

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.T.SANKARAN
&
THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

WEDNESDAY, THE 15TH DAY OF JULY 2015/24TH ASHADHA, 1937

CRL.A.No. 529 of 2010 ()

AGAINST THE JUDGMENT DATED 31.12.2009 IN SC 230/2008 OF
SESSIONS COURT-V, ERNAKULAM
C.P.NO.4/08 OF JUDL. FIRST CLASS MAGISTRATE COURT-I, ALUVA

APPELLANT(S)/ACCUSED:

ABDUL MAJEED, S/O.PAREEKUTTY
PALLIKKAPARAM HOUSE
PUSHPANAGAR COLONY, EDATHALA
ALUVA.

BY ADVS.SRI.RENJITH B.MARAR
SRI.C.V.MANUVILSAN

RESPONDENT(S):

STATE OF KERALA
REPRESENTED BY ITS PUBLIC PROSECUTOR
HIGH COURT OF KERALA
ERNAKULAM. (CRIME NO.726/06 OF ALUVA
POLICE STATION).

R BY PUBLIC PROSECUTOR SRI.K.K.RAJEEV

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
15-07-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

K.T.SANKARAN & B.SUDHEENDRA KUMAR, JJ.

Crl.Appeal No.529 of 2010

Dated this the 15th day of July, 2015

JUDGMENT

K.T.Sankaran, J.

The appellant was found guilty for the offence under Section 302 of the Indian Penal Code and he was sentenced to undergo imprisonment for life and to pay a fine of ₹25,000/- and in default of payment of fine, to undergo rigorous imprisonment for six months. The appellant challenges the conviction and sentence.

2. Hereinafter the appellant/accused is referred to as 'the accused'.

3. The charge against the accused is that on 15th June, 2007, at about 10 A.M., he committed murder of Nizar, by

intentionally stabbing him with a screw driver on his neck and caused the death of Nizar, near to Choondy junction at Edathala in Aluva East Village and thus, committed an offence punishable under Section 302 of the Indian Penal Code.

4. The accused is an autorickshaw driver. He used to ply his autorickshaw at a place different from the place of incident. The deceased Nizar was an employee in a meat shop. On the previous date of the incident, two boys died due to drowning. The deceased was instrumental for calling a hartal at the place till the cremation of the dead bodies of the two boys was over. The shops at Choondy junction were closed at the instance of the deceased. On the date of the hartal, the accused brought his autorickshaw to Choondy junction. The deceased obstructed the plying of that autorickshaw and he put obstacles to the plying of the autorickshaw. The prosecution alleged that

due to that incident, the accused had enmity towards the deceased. It was alleged that on the date of the incident, there occurred a quarrel between the accused and the deceased and the accused drew a screw driver from his autorickshaw and proceeded towards the deceased. Seeing this, the deceased went back and he fell down. The accused stabbed him on his neck with MO1 screw driver. The deceased sustained bleeding injuries. The deceased himself hired an autorickshaw and went to Carmel hospital where he was examined by PW11 Medical Officer who issued Exhibit P7 wound certificate. The deceased died at about 10.25 A.M. on the same day at Carmel Hospital.

5. The uncle of the deceased lodged Exhibit P1 F.I. Statement at 11.30 A.M., which was registered by PW19, the Sub Inspector of Police. Inquest on the dead body of the deceased was carried out by PW22, the Circle Inspector of

Police, and Exhibit P2 inquest report was prepared. The postmortem examination was conducted by PW12, who issued Exhibit P8 postmortem certificate on 16.6.2006. The accused was arrested on 1.8.2006. He was in police custody from 5.8.2006 to 7.8.2006. It was alleged that he made a confession statement and as led by him, MO1 screw driver was discovered from near a chira, as per Exhibit P9 seizure mahazar, which was witnessed by PW13. PW22 conducted the investigation and it was continued by PW21 who completed the investigation and laid the charge.

6. On behalf of the prosecution, PWs 1 to 22 were examined, Exhibits P1 to P24 were marked and MOs 1 to 6 were identified. On behalf of the defence, Exhibits D1 to D1(c) were marked. PWs 1, 5, 6, 7 and 8 were examined as eye witnesses. Except PWs 1 and 8, all other eye witnesses turned

hostile to the prosecution. PW1 stated that he was running a tea shop (thattukada) near Choondy junction. When PW1 was engaged in the thattukada, he saw a few people running to the place of incident stating that a quarrel was going on there. PW1 saw the accused and the deceased quarreling with each other. Thereupon, the accused took out a weapon like a steel knife from his autorickshaw and stabbed on the neck of the deceased with that weapon. PW1 identified that weapon as MO1. He also stated that when the deceased saw the accused taking the weapon from the autorickshaw, he tried to withdraw and he proceeded for about 5 meters. He fell down. While the deceased tried to get up, the accused ran towards him and stabbed him and the accused left the place in his autorickshaw. The deceased hired an autorickshaw and went to the hospital. PW1 also spoke about the hartal and the role of the deceased in the matter of closure of the shops. The incident of obstructing

the autorickshaw of the accused by the deceased was also spoken to by PW1.

