

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 15TH DAY OF OCTOBER 2015/23RD ASWINA, 1937

CRL.A.No. 601 of 2006 (F)

AGAINST THE JUDGMENT IN SC 326/2005 of III ADDITIONAL SESSIONS
COURT (ADHOC), FAST TRACK - I, THRISSUR DATED 14-02-2006

APPELLANT/ACCUSED:

ASHOKAN, S/O. ANDIKUNJU,
KUNDIYARA, EDAVILANGU VILLAGE, KARA DESOM,
THRISSUR DISTRICT.

BY ADVS.SRI.S.RAJEEV
SRI.N.K.UNNIKRISHNAN

RESPONDENT/COMPLAINANT:

STATE OF KERALA, THROUGH THE STATION
HOUSE OFFICER, KODUNGALLUR POLICE STATION
(CRIME NO.583/04) REPRESENTED BY THE PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY SMT.S.HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
15-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.601 OF 2006

Dated this the 15th day of October, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 304 Part II of Indian Penal Code. After trial, he was found guilty of the offence under Section 323 IPC. He was therefore convicted and sentenced to suffer rigorous imprisonment for one year and to pay a compensation of Rs.25,000/- to PW2 and his mother and in default of payment of compensation the accused is sentenced to suffer simple imprisonment for two months.

2. The prosecution case in brief is that the incident occurred on 04.09.2004. On that day, the parents of PW2 after having lunch with him, were returning to their house. While PW2 was in his house, a passer-by informed him that the accused has restrained his father and he is beating him. PW2 is said to have

rushed to the spot and found his mother pleading to let her husband go while the accused had caught hold of his father. PW2 is said to have intervened in the matter and the infuriated accused throw down the victim. The victim fell down and became motionless. He was taken to the hospital and by 2.15 p.m, he was pronounced dead.

3. The deceased had borrowed a sum of Rs.5,000/- from one Babu for which interest has to be paid through his brother Asokan who is the accused in the case and the allegation is that with respect to that, the deceased was restrained. PW2 went to the Police Station and laid Ext.P2 First Information Statement. That was taken down by the Sub Inspector of Police namely, PW9 who, on that basis, registered crime as Crime No.583/2004 for offence under Section 302 IPC.

4. Investigation was taken over by PW8. He went and conducted inquest over the body of the deceased and prepared Ext.P5 report. The body was thereafter sent for postmortem and PW1 conducted autopsy and furnished Ext.P1 certificate. PW8 seized the clothes worn by the deceased and the accused was

arrested on the very same day and was produced before court on 05.09.2004. PW8 recorded statement of witnesses and prepared Ext.P3 scene mahazar. During investigation, he found that the offence under Section 302 IPC may not be made out and so he filed Ext.P6 report incorporating Section 304 IPC as the offence committed by the accused. He completed the investigation and laid charge before court.

5. The court before which final report was laid took cognizance of the offence and on finding that the offence is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Thrissur under Section 209 Cr.P.C. The said court made over the case to III Additional Sessions Court (Adhoc) Fast Track-I, Thrissur for trial and disposal. The latter court, on receipt of records and on appearance of the accused, framed charge for the offence under Section 304 Part II IPC, to which, he pleaded not guilty and claimed to be tried. The prosecution, therefore, had PWs 1 to 9 examined and Exts.P1 to P7 marked. M.O.1 was also marked.

6. After the close of the prosecution evidence, accused was questioned under Section 313 Cr.P.C. He denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent.

7. Finding that the accused could not be acquitted under Section 232 Cr.P.C, he was asked to enter on his defence. He chose to adduce no evidence.

8. The court below, mainly based on the evidence of PWs 2, 4 and 5, came to the conclusion that the incident as alleged had occurred and the deceased suffered injuries at the hands of the accused. However, court below was not inclined to accept that the accused had the intention to do away with the deceased. In other words, cause of death as detected by PW1 is that the death was due to coronary artery disease. The court below found that there is nothing to show that the accused was aware of the condition of the deceased and therefore he could not have intended to cause his death nor he had the knowledge that his act is likely to cause death of the deceased. Resultantly, accused was found guilty of the offence under Section 323 IPC and he was

convicted and sentenced for the said offence as already mentioned. The said conviction and sentence are assailed in this appeal.

9. Learned counsel appearing for the appellant mainly based his contention to the effect that even going by the prosecution case, the parents of PW2, after having lunch with him, were returning to their house. That means the mother of PW2 was accompanying the father. It was in the presence of the mother that the alleged attack is said to have taken place. Learned counsel contended that, for reasons best known to the prosecution, the mother, who would have been the most natural and positive witness in the case, was not examined. This lacuna has been overlooked by the court below and there is no explanation offered as to why the mother is not examined. Accordingly, it is contended that the origin of the incident remains in a mystery and that benefit should have gone to the accused.

