names of assailants to the doctor, is not a ground to disbelieve the case of the injured. Further, even as per the evidence of PW1, except himself, no other persons were there at the time of occurrence and so he could be the only witness who can speak about the incident and if he is able to give evidence in a believable manner, there is nothing wrong for the court to rely on his evidence to convict the accused. So, under the circumstances, according to the learned Public Prosecutor, the court below was perfectly justified in convicting the appellant for the offence alleged and no interference is call for.

9. The case of the prosecution as emerged from the prosecution witnesses was as follows: PW1 was a

paper agent and on the fateful day, namely 16.10.1999, at about 5.15 a.m., he was engaged in delivery of newspaper in his bicycle and when he reached the gate of the house of one P.V.Narayanan, 4 persons came from behind and beat him with sticks. When he fell down, one among them, whom he identified as autorikshaw driver Narayanan(ഓട്ടോറിക്ഷ ഓടിക്കുന്ന നാരായണൻ), who had shouted at him to kill him and along with shouting, he inflicted cut injury on his leg and again attempted to inflict cut injuries, which he warded off which caused injury to his fingers, including loss of the first joint of phalnx of the thumb and other cut injuries. When he made hue and cry that Narayanan was killing him, the accused persons ran away from the place. The persons in the nearby Mosque immediately rushed to the place and they took him to the nearby Mosque, from there, intimation was given to his son, who came there and took him to Government hospital, Hosdurg, from where he was first seen by PW3, who issued Ext.P2 wound certificate. Since, the injuries were grievous, he was taken to University Medical Centre,

Manglore and admitted there, and he was treated there.

10. On getting intimation regarding the admission of PW1 in that hospital, PW7 Head Constable attached to Hosdurg police station went to that hospital and recorded Ext.P1 statement of PW1 and came back to the police station and entrusted the same to PW8, the Sub Inspector of Police, Hosdurg police station, who, on the basis of Ext.P1, registered Ext.P1(a) First Information Report as crime No.54/1999 of Hosdurg Police Station against Narayanan and other three identifiable Bharathiya Janatha Party workers under Section 307 read with 34 of Indian Penal Code.

11. Thereafter, the investigation in this case was conducted by PW9, the Additional Sub Inspector of Police. He went to the place of occurrence and prepared Ext.P5 scene mahazar, in the presence of PW6 and another and seized MOs.2 to 7 from the place of occurrence, after describing the same in Ext.P5 scene mahazar. He questioned the witnesses and recorded their statements, came to understand that the weapon alleged

to have been used for cutting PW1 would be in the house of the first accused belonging to one Devaki. He sent Ext.P6 search memo to the court and thereafter, went to the house and conducted search of the house in the presence of PW5 and another and seized MO.1 sword from that house, as per Ext.P4 search list. He had given requisition to PW4 village officer to prepare the scene plan, on the basis of which, PW4 prepared Ext.P3 scene plan of the place of occurrence on the basis of Ext.P5 scene mahazar.

12. Thereafter, the investigation in this case was conducted by PW10 the Circle Inspector of Police. He questioned further witnesses and recorded their statements and he recorded the further statement of PW1, in which he had disclosed the names and addresses of the all accused persons and also stated that he had identified the first accused on the basis of torch in his hand. He gave Ext.P8 report showing the name and address of all the accused persons. He sent the articles to court along with Exts.P7 and P7(a) property lists. Since he was

satisfied that offence under Section 326 of the Indian Penal Code was also committed, he gave Ext.P7 report to add that Section also. He arrested all the accused on 19.11.1999 at about 9.30 and prepared Ext.P10(a) to P10 (d) arrest memos and produced them before court along with remand report and they were remanded to custody. He sent Ext.P1 forwarding note with request to send the material objects for chemical analysis and they were sent from court and Ext.P12 chemical analysis report was obtained. He collected Ext.P13 wound certificate issued by CW10 from University Medical Centre, Mangalore and produced the same before the court. He completed the investigation and submitted final report.

13. Admittedly except the interested testimony of PW1 injured alone, there is no other evidence to connect the appellant with the commission of the crime. According to PW1, while he was engaged in delivery of newspaper on 16.10.1999 at about 5.15 A.M. and when he reached in front of the house of one P.V.Narayanan, four persons came from behind and had beaten him with sticks

first. Thereafter, among the four persons, he identified one as autorikshaw driver Narayanan, who according to him, shouted at him to kill and then inflicted cut injuries with a sword (വാൾ - വാൾക്കത്തി). First cut fell on his leg and when he again attempted to inflict injuries with the sword, he warded off the same which resulted in loss of a portion of the thumb finger and other cut injuries on his fingers. According to him, when he shouted 'നാരായണൻ എന്നെ കൊല്ലൂന്നേ', accused persons left the place and it is thereafter, some persons in the Mosque came there and took him to the nearby Mosque, from there, they gave intimation to his son and after arrival of his son, he was taken to hospital. This is the nature of version given by PW1 in Ext.P1 statement, which was recorded on 17.10.1999 at 3 P.M. from University Hospital, Mangalore, from where he is undergoing treatment.

