

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

WEDNESDAY, THE 5TH DAY OF AUGUST 2015 / 14TH SRAVANA, 1937

CRL.A.No. 127 of 2011

AGAINST THE JUDGMENT IN SC 424/2010 of ADDL. SESSIONS JUDGE
(ADHOC) III (FAST TRACK COURT-III), PALAKKAD DATED 12-01-2011

APPELLANT/ACCUSED

RAJAKUMARAN, S/O.CHAMI, KOLLAD VEEDU,
MUTHUR P.O, PALAKKAD.

BY ADVS.SRI.SAJAN VARGHEESE K.
SRI.LIJU. M.P

RESPONDENT(S)/STATE & COMPLAINANT:

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1. STATE OF KERALA, REP.BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA.
 2. THE CIRCLE INSPECTOR OF POLICE,
ALATHUR, KOTTAYI POLICE STATION.

BY PUBLIC PROSECUTOR SMT.T.Y LALIZA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 05-08-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.T. RAVIKUMAR, J.

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Crl.Appeal No.127 OF 2011

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Dated this the 5th day of August, 2015

JUDGMENT

This appeal is directed against the judgment of conviction in S.C.No.424 of 2010 passed by the Court of Session, Adhoc-III (Fast Track Court-III), Palakkad. Appellant was the sole accused therein. He was tried for the offence punishable under Section 302 of the Indian Penal Code and was found guilty and convicted for the offence punishable under Part II of Section 304 of the Indian Penal Code. Upon conviction he was sentenced to undergo rigorous imprisonment for a period of seven years.

2. The case of the prosecution was as follows:-

On 7.8.2009 at about 1.30 p.m. in the premises of House No.11/10 of Mathur Panchayat in Kollad in Mathur-I Village in Alathur Taluk the appellant/accused inflicted blows and cut injuries on one Malu with MO1 knife (koduval) and when she fell down he kicked on her chest and abdomen and due to the injuries

sustained by her on her chest and abdomen Malu breathed her last. There was a dispute between the accused and the deceased Malu over a right of way and owing to the said dispute the appellant was entertaining enmity towards the deceased. PW1, Sreedharan gave Ext.P1 F.I.Statement and based on which Ext.P1(a) FIR was registered at Kottayi Police Station. PW13 conducted the investigation and after completing the investigation he charge sheeted the appellant/accused for the offence under Sections 325 and 302 of the Indian Penal Code. The Court of Judicial First Class Magistrate-I, Palakkad committed the case to the Court of Session, Palakkad and it was numbered as S.C.No.424 of 2010 and then, made over to the Court of Additional Sessions Judge Adhoc-III (Fast Track Court-III), Palakkad for trial and disposal. On appearance of the accused after hearing the parties the court framed charge under Section 302, IPC against the appellant. It was read over and explained to him in Malayalam and he pleaded not guilty and claimed to be tried. Prosecution had examined 14 witnesses and exhibited 17 documents besides identifying MO1 to MO4 to bring home the charge against the

appellant/accused. After completion of the evidence of the prosecution the appellant/accused was examined under Section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances put to him. Additionally, he filed a statement. It was stated therein that the deceased criminally trespassed into his property holding a knife and she caused cut injuries on his chest and beaten him on his limbs. He further stated therein that he went to Kottayi Police Station to lodge a complaint in respect of the said incident. However, he was made to sit there and later, upon the death of Malu he was implicated as the accused. During the cross examination of PW13, the Investigating Officer, the appellant got marked Ext.D1 which is the accident register-cum-wound certificate dated 8.8.2009. The trial court finding that the appellant is not entitled to be acquitted under Section 232, Cr.P.C. called upon him to enter on his defence. Apart from marking the aforesaid documents he had not adduced any evidence in defence. It is after a careful consideration of the arguments advanced and on perusing the evidence on record that the trial Court held that the prosecution had failed to prove that the

appellant herein had committed the offence punishable under Section 302, IPC and consequently, acquitted him of the said offence. At the same time, after appreciating the evidence the trial Court found that the alleged action on the part of the appellant in stamping on the chest and abdomen of the deceased was with the knowledge that he was likely to cause death by such act and consequently, he was convicted for the offence punishable under Section 304 Part II, IPC and sentenced as aforesaid. This appeal is preferred in the said circumstances.

