

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

THURSDAY, THE 17TH DAY OF DECEMBER 2015/26TH AGRAHAYANA, 1937

CRL.A.No. 812 of 2015 ()

AGAINST THE JUDGMENT IN SC 32/2013 of ADDL.DISTRICT & SESSIONS COURT-V,
KOTTAYAM DATED 27-08-2014

APPELLANT:

MOHANAN, C.NO.9496, CENTRAL PRISON, THIRUVANANTHAPURAM

BY ADVS.ADV. K.A.ANAS (STATE BRIEF)

RESPONDENT:

STATE OF KERALA

REPRESENTED BY DGP, HIGH COURT OF KERALA
KERALA

BY PUBLIC PROSECUTOR: SMT M G LISHA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.A.No.812 of 2015

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Dated this the 17th day of December, 2015

JUDGMENT

The sole accused, who stands convicted for offence punishable under Section 308 of the Indian Penal Code, is the appellant herein.

2. The case of the prosecution is that on 10.10.2010, the accused picked up a quarrel with his wife and thereafter, when he tried to assault the wife, the daughter and son-in-law of the accused intervened. The accused took out a chopper that was lying on the floor and used it, aimed at the head of the son-in-law. Though he tried to resist it with his arm, it hit on the forehead and sustained injury. He was immediately rushed to the hospital where he underwent treatment. FIS was laid on the next day at 1.15p.m. at the hospital. Crime was registered and after investigation, final report was submitted for offence punishable under Section 308 of IPC. The accused who was arrested on 11.10.2012 itself faced the trial on his plea of innocence. On the side of the prosecution, PWs.1 to 9 were examined and Exts.P1 to P9 were marked. MOs.1

and 2 were identified. Court below, relying on the oral testimony of the eye witnesses who are PWs.2, 3 and 4, convicted the accused and sentenced him to undergo rigorous imprisonment for 5 years for offence punishable under Section 308 of IPC. Set off was allowed.

3. The accused who is in jail has preferred this appeal. Since he expressed the inability to appoint a lawyer of his choice, Adv.K.A.Anas was appointed as counsel on State Brief. Heard the learned counsel on State Brief and Adv.M.G.Lisha, learned Public Prosecutor. Perused the records.

4. PWs.2, 3 and 4 are the crucial eye witnesses projected by the prosecution to sustain the allegation against the accused. PW2 is the injured himself. PW3 is the wife of the accused and PW4, the daughter of the accused who was also the wife of PW2. PW2 in his evidence had narrated the sequence in which the incident took place. According to him, since his wife was carrying, on the desire of the accused himself, he and his wife were residing with the accused. He deposed that on the date of the incident, PW3 and 4 had gone to Kidangoor hospital for a regular check up. They returned at about 3 p.m. The accused picked up a quarrel with them regarding their late coming, thereafter he left the

house. He returned at about 7.30p.m. and picked up quarrel with PW3 at the varandah of the house. When there was a push and pull, PWs.2 and 4 intervened. The accused questioned about the right of PW2 to intervene in the dispute, took a chopper which was lying on the floor and hit on the left side of his forehead. He sustained bleeding injuries and was immediately rushed to the hospital by PWs.3 and 4.

5. This version of PW2 was corroborated in substance by PWs3 and 4. The essential facts leading to the injury to PW2 is consistently and uniformly spoken by PWs.3 and 4. Even though he was cross examined in detail, absolutely no contradiction or omission touching upon his statement given to the police earlier was brought out. There was no embellishment in the evidence apparent on the face of the record.

6. The prosecution relied on the medical evidence in the form of oral testimony of PW1 as well as Ext.P1 wound certificate issued by him. PW1 was the house surgeon of Medical College Hospital wherein PW2 was admitted. Ext.P1 shows that he had sustained left frontotemporoparietal subdural hematoma, pneumocephalus, subarachnoid haemorrhage. He was admitted in the hospital on 10.10.2012 and was discharged on 23.10.2012.

The doctor further stated that the injury was grievous. The doctor was also shown MO1, weapon allegedly used for commission of crime. He tendered evidence to the effect that an injury in the nature of one mentioned in Ext.P1 can be caused by the weapon like MO1.

7. The defence set up by the accused as is evident from the trend of cross examination is one of absolute innocence. Though he did not challenge the main part of the incident which led to the injury, the contention of the accused was that PW2 had fallen down and sustained an injury. This was put to PW1 at the time of cross examination, who also admitted that an injury in the nature of one seen in Ext.P1 can be caused by a fall on a hard and rough surface. However, in his reply to Section 313 Cr.P.C. questioning, he had set up a defence that he was innocent, that others were attempting to assault him and the injury might have happened in the course of it.

8. The available materials will have to be appreciated in the background of this defence set up. Even though, the defence that it was due to fall was set up, Ext.P1 does not disclose the cause of the incident. PW2 has an explanation that he did not convey the cause of the injury to the doctor, since he was under

the trauma of the injury. However, in Ext.P2 FIS, he had given a detailed version regarding the incident, attributing the complicity of the accused. Even though the accused had set up a case that PW2 had fallen down and sustained an injury, the version of PWs.2 to 4 does not support it. There is no reason to believe such a defence also, especially in the background that there is no reason as to why the wife, daughter and son-in-law of the accused should tell falsehood against him. All of them were living under the same roof and there was no reason as to why all the family members tell falsehood which may lead to the conviction of the accused. Hence, I am not inclined to accept the defence set up that it was due to a fall.

