

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW

TUESDAY, THE 17TH DAY OF MARCH 2015/26TH PHALGUNA, 1936

CRL.A.No. 777 of 2014 ()

AGAINST THE ORDER/JUDGMENT IN SC 52/2013 of SESSIONS COURT, KALPETTA DATED
18-02-2014

CRIME NO. 425/2012 OF PULPALLY POLICE STATION , WAYANAD

APPELLANT(S) :

KRISHNANKUTTY S/O.KUNHAN, C.NO.2575, CENTRAL PRISON, KANNUR

BY ADV. DINNY THOMAS (STATE BRIEF)

RESPONDENT(S) :

STATE OF KERALA

R1 BY ADV. PUBLIC PROSECUTOR SMT.BINDU GOPINATH

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17-03-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.ABRAHAM MATHEW,J

Crl.A.No.777 of 2014

Dated this the 17th day of March, 2015

JUDGMENT

In Sessions Case No.52 of 2013 on the file of the Sessions Judge, Kalpetta the appellant was tried for the offences under Sections 307 and 450 IPC. The allegation against him was that in the small hours of 26.8.2012 he trespassed into the room in a shed in which his co-worker Sreedharan was residing and attempted to murder him by striking with a chopper. Learned Sessions Judge found the evidence adduced by the prosecution sufficient to prove the case against the appellant and convicted him of the both offences. For the offence under Section 307 IPC the Sessions Judge sentenced him to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.5,000/- and in default of payment of the fine to undergo rigorous imprisonment for three more months, and for the offence under Section 450 IPC to undergo rigorous for

2 years and to pay a fine of Rs.1,000/- and in default of payment of the fine to undergo rigorous imprisonment for a further period of 3 months. There is a direction to pay the fine amount, if realised, to the victim.

2. In the charge framed by the learned Sessions Judge the victim has been referred to as CW2. The learned Sessions Judge did not take notice of Rule 65 of the Criminal Rules of Practice, which runs as follows:

The person against whom an offence is alleged to have been committed shall be described in the charge by his name and not by his position in the case as prosecutor or witness.

3. The rule prohibits the person against whom the offence is alleged to have been committed being described by his position in the case as prosecutor or witness and mandates that he shall be described only by his name in the charge. This is more often violated than complied with. There is a purpose behind every rule. A charge is framed for the purpose of giving notice to the accused as to the case he has to meet. To the extent possible there shall not be any vague statement in the charge. But since it is clear from the

evidence that the misdescription of the victim in the charge has not caused prejudice to the appellant, it is only to be ignored.

4. In the trial court judgment witnesses are referred to as CW1, CW2 etc. This compels the appellate court – trial court also – to refer to the report filed by the investigating officer under Section 173(2) Cr.P.C to ascertain the identity of the person. It is an unwholesome practice to refer to the witnesses as CW1, CW2 etc. in the deposition of other witnesses and in the judgment. If a witness is not examined, in the deposition of other witnesses and in the judgment he shall be referred to by his name and if he has already been examined only as Prosecution Witness suffixing his number(PW1 and PW2 etc.).

5. In 11 paragraphs learned Sessions Judge has given a summary of the testimony of each of the witnesses examined in the case, which was totally unnecessary. But he has not analysed their evidence. There is no discussion as to the acceptability or otherwise of their evidence or the probative value of their evidence. In just one paragraph he considered the applicability of Sections 307 and 450 IPC before he reached the conclusion that the prosecution has succeeded in proving its case against the appellant.

6. The injured PW2 Sreedharan and the appellant were

workers in the property of PW3 Alice Devasya. PW1 had worked for her family for 5 years and the accused for 4 months on the date of occurrence. They were residing in separate rooms in a shed which was within a stone's throw from her house. Immediately after the incident PW2 Sreedharan was taken to Government Hospital, Pulpally and from there to District Hospital, Mananthavady. Later he was treated at Medical College Hospital, Kozhikod. To prove the injuries sustained by him the prosecution examined PW11 Dr Unnikrishnan, who was working as a doctor at the Community Health Centre, Pulpally. In his deposition there is no mention about any of the injuries sustained by PW2 Sreedharan. The wound certificate issued by him was marked Ext P10. Neither the prosecutor, nor the learned Sessions Judge understood the evidentiary value of the document. A wound certificate is only a previous statement in writing of the doctor who prepared it. It is not a substantive evidence. It is a piece of evidence that may be used only for corroboration under Section 157 or for contradiction under Section 145 of the Evidence Act unless it is covered by section 32 of the Act. Ordinarily, a party shall be allowed to adduce

corroborative evidence only after he has adduced substantive evidence. The doctor should have been asked to depose to the injuries noted by him, which would have been the substantive evidence, and only thereafter the wound certificate issued by him should have been allowed to be tendered in evidence. In this case after marking the wound certificate the doctor was not asked to depose to the injuries noted by him. The result is that there is no substantive evidence. Tendering corroborative piece of evidence without adducing substantive evidence is a futile exercise. The learned Sessions Judge went wrong in admitting the document in evidence.