10. Learned Public Prosecutor, on the other hand, contended that the evidence of PWs 2, 3, 4 and 5 are sufficient in

law to show that there was restraining of deceased by the accused and manhandling by him. Evidence of these witnesses are sufficient to show that hurt was caused to the deceased. If that be so, accused cannot escape from having committed the offence under Section 323 IPC. Learned Public Prosecutor pointed out that PWs 2, 3, 4 and 5 are natural witnesses. PW2 being the son of the deceased and PWs 3 to 5 being neighbours who run to the place immediately on hearing commotion at the place of the incident. Learned Public Prosecutor pointed out that there are no grounds to interfere with the findings of the court below and the appeal is only to be dismissed.

11. Though started with the charge under Section 304 Part II IPC, ultimately, accused was found guilty of the offence under Section 323 IPC. Evidence discloses that the victim had borrowed some amount from the brother of the accused and the brother of the accused had entrusted the accused to collect interest for the amount so given to the deceased. It was due to the default on the part of deceased to pay the interest that the accused restrained the deceased in the afternoon of 04.09.2004.

12. The evidence in the case consists of the testimony of PWs 2, 3, 4 and 5. Among them, PW2 is the son of the deceased and PWs 3 to 5 are neighbours. Of course, actual incident is spoken to by PWs 2, 3, 4 and 5 who came to the spot immediately after the incident and had occasion to move the victim to the hospital. The evidence of PW2 is to the effect that on the date of incident his parents had lunch with him and after they left his house, while he was taking rest, a passer-by informed him that his father has been restrained by the accused and the accused was beating him. PW2 is said to have rushed to the place and he found that his father has been restrained and his mother pleading to the son to release his father. By that time the accused had pushed his father down. His father laid motionless. He was removed to the hospital and soon thereafter he was pronounced dead. PW3 also gives a similar version of the incident. He was in his house when he heard about a commotion in the house nearby and he too would say that he also tried to release Veerankunhu from the grip of the accused. PW4 says that she had occasion to see the couple going along the courtyard

of her house at about 2.15 p.m. She says that she also had occasion to see the accused restraining the deceased. PW5 who claims to have witnessed the incident says that he heard a cry from the courtyard of Babu and he reached the place immediately. He found that the deceased was in the clutches of the accused and that he had occasion to see the accused pushing down the deceased.

13. In the light of the overwhelming evidence furnished by PWs 2, 3, 4 and 5, it is idle for the appellant to contend that no incident as alleged has occurred and that he is innocent. The court below found that neither the intention nor the knowledge that is necessary to attract Section 304 Part II IPC. The court below, on analysis of evidence, came to the conclusion that there is nothing to show that the accused would be credited with knowledge that his act is likely to cause death in the facts and circumstances of the case and found that only offence under Section 323 IPC is made out.

14. Learned counsel appearing for the appellant brought to the notice of this Court Section 222(4) of the Code of Criminal

Procedure which reads as follows:

“222. When offence proved included in offence charged.-

- (1) xxx
- (2) xxx
- (3) xxx
- (4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied”.

It is contended that Section 323 IPC is a non cognizable offence and going by Section 155(3) Cr.P.C, sanction is necessary for investigation and if that be so, conviction is bad in law.

15. Though the argument may look attractive, the answer lies in the decision in **State of Himachal Pradesh vs. Tara Dutt and another** (AIR 2000 Supreme Court 297). The determining criteria is the offence to which the accused is charged and not the offence ultimately found to have been committed by the accused is the dictum laid down in the above decision. Following the principles laid down in the said decision, the contention has only to be rejected. Therefore, the conviction for the offence under

Section 323 IPC is fully justified.

16. Learned counsel appearing for the appellant then contended that 12 years have been elapsed and things might have quieted down and peace may be prevailing in the area and at this point of time an attempt to create disturbance may not be proper.

17. There seems to be some force in the above contention. The court below has sentenced the accused to undergo rigorous imprisonment for one year and to pay compensation of Rs.25,000/-. At this passage of time, it is felt that interest would be justified by limiting the sentence of imprisonment to the period of detention already undergone by the accused and increasing the compensation payable to the legal heirs of the victim.

For the above reasons, while upholding the conviction for the offence under Section 323 IPC, the sentence imposed is set aside and it is held that the period of detention undergone by the accused will be treated as the sentence of imprisonment and he will pay compensation of Rs.50,000/- to PW2 and his mother.

The compensation shall be deposited before the court below within a period of two months from today.

With the above modification, this appeal is disposed of.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A to Judge.