3. I have heard the learned counsel appearing for the appellant and also the learned Public Prosecutor.

4. The appellant contended that the trial Court went wrong in holding that he had committed the offence under Section 304 Part II, IPC as the prosecution had failed to establish that the alleged action was committed by the appellant with the knowledge that he was likely by such act, to cause death of Malu, the deceased. Further it is contended that the court below ought not to have given credence to the testimonies of PWs 2 and 6. PW6 is the son of PW2. They were

entertaining hostility towards the appellant owing to a property dispute. It is contended that the court below ought not to have relied on the version of PW2 that the appellant/accused caused cut injuries on the head and hands of deceased Malu with MO1 knife and thereafter when she fell down, stamped on her chest and abdomen. It is also contended that MO1 is not a chopper; but it is only a knife and further that MO2 and MO3 clothes though sent for chemical examination, Ext.P17 chemical examination report would reveal that the blood group was not detected. It is further contended that the prosecution had failed to explain the injuries on the body of the appellant and therefore, it is fatal to the prosecution. Above all, as an alternative contention, it is contended that taking note of the fact that the incident had taken place in the property of the appellant and that the appellant had also sustained injuries, the court below ought to have found that the appellant had exercised only the right of private defence. Per contra, the learned Public Prosecutor contended that the evidence on record would reveal that the appellant caused cut injuries on the body of deceased Malu with a chopper and when she fell down

on sustaining such injuries, he stamped on her chest and abdomen. The evidence on record were properly appreciated by the trial court and since the impugned judgment is a well merited one, it does not call for any appellate interference, it is further contended.

5. The evidence on record undoubtedly revealed that pursuant to the alleged incident, Malu was taken to District Hospital, Palakkad and she succumbed to the injuries enroute to the hospital. PW9 conducted autopsy on the body of deceased Malu and he issued Ext.P6 post mortem certificate. Ext.P6 would reveal that it is a homicide. It would reveal that the deceased sustained the following antemortem injuries.

1. Incised wound 11x0.3x0.4cm, vertically oblique on top of head, right front end at 11 cm above root of nose in midline. The left back end was 18cm above left eyebrow and 2.5cm to the left of midline. Both ends of the wound were sharp cut and edges contused.
2. Crescentic abrasion 0.5x0.2cm, vertically oblique on right side of face with convexity backwards and slightly downwards, 2cm in front of right ear lobule.
3. Multiple contused abrasions over an area of 9x0.5cm on back and upper aspect of right shoulder, front outer end at 10 cm outer to

root of neck at midline top of shoulder with contusion 9x2x1cm underneath

4. Contusion 6x1x1.5cm, on back and outer aspects of left upper arm, transversely placed at 23 cm above elbow.
5. Incised wound 0.6x0.5x0.4cm at border between back and outer aspect of right upper arm, 12cm above elbow with contusion 6x3x1.5cm underneath.
6. Contusion 7x5x1cm on front of left chest and over left chest and over left sternoclavicular joint, right upper end at 1cm above inner end of left collar bone.
7. Contusion 11x9x1cm on front and right side of chest, 5cm below top of armpit and 10cm outer to midline front of chest.
8. Contusion 6x5x1.5cm on front of left chest, 3cm below collar bone and 7cm outer to midline front of chest.
9. Contusion 12x10x2.5cm on front and left side of chest, 6cm below top of armpit and 10cm outer to midline front of chest.
10. Contusion 9x6x2cm on left half of front of lower abdomen upper inner end 1cm outer to umbilicus. The muscles of abdominal wall underneath were infiltrated with blood.
11. Contusion 6x4x1.5cm on front of hip and lower abdomen, upper end 2cm above top of hip.
12. Incised wound 1.8x0.4x0.5cm on front and inner aspects of right leg, obliquely placed with upper outer end 14 cm below knee and 2.2cm inner to midline front of knee.
13. Incised wound 1.2x0.5x0.4cm on front of left leg in midline, 14cm below knee.
14. Incised wound 1x0.3x0.5cm on midpoint of

front of left knee.

15. Incised wound 1.8x0.3x0.4cm oblique on back of left forearm 11 cm above wrist.
16. Incised wound 0.5x0.3x0.2cm on outer aspect of left forearm, 8cm below elbow.
17. Incised wound 1.2x0.4x5cm, on back and outer aspects of left upper arm, 16 cm above elbow with contusion 5x2x1cm underneath.
18. Contusion 14x3x2.5cm, obliquely placed on back of left chest, upper inner end 12 cm below root of neck in midline back of neck.
19. Contusion 15x2x1cm on back of right chest and shoulder, oblique with upper outer end 6cm below shoulder and 12 cm outer to midline.

