

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 21ST DAY OF JANUARY 2015/1ST MAGHA, 1936

Crl.Rev.Pet.No. 939 of 2003 ()

**AGAINST THE JUDGMENT IN CRL.A.NO.51/2000 of SESSIONS COURT, MANJERI
DATED 28-02-2003**

**AGAINST THE JUDGMENT IN C.C.NO.362/1995 of JUDICIAL FIRST CLASS
MAGISTRATE COURT, TIRUR DATED 05-02-2000**

REVISION PETITIONER(S)/APPELLANT:

**CHELANGATTIL MOIDEEN,
S/O. KUNHIMOIDEEN,
IRUMBILIUM AMSOM,
MALAPPURM DISTRICT.**

**BY ADVS. SRI.T.KRISHNAN UNNI (SR.)
SRI. S.A. SAJU**

RESPONDENT(S)/RESPONDENT:

**STATE REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KEARALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. V.H. JASMINE.

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 21-
01-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

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K. Ramakrishnan, J.

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Crl.R.P.No.939 of 2003

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Dated this, the 21st day of January, 2015.

ORDER

First accused in C.C.No.362/1995 on the file of the Judicial First Class Magistrate Court, Tirur is the revision petitioner herein.

2. The revision petitioner along with three others were charge sheeted by the Sub Inspector of Police, Valanchery in Crime No.112/1994 of Valanchery police station under Sections 323 and 326 read with Section 34 of Indian Penal Code.

3. The case of the prosecution in nutshell was that on 12.08.1994 at about 8 a.m., the accused in furtherance of their common intention CW1 was assaulted by first accused with a spade shaft and caused grievous injury to him and A2 to A4 beat him with hand and caused pain to him and thereby, all of them have committed the offence punishable under Sections 323 and 326 read with Section 34 of Indian Penal Code. After investigation, final report was filed and the case was taken on file as C.C.No.362/1995 on the file of the Judicial First Class Magistrate Court, Tirur.

4. When the revision petitioners appeared before the

court below, charge under Sections 323 and 326 read with Section 34 of Indian Penal Code was framed and the same was read over and explained to them and they pleaded not guilty. In order to prove the case of the prosecution, PWs 1 to 7 were examined and Exts.P1 to P4 were marked on their side. After closure of the prosecution evidence, the accused were questioned under Section 313 of Code of Criminal Procedure and they denied all the incriminating circumstances brought against them in the prosecution evidence. It is seen that they filed C.M.P.No.364/2000 to recall PWs 1 to 4 and 7, but, that was dismissed by the court below by order dated 05.02.2000.

5. After considering the evidence on record, the court below found that first accused had committed the offence punishable under Section 326 of Indian Penal Code and accused Nos. 2 to 4 committed the offence under Section 323 of Indian Penal Code and convicted them for the respective offences and sentenced the first accused to undergo rigorous imprisonment for one year and also to pay a fine of Rs.5,000/- in default to undergo rigorous imprisonment for two months. Accused Nos. 2 to 4 were sentenced to pay a fine of Rs.500/- each in default to undergo simple imprisonment for 15 days

each. Aggrieved by the same, they filed Crl.Appeal No.51/2000 on the file of the Sessions Court, Manjeri and the learned Sessions Judge confirmed the order of conviction and sentence in respect of accused Nos.2 to 4 and also the conviction and fine with default sentence imposed in respect of the first accused - the revision petitioner, but, reduced the substantive sentence to simple imprisonment for six months and further directed to pay Rs.4,000/- out of the fine to PW1 as compensation under Section 357(1)(b) of Code of Criminal Procedure. Aggrieved by the same, the present revision has been filed.

6. Heard the Counsel for the revision petitioner and the Public Prosecutor.

7. The Counsel for the revision petitioner submitted that none of the witnesses were cross examined and when an application for recalling them was filed, it was dismissed by the court below. Further, there was a cross First Information Report registered on the basis of the statement given by the first accused and that fact was suppressed by the prosecution. Though he filed an application for recalling the witnesses, that was dismissed and the reason stated by the court below is not

proper and that has caused prejudice to him. He had relied on the decisions reported in **Pylan Vs. State of Kerala [1992 (2) KLT 661]**, **T.N. Janardhanan Pillai Vs. State [1992 CRI.L.J.436]** and **Ronald Wood Mathams and others Vs. State of West Bengal [AIR 1954 SC 455]** in support of his case.

8. The learned Public Prosecutor supported the concurrent findings of the court below.

9. The case of the prosecution as emerged from the prosecution witnesses was as follows:

After taking tea, PW1 was going to his house. There was a small canal in front of his house and he had put a wooden log across it to use it as a bridge. But, when he came back after taking tea, he noticed that somebody had taken away the wooden log and put in to the canal and when he tried to replace the same, the first accused came and beat him with a shaft of the spade and when he fell down, others came there and beat him with hands and due to the blows, he sustained fracture to his hand. He was taken to hospital from where he was seen by PW4 who issued Ext.P2 wound certificate. On getting intimation regarding the incident, PW6 went to the

hospital and recorded Ext.P1 statement of PW1 and registered Ext.P4 First Information Report as Crime No.112/1994 against the accused persons under Sections 323 and 326 read with Section 34 of Indian Penal Code. The investigation was conducted by PW7. He went to the place of occurrence and prepared Ext.P3 scene mahazar in the presence of PW5 and another and seized the spade shaft. He questioned the witnesses and recorded their statements and the final report was filed by the Sub Inspector of Police. PW1 was the injured and PWs 2 and 3 were the eye witnesses to the incident. They deposed in tune with the statement given by PW1 in Ext.P1. It is seen from the records that though the defence counsel was present, he prayed for an adjournment for cross examination and that was rejected and defence counsel had submitted that he had nothing to cross and so, it was noted as cross nil. Even the witnesses examined on the subsequent days were also not cross examined by the defence counsel. The Doctor who examined as PW4 and proved Ext.P2, had deposed that the injury could be caused as alleged and it was noted that there was a fracture right ulna and dislocation of left little finger apart from D.I.P joint apart from lacerated injury on the scalp

and right elbow. The cause of injury was given as;