7. PW8 saw the accused and the deceased quarreling with each other and he stated that they were separated. He did not see any incident thereafter and he only heard that Nizar was taken in an autorickshaw to the hospital.

8. PW11, the Casualty Medical Officer of Carmel Hospital, stated that the deceased died two or three minutes after he was brought to the hospital. He also stated that the injury sustained by the deceased could be caused by MO1. He noticed profuse bleeding on the left portion of the neck of the deceased and opined that such kind of bleeding in the ordinary course of nature is sufficient to cause death.

9. In Exhibit P8 postmortem certificate, ante-mortem injury No.1 noted is the following :

“1. Incised stab wound 2.5x0.5 cm. oblique situated on the left half of front of neck, its inner upper square cut end 3.7 cm. outer to midline and 3 cm. below jaw border and outer lower sharply cut end was 4 cm. below the jaw border. It cut the skin, subcutaneous tissue and strap muscles on the left side of neck, entered the larynx by cutting the left half of thyroid cartilage, cut the right half of thyroid cartilage, strap muscles on right side of neck, right subclavian artery and entered the right pleural cavity inner to the first rib, transfixated the upper lobe of right lung and terminated by making a cut 0.3x0.1x0.1 cm. on the inner aspect of right fourth rib in the anterior axillary line.

The wound track was directed downwards, backwards and to the right for a total minimum depth of 21 cm. The right chest cavity contained 1.5 litres of fluid blood and air. The right lung was partially collapsed.”

10. PW12 who conducted the postmortem stated in

evidence that the deceased died as a result of the stab injury on his neck and it can be caused by MO1. He stated in evidence that he had never seen “such an injury which was starting from neck going to fourth rib, chest piercing lungs.”

11. On a re-appraisal of the entire evidence, we do not find any ground to interfere with the finding of the court below that Nizar died as a result of the stab injury caused by the accused with MO1 screw driver. The evidence of PW1 is believable. Though PWs 4, 5, 6 and 7, who were running hotel grocery shop, vegetable shop and hardware shop respectively at Choondy junction, turned hostile, we do not see any reason to reject the evidence of PW1. PW8 had also spoken about the first part of the incident, namely, the quarrel between the accused and the deceased. We do not also find any ground to disbelieve the discovery of MO1 on the disclosure made by the

accused. It is proved in the case that there was quarrel between the accused and the deceased on the previous day as well as on the date of the incident. It is also proved that the autorickshaw driven by the accused was way laid by the deceased on the previous day of the incident and that resulted in an altercation between the two. The medical evidence available in the case supports the prosecution story. Exhibit P15 Certificate of chemical analysis shows that human blood was detected on MO1 and this fact was spoken by PW17, the Assistant Chemical Examiner.

12. From the materials available in the case, we concur with the finding rendered by the court below that the accused stabbed the deceased with MO1 screw driver as alleged by the prosecution and that the deceased died as a result of the injury sustained therefrom.

13. The learned counsel appearing for the appellant lastly submitted that even if the prosecution case with respect to the incident, the injury and cause of death is accepted as true, the only offence that is made out would be an offence under Section 304 Part II of the Indian Penal Code. He submitted that the intention to cause death is not established and there was no premeditation on the part of the accused. He submitted that the accused was plying the autorickshaw elsewhere and he happened to be at the place of incident. Therefore, the story of previous enmity and the intention attributed to the accused to cause the death of the deceased is quite out of place and unsustainable. The learned counsel submitted that on the materials available in the case only an offence under Section 304 Part II of I.P.C. would lie against the accused.

14. Section 299 of the Indian Penal Code provides that

whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. Culpable homicide would be murder except as stated in Exceptions 1 to 5 of Section 300 I.P.C. For the sake of convenience, Section 300 I.P.C. is extracted below:

“300. Murder :- Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or -

Secondly.- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

Thirdly.-If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or -

Fourthly.-If the person committing the act knows

that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1. When culpable homicide is not murder - Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:-

First- That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly- That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly- That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation- Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2- Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3- Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4-Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a

cruel or unusual manner.

Explanation- It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5- Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.”

