

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

WEDNESDAY, THE 9TH DAY OF DECEMBER 2015/18TH AGRAHAYANA, 1937

CRL.A.No. 268 of 2012 ()

(AGAINST THE ORDER/JUDGMENT IN SC 227/2009 of ADDL. DIST. COURT
(ADHOC)-II, KALPETTA)

APPELLANT(S)/ACCUSED:

1. SURESH,
AGED 36 YEARS, S/O. SUNDRAN, MANGALATH HOUSE
MANANTHAVADY

2. SURESH @ CHINNAN,
AGED 30 YEARS, S/O. PRABHAKARAN, ILLIKKAL VEEDU
THALAPUZHA THAVINHAL,

3. GIREESH,
AGED 36 YEARS, S/O. KRISHNAN, ENVILATHODI VEEDU
IDIKKARA, THAVINHAL

4. SURESH,
AGED 32 YEARS, S/O. KRISHNAKURUPPU,
CHOVVAYIL PUTHANPURAYIL HOUSE, EDAVAKA, KALLODI

BY ADVS.SRI.S.RAJEEV
SRI.K.K.DHEERENDRAKRISHNAN

RESPONDENT(S)/STATE/ADDL.RESPONDENT

STATE OF KERALA
REP.BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM (CRIME NO.454/2008 OF MANANDAVADY POLICE STATION,
WAYANAD DISTRICT)

2.RATHEESH,
AGED 32 YEARS, S/O. APPUKUTTAN,
KAVUMKUNNEL VEEDU, ARATTUTHARA P.O.
VALLIYOORKAVU, PAYYAMPALLY VILLAGE
MANANTHAVADY, WAYANAD DISTRICT.

RADDL BY ADV. SRI.VINOD KUMAR.C
R BY PUBLIC PROSECUTOR M.G.LISHA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 13-10-2015,
THE COURT ON 9/12/2016 DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

Crl.Appeal. No. 268 of 2012

Dated this the 9th day of December, 2015

JUDGMENT

This appeal is directed against the judgment, conviction and sentence in SC No.227/2009 of the Additional Sessions Judge(Adhoc)-II, Kalpetta for offences punishable under Sections 324,326,308 read with Section 34 IPC.

2. The allegation of the prosecution was that the defacto complainant was an autorickshaw driver and that on 21/10/2008 in the evening, the accused inflicted injuries on the body of the defacto complainant. The sequence of the events, as narrated by the prosecution, was that, one of the accused at about 3 O'clock hired the autorickshaw of the defacto complainant, led him through various routes and ultimately to the place of the incident, which was a forest area. While traveling, he had been making mobile calls to several persons. When the vehicle reached the spot, on the direction of the person who was in the autorickshaw, the vehicle was stopped. Three persons were walking along the road. While

the traveller was attempting to pay the autorickshaw charge, the three persons who were walking along the road, joined the traveller. One person took up an iron rod and attempted to hit on the head of the defacto complainant. He resisted and it is stated that, had he not done that, it would have resulted in the death of the defacto complainant. It was stated that all other persons thereafter had beaten him using the same iron rod on the various parts of the body and left the spot. It is alleged that he lost his mobile and Rs.250/- in the above incident. He went to a nearby house, called a friend on mobile, who came and took him to the hospital. It was alleged that previous political enmity was the cause for the above incident. On the basis of a complaint laid by him, the crime was registered and after investigation, the final report was laid for offences punishable under Sections 324,326 and 308 read with Section 341 IPC. On the side of the prosecution, PWs 1 to 9 were examined, PW1 to P11 were marked and MO1 was identified. On the side of the accused, there was no defence evidence, but two portions of the previous statements were marked as Exts.D1 and D2. On an evaluation of the materials, the Additional Sessions Judge

concluded that the offence under Sections 324 and 308 were made out and convicted them to undergo RI for three years each and to pay a fine of Rs.5,000/- and in default RI for one year each for offence punishable under Section 324 IPC. They were sentenced to undergo RI for seven years and to pay a fine of Rs.10,000/- each in default RI for one year for offence punishable under Section 308 IPC.

3. This is challenged by the accused in this appeal. Heard and examined the records.

4. When the matter came up for hearing, it was submitted by the learned counsel for the accused that the matter has been settled amicably between the parties and permission was sought to bring on record the defacto complainant as the second respondent. The 2nd respondent has appeared and filed the vakalath through a counsel. An affidavit was filed by the defacto complainant sworn before a notary public dated 6th October 2015 stating that parties were close neighbours, that due to some misunderstanding, the incident took place and now the matter has been settled between the parties. It was asserted that he do not want to proceed with the case, since the entire

disputes are settled. Hence, they requested that the statement which was given on his own volition may be accepted and the matter either quashed or the accused acquitted. The learned counsel for the defacto complainant also endorsed the averments made in the affidavit.

5. The learned counsel for the appellants vehemently contended that in the light of the settlement between the parties, the conviction arrived at by the court below may be quashed. It was contended that further continuation of the proceedings would amount to abuse of process of Law and result in manifest injustice. The learned counsel relied on the various decisions of the Supreme Court to buttress his arguments. Evidently, the accused stood convicted for offence under Section 308 IPC, which is not compoundable. Though there are several decisions to the effect that the court, in appropriate cases, on a finding that the matter has been settled and that the continuance of the proceedings would result in manifest injustice, may quash the proceedings, the Supreme Court in **Gian Singh v. State of Punjab [2012 (4) KLT 108(SC)]** has held that a non compoundable offence cannot be compounded. The court held

that compounding of offences under Section 320 Cr.P.C and quashing of criminal proceedings under Section 482 Cr.P.C. are different and distinct.