Internal:

1. Hyperextension fracture between 5th and 6th cervical vertebra with thick blood infiltration around the fracture site on front aspect of spinal column.
2. Fracture separation of 2nd to 7th ribs on right side at multiple sites in the front and back aspects. Fracture separation of 1st and 2nd ribs on left side in the front aspect, of 4th to 8th in the front and outer aspects and of 5th to 9th ribs in the back aspect. Both chest cavities contained 250ml of blood on each side. Both lungs were contused and partially collapsed.
3. Peritoneal cavity contained 450ml of blood. Laceration 7x2.5x4cm of spleen involving full thickness.
4. Scalp contusions 8x7cm on frontal region just above eyebrow and 7x5cm on right at just above top of ear. Thin subdural and

subarachnoid bleeding was present over both cerebral hemispheres. Brain was edematous.

6. PW9 deposed to the effect that Malu died due to injuries to chest, abdomen and spine and internal injuries 1 to 3 were sufficient in the ordinary course to cause death. He deposed that external injuries noted as items 6 to 9 in Ext.P6 post mortem certificate with the corresponding internal injury No.2 could be caused by forceful contact with hard object or surface and the pattern of injury is suggestive of kneeing. He deposed further that the external injuries 10 and 11 noted in Ext.P6 along with corresponding internal injury No.3 could be caused by application of blunt force on lower abdomen and that the nature of the injuries is suggestive of kicking. He would also depose during cross examination that the incised wounds noted in Ext.P6 certificate could be caused only by the use of a weapon like MO1. Taking into account the nature of the injuries as noted in Ext.P6 certificate, I do not find any reason for disagreeing with the opinion of PW9 that internal injuries Nos.1 to 3 were sufficient in the ordinary course of nature to cause death. In such circumstances, it can

only be held that the death of Malu is homicidal in nature.

7. Now, the question is whether the fixing of the culpability on the appellant is correct and sustainable? In that context, the evidence on record has to be scrupulously scanned. PW2 is the independent witness. She is related to both the accused and the deceased through her husband. She would depose that she witnessed the incident from her house and the place of occurrence lies in such a position to have a vision of things happening at the place of occurrence from her house. She would depose that the incident took place near the electric post by the side of a fence on the north western side of the house of the appellant-accused. She also deposed that the appellant-accused inflicted cut injuries on the head of deceased Malu with a chopper as also on her hands. Ante mortem injuries noted in Ext.P6 post mortem certificate would also reveal that deceased Malu sustained cut injuries as noted at item Nos.1 and 15 to 17 in Ext.P6. She would further depose that on sustaining such injuries with chopper, the deceased Malu fell down and thereafter, the appellant accused stamped on her chest and abdomen and left the place. PW2 identified MO1 knife as

the chopper (koduval) used by the appellant to inflict such injuries on deceased Malu. She would also admit that there was a dispute between the appellant and deceased Malu regarding the fence and she also would admit the fact that earlier there was a dispute between herself and the appellant regarding the right of way. Evidently, she has also stated that there was an altercation between the appellant and the deceased.

8. As noticed hereinbefore, the contention of the appellant is that PW2 is not a trustworthy witness and she is an interested witness as the deceased was a close relative of her husband. Hence, according to the appellant, her evidence ought to have been discarded by the trial court. A scanning of the evidence of PW2 would reveal that she had admitted the fact that she is related to the appellant-accused and also to the deceased Malu, through her husband. In other words, her husband is a relative of both the accused and the deceased. In the contextual situation, it is relevant to refer to the decision of the Hon'ble Apex Court in **Natthu v. State of U.P [AIR 1977 SC 2096]** wherein it was held that being a relative of the deceased could not be a

reason to disbelieve a witness. In short, the trustworthiness of a witness has to be tested by appreciating his oral testimony. In fact, such a witness would not normally permit the real culprit to escape. It is pertinent to note that a scrutiny of the evidence of PW2 would reveal that she had never attempted to conceal anything and she had virtually admitted even the dispute that existed between herself and the appellant. She has also deposed to the effect that there occurred an altercation between the appellant and the deceased. The testimony of PW2 is to the effect that the incident which took place in the property of the appellant was easily visible from her property and in fact, the version of PW2 would gain support from the evidence of PW9 with Ext.P6. As noticed hereinbefore, PW2 deposed to the effect that the appellant-accused inflicted cut injuries on the head and arms of deceased Malu. Ext.P6 certificate would reveal sustainment of such cut injuries by the deceased. Both PW2 and PW9 would depose that such injuries could be caused by using MO1 knife. The appellant accused attempted to mount challenge against the oral account of PW2 relying on the evidence of PW1, the first informant

