

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

WEDNESDAY, THE 11TH DAY OF NOVEMBER 2015/20TH KARTHIKA, 1937

CRL.A.No. 78 of 2015 ()

(AGAINST THE ORDER/JUDGMENT IN SC 132/2013 of ADDL. D.C. & SESSIONS
COURT - I, KALPETTA DATED 08-07-2014
CRIME NO. 350/2012 OF AMBALAVAYAL POLICE STATION , WAYANAD)

APPELLANT(S) :

RAJU PAUL @ ABDUL AZEEZ,
C.NO.3034, CENTRAL PRISON, KANNUR

BY ADV. ADV. ABHISHEK KURIAN (STATE BRIEF)

RESPONDENT(S) :

STATE OF KERALA
AMBALAVAYAL POLICE STATION,
CRIME NO. 350/2012

R1 BY ADV. PUBLIC PROSECUTOR M.G.LISHA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27-10-2015,
THE COURT ON 11/11/2015 DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.A.No.78 of 2015

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Dated this the 11th day of November, 2015

JUDGMENT

The sole accused who stands convicted in S.C.No.132 of 2013 of the Additional Sessions Court-I, Kalpetta for offence punishable under Section 304 Part II of the Indian Penal Code is the appellant herein.

2. The allegation of the prosecution is that the deceased Varghese was the paternal uncle of the accused. Varghese and his wife were living together in a house and accused used to stay with them, occasionally. The accused had embraced Islam. On 09.11.2012, accused went to PW1 and is reported to have told that he had kicked Varghese, and was lying dumped on the floor of his house. He rushed to the spot and found Varghese lying on the floor, with bleeding injuries. Injured was immediately rushed to the nearby hospital from where he was shifted to Bathery hospital and thereafter in turn referred to the Medical College hospital. It was alleged that the accused had attempted to pray in the name of Allah, which was objected to by Varghese. Infuriated, the accused hit him on head with a stick and thereafter, stamped on the chest

and the stomach. Blood started flowing from the nose and ears. While undergoing treatment in the medical college hospital, Varghese died on 20.11.2012. In the meanwhile, on 13.11.2012 at about 11.30 a.m., PW1 had laid the FIS which was recorded by PW9. Originally, the charge was under Section 324 and consequent to the death of Varghese, it was altered to Section 302 of IPC. After conclusion of the investigation, final report was laid before the Court for offence punishable under Section 302 of the IPC. The accused pleaded not guilty and faced the trial.

3. On the side of the prosecution, PWs.1 to 12 were examined and Exts.P1 to P14 were marked. No material object was identified. The court below on an evaluation of the available materials, concluded that though the culpability of the accused was proved, evidence did not establish the commission of an offence punishable under Section 302 IPC. However, court below held that the ingredients of Section 304 part II of the IPC were made out, convicted the accused and sentenced him to undergo rigorous imprisonment for ten years. Set off was allowed. Aggrieved by the above conviction and sentence, accused has preferred this appeal from jail. Since he is not represented by a

counsel, Adv. Sri. Abhishek Kurian was appointed as the counsel on State Brief. Heard the learned counsel for the accused and the learned Public Prosecutor and examined the records.

4. The allegation against the accused is sought to be established through the oral testimony of PWs.1 and 2. Both are stated to be neighbours. Both have deposed uniformly alleging that the accused had approached them on 09.11.2012 at about 7 a.m. separately and conveyed to each of them, that he had kicked and dumped Varghese. Thereafter, both of them rushed to the house and found Varghese with bleeding injuries. Thereafter, he was taken to hospital and ultimately to the Medical College Hospital in an ambulance.

5. It is an admitted fact that while undergoing treatment in the Medical College Hospital, Varghese died. The cause of death is stated to be established through the evidence of PW10 who conducted the autopsy and issued Ext.P8 autopsy report. PW1 in his evidence have stated that he saw the injured lying in his house with bleeding from his ears and nose. Immediately, he was rushed to the hospital and was put on the ventilator. This is corroborated by PW2, who also deposed that he had seen

Varghese with bleeding injuries. It appears that the injury was sustained on his body sometime during the night on 08.11.2012 or in the morning on 09.11.2012. Ext.P8 autopsy report refers to 18 injuries on the various parts of the body. The doctor had noticed that all the injuries were resolving and were of same age. Regarding the opinion as to death, he had recorded that Varghese died of compressive blunt thoraco abdominal injuries causing multiple bilateral fracture of ribs and involving the lungs and abdominal visceral organs. He had also sustained blunt trauma to the head on both sides (suggestive of counter blunt pressure effect). Ext.P2 is the inquest report which also indicates the cause of death as the injury sustained on the body of Varghese. There is absolutely no other suggestion regarding the cause of death. Hence, the available materials unequivocally establish that Varghese had died of the injuries sustained on his chest and abdomen, as alleged by the prosecution.