6. Having invoked the appellate jurisdiction of this Court and in the absence of any specific prayer seeking relief under Section 482 of the Criminal P.C., I am not inclined to invoke that jurisdiction. Various decisions relied on by the learned counsel for the appellants are not in accordance with the above cited decision.

7. In the above circumstances, the learned counsel for the accused contended that even an offence alleged under Section 308 was not made out. The learned counsel contended that absolutely no evidence was let in by the prosecution to show that the accused had an intention or knowledge to commit culpable homicide. It was further contended that the evidence available in the form of solitary testimony of PW1 on merits did not prove the ingredients for constituting an offence under Section 308 IPC. In the above circumstance, it was necessary to consider the above contention on merits, essentially in the background that the parties have settled the issue.

8. The entire allegation against the accused is sought to be established through the oral testimony of PW1. He had deposed that while he was driving the autorickshaw with the accused in the rear seat, he was asked to stop, when it had reached a forest area. When it was stopped, the traveller called three other persons who were standing near the road. One of them caught hold of the shoulder of PW1,, hit on the various parts of the body and thereafter injured him with MO1 iron rod. He was hit on his head, leg and on various other parts of the body.

9. The version spoken by PW1 suffers from various inferences and contradictions. Even though in Ext.P1, it was stated that when the vehicle was stopped, three persons approached him and attacked him, at the time of the evidence, he modified this version and stated that the traveller in the autorickshaw had called three other persons who were waiting outside, who came and attacked. The main crucial contradiction is regarding the material object used. In Ext.P1, it was stated that one person armed with iron rod had attacked and the same iron rod was used by others to inflict injuries on the various part of the body. However, at the time of evidence, he modified it and

deposed that all the accused were armed with iron rod. However, the investigating officer when examined as PW8, deposed that the injured had not given a statement that the other accused were armed with iron rod. Further, one iron rod alone was produced, which, according to the witnesses, was used to inflict injuries. While PW1 was examined, he had stated that one person had caught hold of his shoulder and pulled him down. This version was neither stated to the investigating officer nor seen recorded in Ext.P1. In Ext.P1, his case was that he lost about Rs. 250/-. At the time of evidence, he modified it as Rs.400/-. Another significant contradiction was that according to PW1, after he was injured, one person came to spot and took him to the nearby house. PW2 in his version corroborated this by stating he took PW1 to the adjoining house. However, in Ext.P1, his version was that he himself had gone to the nearby house, after sustaining injury. Evidence of PW1 to the above extent suffers from substantial contradictions and infirmities. It is also to be noted that he is involved in SC No.126/2009, for offence punishable under Section 436 IPC. Hence, the available material evidence of PW1 has to be approached with due care

and caution, essentially in the background of appreciating the allegation under Section 308 IPC. It is pertinent to note that though his evidence regarding injury is corroborated by PW2 as well as by medical evidence, PW1 did not specifically say that the accused had an intention to cause culpable homicide or that they had sufficient knowledge that the injuries inflicted on PW1 were likely to result in culpable homicide.

10. PW3 is the doctor who deposed on the strength of the wound certificate. He had deposed that injured had deposed that injured had sustained lacerated scalp wound, lacerated wound on ankle, a contusion on right side of the face, contusion on right elbow and left thigh. Doctor opined that injuries were grievous and could be caused as alleged. However, it is pertinent to note that PW3 did not depose that he had seen MO1. The prosecution has not made any attempt to prove that the injuries sustained on the body of the witness can be caused by MO1 and that it corresponds with MO1. PW8 also admitted that MO1 was not shown to PW3. In the above circumstance, evidence on record is insufficient to sustain a conviction under Section 308.

11. The only reason arrived at by the court below to sustain a conviction under Section 308 was based on the injuries alone. It is true that PW3 had stated that injuries were grievous. That does not satisfy the evidence required by law. PW1 did not depose that accused had an intention or knowledge to commit culpable homicide. There was absolutely no overtact indicating that the accused had instigated or made any overtacts which impliedly indicated that they had intention to commit culpable homicide. Even though in the FIS, PW1 had stated that attack was resisted by him with his palm and otherwise it would have resulted in his death, it was not spoken by PW1 at the time of evidence.

12. The appreciation of the above facts show that the available materials are insufficient to sustain a conviction under Section 308 IPC. In the light of the above, conviction against the accused under Section 308 IPC is liable to be set aside and to be confined to Section 324 IPC alone. However, there is no evidence that the weapon used was a dangerous weapon. Hence, the offence can only be one under Section 323 IPC. Conviction under Section 3243 IPC is compoundable. The learned counsel

for the appellant and the learned counsel for the defacto complainant had uniformly stated that they wanted to put a quietus to the entire proceedings and have amicably settled the issue. Considering the fact that the parties are neighbours and the matter has been pending since long, which they have ultimately agreed to settle and no public interest is involved, I feel that parties can be permitted to compound the offence. The learned counsel relied on the decision reported in **Joy v. State of Kerala** [2014 (1) KHC 414] to buttress his submissions.

In the result, the conviction under Section 308 is set aside and the parties are permitted to compound the offence under Section 323 IPC. The decision will have the effect of acquittal of the accused. The appeal is allowed accordingly.

Sd/-

SUNIL THOMAS
Judge

dpk

/true copy/ PS to Judge.