who turned hostile though admitted his signature in Ext.P1 FI statement. His testimony would reveal that he would admit his signature in FI statement. But, at the same time, he denied to have witnessed the incident. Merely because he had denied of witnessing the said incident, that by itself is no reason at all for discarding the evidence of PW2 especially when her evidence is corroborated with the evidence of PW9 with Ext.P6. That apart, as noticed hereinbefore, she has to be treated as a truthful witness as she never attempted to conceal anything from the court, as stated hereinbefore. In such circumstances, I am of the view that the version of PW2 is trustworthy and evidently, the medical evidence supports the ocular evidence of PW2 as regards the manner as also the nature of the injuries. PW13, the investigating officer deposed that MO1 knife was discovered based on the information furnished by the appellant. Ext.P13 is the disclosure statement. MO1 was discovered under Ext.P3 mahazar. PW6 is one of the attesting witnesses to Ext.P3 mahazar and he supported the case of the prosecution and also identified MO1. Ext.P17 is the chemical examination report. It would reveal the

presence of human blood on MO1 knife. True that the blood group could not be determined. The contention of the appellant that it could not have been and should not have been treated as an incriminating material against him owing to the non-determination of the blood group and it is liable to be rejected in the light of the decision of the Hon'ble Apex Court in **Shaji v. State of Kerala [2013 (1) KLT 493 (SC)]**. However, it is not held therein that blood grouping is necessary to use the discovery of material object based on the information furnished by the accused as an incriminating material against him. In this case, based on the information furnished by the appellant, MO1 knife was discovered under Ext.P3 mahzar and it contained blood of human origin. Certainly, in such circumstances, it is another piece of incriminating circumstance against the appellant. In this context, another aspect also assumes relevance. It is to be noted that the appellant took up the plea of private defence. In such circumstances, the presence of the accused in the place of occurrence and that the deceased Malu sustained some injuries at his hands cannot be disputed. True that, it is permissible for the accused to take

alternative pleas. Taking into account all such circumstances, I have no hesitation to hold that the trial court has correctly assessed the evidence and found that deceased Malu sustained injuries in the alleged incident and that the alleged incident took place inside the premises of the appellant and injuries sustained on her chest, abdomen and spine were the reason for her death. In other words, the appellant herein is the culprit.

9. Evidently, the appellant was tried for the offence under section 302, IPC. But, the trial court found that the prosecution has failed to establish the offence punishable under section 302, IPC against the appellant and the State has not preferred any appeal against the same. So also, evidently, none of the relatives of deceased Malu who would fall within the expression 'victim' also preferred any appeal against the impugned judgment to the extent the appellant was acquitted of the offence punishable under section 302, IPC. In such circumstances, the question is whether the conviction of the appellant for the offence punishable under section 304 Part II IPC is sustainable in the light of the evidence on record. In this context, it is also to be

noted that neither the State nor anyone falling within the expression 'victim' preferred an appeal taking up a contention that having found not guilty under section 302, IPC, the appellant ought to have been found guilty under part I of section 304, IPC. The distinction between Part-I and Part-II of section 304, IPC is that the element of intention is to be involved to bring an offence under Part I of section 304, IPC and it is the knowledge while committing an act that by such act he is likely to cause death which would attract the offence under Part II of section 304, IPC. Thus, the question is whether internal injury Nos.1 to 3 noted in Ext.P6 are sufficient to cause death in the ordinary course of nature could be said to be inflicted by the appellant with the knowledge that such act was likely to cause the death of Malu. Certainly, if the answer is in the affirmative, the conviction and consequential sentence under section 304 of Part II IPC has to be sustained.

10. In this case, evidently, going by the prosecution case, there was only two eye witnesses viz., PWs 1 and 2. PW1 was the first informant. Evidently, he turned hostile to the case of the prosecution.

At the same time, he would admit his signature in Ext.P1 FIS. True that he had deposed that he had not seen the incident. Though he turned hostile and was cross examined by the prosecution, nothing could be elicited to establish that he had actually seen the incident. But at the same time, taking into account the fact that he admitted his signature in Ext.P1, the inevitable inference could be that it was he who informed the incident to the police. In such circumstances, the question is whether PW2 could be believed. I have already found that the version of PW2 is only to be believed and he is a trustworthy witness. In Ext.P6, cut injuries were also noted on the legs of deceased Malu. PW2 did not depose to that effect. She has deposed only what she had seen. That apart, the deposition of PW2 to the effect that she had seen the appellant causing cut injuries with chopper on the head as also on the hands was corroborated by the evidence of PW9 with Ext.P6. In Ext.P6, item Nos.1 and 15 to 17 would reveal that the deceased Malu sustained cut injuries on her head as also on the arms. PW9 deposed during cross examination that such injuries could be caused by weapon like MO1. In the light of the evidence of