6. In Section 313 Cr.P.C questioning, the accused has set up a defence of absolute innocence. This defence was carried forward by him in the course of cross examination of all the witnesses. There was no independent evidence on his side to

substantiate defence. Hence, available materials will have to be scanned to find out whether prosecution has succeeded in proving the allegation against the accused.

7. PW1 is the neighbour of Varghese. He deposed that the wife of Varghese was not there on the relevant day and had gone to her house. Accused had been living with Varghese during the past one week. Witness deposed that on 09.11.2012, while he was milking the cow, accused approached him and informed that he had kicked Varghese and dumped him and enquired whether he can get an autorikshaw. After conveying this, he left the place. PW1 rushed to the house of Varghese and saw him lying in a pool of blood. PW1 further deposed that Varghese had informed that the accused had hit him, and pleaded to take him to the hospital. According to the witness, they took him to the hospital and during that time, he was conscious. He was taken to the Medical College Hospital and was put on ventilator. He died after 7 days. He further deposed that he was a witness to the Ext.P2 inquest report also. He further stated that he had gone to the police station and laid Ext.P1 FI statement. Ext.P7 FIR was registered thereupon.

8. PW2, another neighbour also deposed that while he was consuming tea in a tea shop, accused came there and informed that he had kicked Varghese and needed an autorikshaw. On getting this information, PW2 rushed to the house of Varghese and found him lying on the floor, bleeding from ears and mouth. The injured informed that accused had kicked him and requested him to be taken to the hospital. He also deposed that the injured was taken in a vehicle to the hospital and thereafter, to the Medical College Hospital, Calicut, where he was put on ventilator. He died while undergoing treatment.

9. PW4 is another neighbour who deposed that he saw the accused last on 08.11.2012 at about 3 p.m. Accused was also there in the house. In the cross examination, he admitted that he was residing very near to the house of Varghese and was in his house from 7 p.m. onwards. He admitted that he did not hear any sound from the house.

10. PW5 is the wife of the deceased Varghese. She deposed that she got information about the incident and rushed to the Medical College Hospital. She reached there at about 3 p.m. and met Varghese in the ICU. He started sobbing and thereafter

informed that when accused prayed in the name of Allah, it was objected to by Varghese and he was beaten up by Varghese.

11. Learned counsel for the accused contended that the prosecution case was unbelievable and that the version of PWs.1 and 2 suffered from various contradictions and omissions. It was contended that there were several material contradictions in the versions of PWs.1 and 2. It was stated that PW1 in his chief examination had stated that accused came to him while he was milking the cow. On the other hand, in his version to the police, he had stated that accused met him while he was returning after supplying the milk. He first deposed that the accused has asked him as to whether an autorikshaw can be made available. This is not seen recorded in Ext.P1 FIS. Further, according to PW1, the wife of Varghese had not reached the Medical College Hospital till Varghese was shifted to the ventilator. However, in the re-examination he clarified that wife had informed to reach the hospital by evening. On the other hand, PW2 in his evidence had deposed that he reached the Medical College Hospital at about 1.30 to 2 p.m. By that time, wife of Varghese had reached there. He remained there till 10 p.m. and left after shifting Varghese to

the ventilator. This is diametrically opposite to the version spoken by PW1. Another contradiction pointed out by the learned counsel was that PW2 did not disclose to the Investigating Officer that accused had enquired about getting an autorikshaw. Another contradiction pointed out was that he had told the police that the accused was hit with wooden rod. PW2 initially stated that he found Varghese in an unconscious stage. Relying on this, learned counsel contended that this indicates that the version of PWs.1 and 2 that Varghese had informed them that the accused had committed the offence could not be believed. However, both the witnesses had stated that they were told by Varghese that the accused had hit him. In the above circumstance, it cannot be believed that Varghese was unable to speak at that time.