9. The next crucial question that arises is whether the injury was caused by the accused. The version of PWs.2 to PW4 as mentioned above, is consistent. There is absolutely nothing to doubt the version. This has to be appreciated in the background of testimony of PW1 that such an injury can be caused by a weapon like MO1. Further, the oral testimony of PWs.2 to 4 gets its corroboration from the attending circumstances also.

10. Learned counsel for the accused vehemently contended that the prosecution case suffers from various infirmities. It was

contended that there were sufficient indication that he is entitled for a defence under Sections 81 and 86 of the IPC. However, the sequence of events as narrated by PWs.2 to 4 clearly establish that such a defence is not sustainable.

11. Learned counsel on State Brief, relying on authorities, vehemently contended that the offence under Section 308 of IPC will not lie against the accused. It was contended that even if the prosecution case is believed, there was absolutely no intention on his part to cause an injury which may amount to culpable homicide as defined under Section 299 of IPC or had requisite knowledge, that by his conduct an injury that may lead to culpable homicide could be caused. Learned counsel Mr.K.A.Anas relied on the decision reported in **Joti Prasad v. State of Haryana (1993 KHC 704)** to contend that the ingredients of knowledge as defined under the statute is not brought out. In the above decision, it was held that knowledge is an awareness on the part of the person concerned indicating the state of mind. Further, knowledge will be slightly on higher plane than “reason to believe”. It was held that a person can be supposed to know whether there is a direct appeal to his senses and a person is presumed to have a reason to believe it, if he has sufficient cause to believe the same as defined

under Section 26 of the IPC. Learned counsel further relied on the decision reported in **Bishan Singh and Another v. State ((2009) I Supreme Court Cases (CrI)259)** to contend that the ingredients of Section 308 were not attributed in that case. The Supreme Court held that before an accused can be held to be guilty under Section 308 of IPC, it was necessary to arrive at a finding that the ingredients thereof, namely, requisite intention or knowledge was existing. There cannot be any doubt that such an intention or knowledge on the part of the accused to cause culpable homicide is required to be proved. Learned counsel further contended that in that reported decision, the Honourable Supreme Court was dealing with a case wherein several persons were accused of having hit on the various parts of the body of the injured. The injury caused included 3 lacerated wounds on the head. On an evaluation of the facts, Supreme Court concluded that the ingredients under Section 308 of IPC were not made out.

12. Though I am inclined to accept the proposition which is also the settled, that there must be requisite knowledge or intention to commit culpable homicide to attract Section 308 of IPC, on facts, the present case stands on a different footing from the above decision. The necessary ingredients of knowledge can

be deducted from the evidence of PWs.2 to 4. It is important to note that the sequence of events indicate that, after the quarrel with the wife had started, it was followed by pushing of the wife. At that moment, both PWs.2 and 4 were standing on the veranda. Thereafter, they intervened and tried to refrain the accused from proceeding further. This was followed by the accused asking PW2 as what was his authority to interfere in that issue. This clearly shows that he was in his senses and he meant, what he intended. It was thereafter he took up the knife which was lying on the floor and inflicted the injuries on PW2. This sequence clearly indicates that at that moment, though there is sufficient evidence to conclude that it was not a premeditated act, he had the sufficient knowledge and had intended to cause injury on the body. Otherwise, he would not have picked up the weapon. At that time, there was no threat to his life.

13. This conclusion is fortified by several other reasons also. The situs of injury is on the forehead. The medical record indicates that the weapon had pierced the skull and the brain had injured. That shows the nature of force applied. It is also pertinent to note that the actual inflicting of injury by the accused was preceded by his own words. Above all, the weapon used is one

which the accused himself uses for his livelihood. He knows its sharpness, use and the impact of it when it applied on a human body. With these facts, sufficient knowledge as contemplated under Section 308 of the IPC can be attributed to the accused. Hence, I am not inclined to accept the contention of the learned counsel for the accused that the offence under Section 308 of the IPC is not made out.

14. The learned counsel for the accused further contended that having regard to the facts and circumstances of the case, the sentence imposed on him is highly excessive and on the higher side. It is pertinent to note that the incident happened as a sequel to a family dispute. All the family members were living together. Accused was a person who had sustained an injury consequent to a fall and was convalescing. In the above circumstances, there is nothing on record also to show that there was any loss of relationship between the members of the family. In fact, the accused himself and his wife had asked PW2 to come and reside with them. Evidently, it was not a premeditated act and happened on spur of the moment. There cannot be any criminal intention attributed to the accused. Having regard to these facts, I feel that the sentence imposed by the court below is on the higher side.

Substantially, a sentence of 3 years rigorous imprisonment would serve the interest of justice. It appears from the records that he was arrested on 11.10.2012 and has been in jail during the period of trial and even thereafter. The sentence was not suspended during the pendency of this proceeding. Hence, essentially the period undergone by him will cover the proposed sentence. If he has covered the substantive sentence of three years, he is entitled for release from the jail.

In the result, the appeal is allowed in part. While maintaining the conviction under Section 308 of the Indian Penal Code, sentence is modified to three years rigorous imprisonment and if he has already completed the sentence, he shall be released from jail forthwith, if his presence is not required in connection with any other case.

Sd/-

SUNIL THOMAS
Judge

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P.A to Judge