PW9 to the effect the injuries which Malu sustained on her chest, abdomen and spine especially internal injuries 1 to 3 were sufficient in the ordinary course of nature to cause death and taking into account the fact that the testimony of PW9 to that effect was not successfully challenged and also taking into account the fact that the nature of the injuries would also suggest that, they were sufficient in the ordinary course of nature to cause death, it is only to be held that the prosecution had succeeded in proving that such injuries which ultimately caused death of Malu were caused by the appellant. As noticed hereinbefore, the evidence of PW9 with Ext.P6 would reveal that deceased Malu sustained cut injuries and 3 other injuries on her legs. The evidence of PW2 is to the effect that on sustaining such injuries with chopper, she fell down and it was thereafter that the appellant stamped on her chest and abdomen. In this context, it is also to be noted that at the time of the incident, the appellant was aged 32 years and deceased Malu was 55 years. Kicking on the chest as also on the abdomen of an aged lady who sustained cut injuries and consequently fell down cannot be said to be an act sans any

knowledge that such acts were likely to cause death. It is also to be noted that the appellant had taken up the plea of self defence. In such circumstances, the appellant cannot be heard to say that he was absolutely having no knowledge that such acts were likely to cause death. In this case, evidently, the prosecution has not attempted to conceal the fact that in the said transaction the appellant had also sustained injuries. Evidently, Ext.D1 accident register-cum-wound certificate dated 8.8.2009 contained the noting of injuries sustained by the appellant. Thus, the prosecution cannot be accused of concealment of the factum of sustainment of injuries by the accused appellant. In this context, it is also to be noted that PW2 had also deposed to the effect that there was an altercation between the appellant-accused and deceased Malu and she had also deposed to the effect that for inflicting such injuries noted hereinbefore, the appellant had used a chopper. In such circumstances, how can it be said that the prosecution had not explained the circumstances under which the appellant sustained injuries. In short, the contention of the appellant that he had exercised only the right of private defence also cannot be a

reason for not holding him guilty under section 304 Part II. It cannot be said that the appellant had exercised the right of private defence only a little in excess of what can be exercised by him in such circumstances. In that context, it is to be noted that Ext.D1 even if it is taken as proved would show that such abrasions are cut marks. It is to be noted that he had not sustained any cut injuries and the injuries noted in Ext.D1 were not on the vital parts of his body capable of creating apprehension in his mind that his life is on peril. The appellant was an able bodied young man aged 32 years and the deceased was a lady aged 55 years. Malu sustained cut injuries on her head and lower and upper limbs and consequentially she fell down. The evidence of PW2 would reveal that thereafter the appellant stamped on her chest and abdomen. When that be the circumstances, I do not find any merit in the contention of the appellant that he had exercised only the right of private defence. Taking into account all such circumstances, I do not find any reason to interfere with the conviction entered against the appellant by the trial court under section 304 part II IPC. It is only to be confirmed and accordingly, it

is confirmed.

11. What survives for consideration is whether the sentence imposed therefor by the trial court is to be sustained or not. As noticed hereinbefore, for the conviction under section 304 Part II IPC, the appellant was sentenced to undergo rigorous imprisonment for a period of seven years. Set off was also allowed under section 428 Cr.P.C. for the period from 8.8.2009 to 24.9.2009. The learned counsel for the appellant contended that the appellant had already undergone the sentence for two years and seven months and seven days. In such circumstances, it is submitted that the sentence may be reduced to the period already undergone. I am of the view that taking note of the fact that in the incident in question a lady aged 55 years lost her life and the manner in which the incident took place, the appellant has to be awarded with comeuppance. Certainly, a period of 2 years seven months and seven days could not be said to be a deserving penalty. At the same time, I am of the view that the appellant had no pre-meditation and the incident in question could be said to be taken place at the spur of the moment. It is to be noted that

the appellant had taken advantage of the situation. Still taking note of the entire circumstances, I am of the view that the sentence to undergo rigorous imprisonment for a period of 5 years would be a condign punishment for the appellant for the commission of offence punishable under section 304 Part II IPC. In such circumstances, in substitution of the sentence imposed by the trial court, the appellant is sentenced to undergo rigorous imprisonment for a period of 5 years for the offence under section 304 Part II IPC. It is made clear that he will be entitled to get set off under section 428 Cr.P.C for the period from 8.8.2009 to 24.9.2009 and the period of two years, seven months and seven days mentioned above shall also be taken into account for fixing the remaining period of sentence to be suffered. The Registry is directed to transit the records to the trial court for the appellant to suffer the sentence upon his surrender. In case of his failure to surrender, he shall be made to suffer sentence in accordance with law.

Sd/-
C.T. RAVIKUMAR
(JUDGE)

spc/