15. To constitute the culpable homicide as murder, any of the four conditions mentioned Firstly, Secondly, Thirdly or Fourthly should be available. Even if any of those clauses applies, still culpable homicide would not amount to murder, if the case comes under any of the five Exceptions to Section 300 I.P.C. If any of the five Exceptions is attracted, the case would go out of Section 300/302 I.P.C. and it would remain as culpable homicide not amounting to murder and Section 304 I.P.C. would be attracted. Part I or Part II or Section 304 I.P.C. will apply depending upon the element of intention. If the act

by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, Part I of Section 304 I.P.C. would be attracted. If the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death, Part II of Section 304 I.P.C. would be attracted.

16. In **Rajwant Singh and another v. State of Kerala** (AIR 1966 Supreme Court 1874), the Supreme Court considered the scope and ambit of Sections 299, 300 and 304 I.P.C. and held thus :

“(8) what distinguishes these two offences is the presence of a special mens rea which consists of four mental attitudes in the presence of any of which the lesser offence becomes greater. These four mental attitudes are stated in Section 300

I.P.C. as distinguishing murder from culpable homicide. Unless the offence can be said to involve at least one such mental attitude it cannot be murder....

(9) The first clause says that culpable homicide is murder if the act by which death is caused is done with the intention of causing death. An intention to kill a person brings the matter so clearly within the general principle of mens rea as to cause no difficulty. Once the intention to kill is proved, the offence is murder unless one of the exceptions applies, in which case the offence is reduced to culpable homicide not amounting to murder.

(10) The second clause deals, with acts done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom harm is caused. The mental attitude here is two-fold. There is first the intention to cause bodily harm and next there is the subjective knowledge that death will be the likely consequence of the intended injury.....

(11) The third clause discards the test of

subjective knowledge. It deals with acts done with the intention of causing bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. In this clause the result of the intentionally caused injury must be viewed objectively. If the injury that the offender intends causing and does cause is sufficient to cause death in the ordinary way of nature the offence is murder whether the offender intended causing death or not and whether the offender had a subjective knowledge of the consequences or not. As was laid down in *Virsa Singh v. State of Punjab*, 1958 SCR 1495 : (AIR 1958 SC 465) for the application of this clause it must be first established that an injury is caused, next it must be established objectively what the nature of that injury in the ordinary course of nature. If the injury is found to be sufficient to cause death one test is satisfied. Then it must be proved that there was an intention to inflict that very injury and not some other injury and that it was not accidental or unintentional. If this is also held against the offender the offence of murder is established.”

17. In State of Andhra Pradesh v. Rayavarapu Punnayya and another (AIR 1977 Supreme Court 45), it was held thus :

“21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder' on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to “culpable homicide” as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300, Penal Code, is reached. This is the stage at which the Court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four Clauses of the definition of 'murder' contained

in Section 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third Clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the Exceptions enumerated in Section 300, the offence would still be 'culpable homicide not amounting to murder' punishable under the First Part of Section 304, Penal Code.

22. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages.”

18. The facts and circumstances available in the case clearly show that Exception 4 to Section 300 I.P.C. would apply

in the case. Admittedly, there was no premeditation. Incident happened as a result of sudden fight. The evidence would disclose that the act was committed by the accused in the heat of passion upon a sudden attack. It cannot also be said that the accused took undue advantage or acted in a cruel or unusual manner. Since Exception 4 to Section 300 I.P.C. applies, the act alleged would constitute culpable homicide not amounting to murder and it would attract Section 304 I.P.C. In the present case, the facts and circumstances would disclose that the accused had the intention of causing bodily injury as is likely to cause death. Therefore, we are of the view that Section 304 Part I of the Indian Penal Code is attracted.

19. For the aforesaid reasons, we find the accused guilty for the offence punishable under Section 304 Part I of the Indian Penal Code. Rigorous imprisonment for a period of ten

years would be adequate punishment in the facts and circumstances of the case.

20. Accordingly, the Criminal Appeal is allowed in part and the conviction and sentence under Section 302 I.P.C. is set aside. The appellant/accused is convicted under Section 304 Part I of the Indian Penal Code and he is sentenced to undergo rigorous imprisonment for a period of ten years and also to pay a fine of ₹25,000/-. In default of payment of fine, the appellant/accused shall undergo simple imprisonment for a period of six months. The fine amount, if realised, would be paid to the legal representatives of the deceased.

The compensation awarded by the trial court at ₹25,000/- to our mind, is inadequate, taking into account the facts and circumstances of the case. Section 357A of the Code of

Criminal Procedure, which was introduced by Act 5 of 2009, provides for Victim Compensation Scheme; on the recommendation made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the Victim Compensation Scheme. We direct the District Legal Service Authority, Ernakulam, to decide the quantum of compensation to be awarded under the Victim Compensation Scheme to the dependants of Nizar, the deceased. Such compensation shall be distributed to the legal representatives of the deceased.

K.T.SANKARAN
JUDGE

B.SUDHEENDRA KUMAR
JUDGE