12. It is pertinent to note that PWs.1, 2 and 5 had stated that the accused had hit Varghese with a stick. PW3 was a witness to the recovery of a wooden rod by Ext.P4 seizure mahazar. It was recovered from the bedroom of Varghese on an allegation that it was used for commission of the offence. However, by Ext.P11 report, the Investigating agency informed the Court that the above wooden rod was not involved in the

incident. PW12 Investigating Officer had also admitted the fact that a wooden rod was recovered. According to PW1 and PW2, Varghese had informed them that accused had hit him on the head with a wooden rod. Postmortem refers to the injury on the head. However, strangely, the prosecution took a stand that the wooden rod which was seized was not involved in the crime for the reasons best known to the investigating agency. Learned counsel for the accused strongly contended that consequently, the injury on the head remains unexplained. It is true that the stand taken by the investigating agency in this regard appears to be highly doubtful. After having found that accused had hit Varghese with a wooden rod and after recovering it, without any reason investigating agency retracted from the stand that wooden rod was not involved. Even though the stand of the investigating agency is doubtful, that does not by in any manner weaken the allegation against the accused.

13. Ext.P5 is a certificate of ownership issued by the Panchayath Secretary, who was examined as PW7. The above document proves that the house where the incident took place was in the ownership of the wife of Varghese.

14. Learned counsel for the accused further contended that there was 4 days delay in lodging the FIS. Admittedly, the incident happened in the morning of 09.11.2012. However, FIS was laid only on 13.11.2012. It is to be noted that the injured was taken to the Medical College Hospital, Calicut and the wife had directly reached that hospital. PW1 who lodged the FIS had also gone there and returned only by night. There was no close relative available at the spot. Further, considering the entire facts and circumstances and further fact that the allegation against the accused is sought to be established through the medical evidence also, I feel that the delay is inconsequential. Further, accused has no case that the delay was with the object of creating evidence or for tampering with records.

15. The entire allegation against the accused is sought to be established through the circumstantial evidence. The motive alleged is provocation caused to the accused, since he wanted to offer his prayers in the name of Allah, which was objected to by the deceased. There is no direct evidence to prove this. However, there appears to be an extra judicial confession of the accused by PWs.1 and 2. Evidently, an extra judicial confession has to be

approached with due care and caution as held by the Supreme Court in **Sahadevan Vs. State of Tamil Nadu (2012(6) SCC 403)**. In this case also, the extra judicial confession has to be approached with due care and caution. PWs.1 and 2 have consistently stated that the accused met them individually and conveyed that he had kicked and dumped, Varghese. This version of PWs.1 and 2 is immediately followed by both of them reaching the house and meeting the injured Varghese. Immediately thereafter, he was taken to the hospital. The entire circumstance has a ring of truth, and is believable. There is no allegation that both the witnesses have any reason to falsely implicate the accused. Hence, there is absolutely no circumstance to doubt the version spoken by PWs.1 and 2. The extra judicial confession of the accused can safely be relied on.

16. Another piece of evidence is the version spoken by Pws.1, 2 and 5 that the injured himself had disclosed about the cause of injury. All the witnesses have uniformly stated that the injured told them that the accused had caused the injury. There is no reason to doubt this version also.

17. Another important circumstance advanced by the prosecution was that the accused was seen in the company of the injured by PW4 on the previous evening. The last seen theory can be applied in the above circumstance.

18. The above facts lead to an irresistible conclusion that the accused had committed the offence. Court below on an evaluation of the facts has held that Section 304 Part II of the IPC was attracted. I find no reason to take a different view and the conviction imposed by the court below is only to be sustained.

19. The act alleged against the accused is gruesome. The postmortem report indicates that the deceased had 18 injuries on his body, spread over various parts of the body. The first three were injuries on the head. There were injuries which resulted in the fracture of several ribs. He had kicked on the chest as well as the abdomen. Evidently multiple attacks have been made on the body of the injured. After the incident, he without any remorse went to PW1 and PW2 and informed that he has "kicked and dumped" Varghese. This approach seems to be inhumane. This cannot be lightly seen. The court below has imposed a sentence of 10 years rigorous imprisonment. Considering the fact that the

accused is aged about 49 years and the incident happened on the spur of the moment and did not involve any premeditation, I feel that a lenient view can be taken and the sentence of 8 years rigorous imprisonment will serve the interest of justice.

In the result, the appeal is allowed in part. While confirming the conviction under Section 304 Part II of IPC, the sentence is modified to rigorous imprisonment for 8 years . The accused is entitled for set off.

Sd/-

SUNIL THOMAS
Judge

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