7. After his treatment at Medical College Hospital, Kozhikode PW2 Sreedharan was discharged. Ext P6 is the discharge certificate issued by PW6 Dr Jeffin Jose. His examination also was not done in the proper manner. From his evidence it appears that the assault resulted in the victim's left shoulder muscle being cut off (hundred percent) and in his sustaining fracture of the left shoulder bone and an injury on the scalp.

8. PW7 Dr Jeffin Jose expressed the opinion that the injuries

sustained by the victim were of grievous nature.

9. To prove the occurrence the prosecution relies on the evidence of PW2 Sreedharan and PW1 Michael Scaria, son in-law of PW3 Alice Devasya, the employer of the victim and the appellant.

10. The incident happened at about 3 in the morning on 26.8.12 (night between 25th and 26th). It was the first death anniversary of the husband of PW3 Alice Devasya. At about 7.00 p.m on 25.8.2012 PW2 Sreedharan went out and consumed liquor. When he came back to the shed at 8, he found the appellant behaving in a disorderly manner under the influence of alcohol, for which the former reproved and rebuked the latter. These are facts brought out in the examination of PW2 Sreedharan.

11. The version of the victim, PW2 Sreedharan, is that at 3 in the morning when he has making tea the appellant trespassed into his room and struck him on the left shoulder with MO5 chopper. When he attempted to stand up, the appellant again struck him on the right side of his head with the chopper; he collapsed at the door of his room. He denied the suggestion of the learned defence

counsel that he sustained injuries when he fell down as he could not take care of himself due to the effect of the liquor he had consumed. In his cross-examination learned counsel could not bring out anything to show that his evidence is not acceptable.

12. The prosecution also relies on the extra judicial confession allegedly made by the appellant to PW1 Michael Scaria, son in -law of the employer of the appellant and the victim. He came to the house of his wife on 25.8.2012 in connection with the first death anniversary of his father in-law. He was sleeping along with his wife when he heard someone knocking on the door, and calling from outside "chechi", "chechi". He switched on the light and came out of the room to see the appellant, who told him that he had struck PW2 Sreedharan as Sreedharan had beaten him. Blood was seen on his shirt and 'dhoti'; he had a chopper in his hand on which also there was blood. He went to the shed only to see PW2 Sreedharan lying near the door of his room in a pool of blood. He summoned the neighbours and took the victim to Govt. Hospital, Pulpally. Ext P1 is the FI Statement given by him to the police at 8.00 in the morning. In the cross-examination he told that

the shed in which the appellant and the victim were staying was within a stone's throw from the house of his mother in-law; he had not heard any commotion from the shed. Learned counsel for the appellant submits that this is inconsistent with the evidence of PW4, a neighbour, who said that he had heard the appellant and the victim talking till 11 in the night. It cannot be said that there is inconsistency in the evidence of these two witnesses. PW4 only said that he heard the appellant and the victim talking; he has no case there was any commotion in the shed.

13. Yet another piece of evidence relied on by the prosecution is the recovery of MO5 chopper pursuant to the information allegedly given by the appellant when he was in the custody of the police. In the course of his evidence PW12 C.I of Police stated: " I recorded the confession statement of the accused; Ext.P11 is the relevant portion. Along with the accused I went to a felled tree six meters from the place of occurrence, from near the stump of which MO5 knife was recovered". Is this sufficient to prove the discovery of fact which has been sought to be proved by the prosecution. Section 27 of the Evidence Act which is the relevant

provision is extracted:

Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

The Section permits proof of so much of the information given by the accused as relates distinctly to the fact discovered pursuant to that information. But this is not possible unless and until the person to whom the information was given deposes to it. To depose means to give oral evidence in court. Marking of a document containing information given by the accused is not a substitute for deposition. In fact, unless oral evidence as to the information is given by the witness and recorded by the court, marking of the document containing the information is illegal. Discovery of a fact can be said to have been proved only when the investigating officer has deposed to the information obtained by him from the accused and to the subsequent seizure of the object pursuant to it. PW12 CI of Police failed to depose to the information allegedly given by the appellant. Learned Sessions Judge went wrong in receiving in evidence Ext P11 which is said to be the relevant portion in the 'confession statement' of the accused.