14. But, when he was seen by the doctor PW3 on 16.10.1999 at about 6.40 a.m., immediately after sometime of the incident, he had given the cause of injury as "alleged to have been assaulted by three unidentifiable

persons, while he was supplying paper at Neelam Kavu, Belur village at about 5.30 a.m. on 16.10.1999". It is also seen from Ext.P2 wound certificate that he was taken by his son A.V.Kunhambu. If really he had identified one of the assailants as autorikshaw driver Narayanan, he would disclosed this fact to his son or other persons accompanying with him and quite naturally his name would have been mentioned to the doctor as one of the persons attacked him either by himself or by the persons accompanied him including his son. That was not done in this case. It is true, that always necessary non disclosure of name of the assailants to doctor is sufficient to disbelieve the case of the prosecution as Doctor is not excepted to probe into those aspects at that time. But when he knew the assailants and he is a known person then, non mentioning of that person to the doctor at that stage is relevant, so as to evaluate his evidence regarding the identity of the assailants as the person who attacked him.

15. In Ext.P1 statement, he did not mention

about the presence of torch and as to how he had identified one of the assailants as autorikshaw driver Narayanan. If really he had identified him with the help of torch, then he ought to have mentioned that fact in Ext.P1, especially when he could not identify the other assailants, at the time when he gave Ext.P1 statement. Further, though, he had a case that he had disclosed this fact to the police constable, who recorded the statement has stated that he had not disclose this fact to him. So that shows that it was a development made by him at a later stage, so as to make the first accused as one of the assailants who belongs to different political party at the instance of somebody else. Further, if really he was aware of the name and address of other accused persons also, which he had given in detail on a subsequent occasion, when he was questioned by the investigating officer, there is nothing preventing him from giving at least the names of the other assailants, even at the time when Ext.P1 statement was given as it was given after nearly more than one and half days from the time of

occurrence.

16. Further, though, he had a case that four persons had attacked him with stick first and he was indiscriminately beaten with stick by the other assailants, no corresponding injuries were seen on the body of the injured, either in Ext.P2 wound certificate or in Ext.P13 wound certificate collected and produced, except showing some aberrations on his chest, apart from the incised and lacerated wounds seen on the leg and right hand. Further, it is seen from the evidence that though the accused persons were arrested on 19.11.1999, no attempt was made to get them identified by the injured in the process known to law as part of the investigation. That was not done in this case.

17. Further, there was some discrepancy in the evidence of PW1 also regarding the manner in which the incident occurred and how he was attacked by the assailants. The nature of weapon used as stated by him was also different when compared to the weapon alleged to have been seized by the investigating officer namely

MO1 which he identified as the weapon used for commission of the offence. Further, the recovery of weapon also creates doubt. Though, it was mentioned that the search was conducted in the house, where he was residing, there is no material evidence adduced on the side of the prosecution to prove the connection of the house from where, MO1 was recovered as per Ext.P4 search list with the appellant, especially when the recovery of witness had turned hostile, though he admitted the signature in Ext.P1 and it was not a recovery effected under Section 27 of the Evidence Act on the basis of the statement given by the first accused. Further, in Ext.P12 chemical analysis report, there was no bloodstain or presence of blood was noted in MO1 knife as well. So, it cannot be said that the prosecution was able to prove that MO1 weapon was used by the first accused for the purpose of commission of the offence as well.

18. It is true that in a case like this, where except the injured, no other persons will be available at the place of occurrence and normally the evidence of

injured alone will be available for describing the incident and also disclose the identity of the assailants, who had involved in the commission of the crime. In this case, the court below had disbelieved the evidence of PW1 regarding the identity of the other accused persons namely accused Nos.2 to 4, on the basis of the subsequent statement given by him, regarding their identity to the investigating officer when he was questioned on a later occasion. In the absence of mentioning of the name of first accused to the doctor, especially when he had a case that even at the time when he was being attacked, he identified the first accused as one of the assailants throws suspicions about his mentioning of the name of first accused as autorikshaw driver Narayanan, in Ext.P1 the First Information Statement which was recorded more than 1 and half days after the incident. So under the circumstances, the mentioning the name of first accused for the first time in Ext.P1 could be possible due to some deliberation with persons having interest in the incident and on that basis

the falsification of first accused in a case like this cannot be ruled out. In the absence of any other convincing evidence to connect the first accused with the commission of the crime and in view of the embellishment and improvement made by PW1 regarding the identity of the accused which he did not disclose to the doctor, but later disclosed at the time when Ext.P1 statement was given, it is not safe to rely on his evidence alone for the purpose of convicting the accused. Though there may be suspicion about the involvement of the accused on the basis of some doubt, but that will not substitute the nature of proof required to be adduced by the prosecution to pinpoint the involvement of the first accused also in the commission of the crime, beyond reasonable doubt and if this is not done, then that benefit must be given to the accused.

19. In view of the discussions made about, the finding of the court below that the prosecution has proved beyond reasonable doubt that the first accused had inflicted injuries on PW1 with MO1 weapon and thereby he

had committed the offence punishable under Section 326 and 307 of the Indian Penal Code and consequential conviction of first accused for the said offence by the court below are unsustainable in law and the same are liable to be set aside. The appellant is entitled to get acquittal of the charge levelled against him, giving him the benefit of doubt. In view of this findings, the appellant is entitled to get acquittal, the sentence imposed by the court below is also not proper and the same is 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 Sections 326 and 307 read with 34 of the Indian Penal Code are hereby 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. The fine amount if any remitted by the appellant is directed to be returned to the appellant by the court below on making necessary application for that purpose before that court. Office is directed to

communicate this order to the concerned court
immediately.

Sd/-
K.RAMAKRISHNAN
JUDGE

VS