14. There is no doubt that discovery of the fact sought to be

proved by the prosecution has not been proved in accordance with the requirements of Section 27 of the Evidence Act. That apart, the evidence of PW6, witness to the recovery of MO5 chopper, is that the weapon was recovered from the foot of a fence. There is no explanation for the inconsistent versions given by this witness and the investigating officer. In any view of the matter the evidence adduced by the prosecution to prove that MO5 chopper was recovered in pursuance of the information given by the accused cannot be accepted. In view of the prohibition contained in Section 25 of the Evidence Act that no confession made to a police officer shall be proved as against the person accused of an offence it does not appear to be proper for the court to allow a police officer to state that he recorded confession statement of the accused, which implies that the accused confessed to guilt. The court may allow the officer to depose that the accused gave him a statement and thereafter to depose to the information obtained by him in the course of the statement.

15. Advocate Sri. Dinny Thomas learned counsel for the appellant submitted that Ext P12 FSL report reveals some suspicious circumstances. Along with some other items the investigating officer sent two shirts and a 'lungi' to the FSL for examination. MO1

was the shirt PW2 was wearing at the time of occurrence. MO2 and MO3 are said to be the shirt and the 'lungi' the accused was wearing when the incident took place. Ext P12 certificate shows that the blood detected on MO2 shirt belonged to 'O' group and the blood detected on MO1 shirt belonged to 'A' group. The prosecution has no explanation for it. In a case in which the prosecution seeks to establish involvement of the accused in the incident by proving presence of the blood of the victim at the place of occurrence or the articles used by the accused, it is necessary for it to adduce evidence to prove the blood groups of the accused as well as of the victim. The defence may argue that the blood stain seen on the clothes or articles of the accused was caused by his own blood, which will not prove his presence at the place of occurrence or involvement in the incident. The reason for proving the blood group of the accused is to exclude the possibility of such an argument. Proof of the group of the blood seized from the place of occurrence or seen on the articles seized by the police alone will not serve any purpose since it does not establish nexus between it and the victim. In the absence of any evidence to prove the blood group of the appellant or the victim Ext P12 F.S.L Report is irrelevant.

16. Evidence of the victim, PW2 Sreedharan, is sufficient to prove that the appellant assaulted him with a chopper. The testimony of PW1 Michael Scaria that the appellant made extra judicial confession to him within a few moments of the occurrence is also substantive evidence and it corroborates the evidence of PW2. The prosecution has succeeded in proving that the appellant struck PW2 Sreedharan with a chopper on his head and left shoulder.

17. The next question is whether the facts would attract Section 307 IPC. The weapon used was a chopper which is a heavy weapon. The assault was on the head and near the neck. The inference is that the attempt of the appellant was to cause the death of the victim. Learned Sessions Judge rightly came to the conclusion that the offences committed by the appellant fall under Sections 307 and 450 IPC.

18. The sentence imposed on the appellant for the offence under Section 307 IPC is rigorous imprisonment for 7 years and fine of Rs.5,000/-. There is a default clause also. For the offence u/S.450

IPC the appellant has been sentenced to undergo rigorous imprisonment for 2 years and to pay a fine of Rs.1,000/-. There is a default clause. There is a direction that the sentences shall run concurrently. Learned counsel for the appellant submits that some leniency may be shown in the matter of sentence as it is evident that the appellant and the victim had consumed alcohol a few hours before the incident. Having regard to the facts of the case, I think the punishment for the offence under Section 307 IPC can be reduced to rigorous imprisonment for 5 years. The other sentences will not be disturbed.

In the result, this appeal is allowed in part. Conviction of the appellant for the offences under Sections 307 and 450 IPC is confirmed. The sentence imposed on him for the offence under Section 450 IPC is confirmed. The sentence for the offence under Section 307 IPC is reduced to rigorous imprisonment for a period of 5 (five) years. As directed by the trial court he shall pay a fine of Rs.5,000/-(Rupees five thousand only) and in case of default, he shall undergo rigorous imprisonment for three more months. The

sentences of imprisonment will run concurrently. His period of custody during the investigation will be set off.

**K.ABRAHAM MATHEW
JUDGE**

pm