"പുറമങ്ങുരിൽ വെച്ച് മൊയ്ക്കപ്പ എന്ന ആൾ കൈക്കോട്ടു തായ കൊണ്ട് അടിച്ചതിനാൽ"

Merely because the weapon of offence has not been marked is not a ground for disbelieving the case of the prosecution and the witnesses identified the accused persons from the court and they deposed that it was first accused who had beaten PW1 with the handle of the spade.

10. In the decision reported in **T.N. Janardhanan Pillai Vs. State [1992 CRI.L.J.436]**, this court was considering the scope of recalling the witnesses and adducing defence evidence under Section 233 of Code of Criminal Procedure in a Sessions case and the scope of Section 247 of Code of Criminal Procedure in the case of trial before the magistrate court. There is no proviso as provided in Section 247 of Code of Criminal Procedure giving a discretion for the court to deny recalling the witness or adducing defence evidence. Such a clause was not there in Section 233 of Code of Criminal Procedure and an application filed by the accused to recall the witnesses as a defence witness which was dismissed by the Sessions Court was set aside by this court on

the ground that in view of the fact that there is no restriction as provided under Section 247 of Code of Criminal Procedure was present in Section 233 of Code of Criminal Procedure, the Sessions Judge was not justified in dismissing the application and directed the Sessions Judge to allow cross examination of witnesses after recalling them. That was not the case here. So, the dictum laid down in the above decision is not applicable to the facts of this case. Similarly, the dictum laid down in the decision reported in **Ronald Wood Mathams and others Vs. State of West Bengal [AIR 1954 SC 455]** is also not applicable to the facts of this case. That was a case where the defence counsel had cross examined some of the witnesses and for the purpose of clarification of certain aspects, they wanted to recall those witnesses and dismissal of that application was commented by the Supreme Court and that was not the case here. In this case, the defence counsel was present, the witnesses were offered for cross examination, but, the defence counsel did not cross examine the witnesses and he had stated that, there was nothing to cross when the prayer for adjournment sought was rejected and it was on that basis, it was noted by the magistrate that cross nil of all the

witnesses examined. Further, no attempt was made to file an application to recall the witnesses immediately after their examination. It is only after it was posted for defence evidence without stating any reason for non cross examination of the witnesses earlier, an application was filed as C.M.P.No.364/2000 to recall those witnesses and that application was dismissed by the court below stating that, though opportunity was given, no attempt was made to cross examine the witnesses and no application was filed before the evidence was closed to recall them also. So, under the circumstances, court below came to the conclusion that it was filed without any bona fides and dismissed the application applying the discretion available under proviso to Section 243 of Code of Criminal Procedure.

11. In the decision reported in **Pylan Vs. State of Kerala [1992 (2) KLT 661]**, this court has observed that non explanation of the injuries sustained by the accused and non production of counter case records is fatal. It was nowhere stated in the court below that there was a counter case registered. Even in the 313 examination, nothing was mentioned about the same. Now, the learned Counsel for the

petitioner had produced the certified copy of the refer report in Crime No.113/1994 said to be a counter case registered in respect of the same incident against PW1 alleging offence under Sections 323 and 324 of Indian Penal Code for perusal of this court and a perusal of the same showed that it was referred by the police as false and there was no evidence to show that any further action was taken by the de facto complainant in that case by filing a protest complaint. But, in the decision reported in **Pylan's case** (supra), the accused also sustained severe injuries and the witnesses examined had stated that they did not know as to whether the accused sustained injury at all. So, under the circumstances, this court has come to the conclusion that non production of those documents will be fatal as they are trying to suppress the material fact before the court regarding the real genesis of the incident. So, under the circumstances, that dictum is also not applicable to the facts of this case. Further, no purpose will be served by remanding the case after lapse of nearly 20 years of the incident and it is not known as to whether the witnesses will be available for cross examination also. If due to any adamant attitude of the defence counsel, the witnesses could

not be examined, prosecution cannot be blamed for that purpose and further if really he wanted to recall those witnesses immediately after examination of PWs 1 to 3 the incident witnesses, he could have filed an application to recall them before further proceeding with the case of examination of other witnesses and that was not done in this case. Further, the Sessions Judge has already confirmed the order of conviction and sentence of accused Nos.2 to 4 and fine imposed passed by the court below. So, under the circumstances, this court feels that there is no merit in the submission that prejudice has been caused to the first accused and thereby, the matter has been remanded to the court below for fresh trial. In the absence of any evidence adduced, this court feels that there is nothing to interfere with the concurrent findings of the court below regarding conviction entered against the first accused who is the revision petitioner herein by invoking the revisional jurisdiction.

12. As regards the sentence is concerned, the court below sentenced the first accused to undergo rigorous imprisonment for one year and also to pay a fine of Rs.5,000/- in default to undergo rigorous imprisonment for two months.

The appellate court had reduced the substantive sentence to simple imprisonment for six months while confirming the fine and default sentence imposed and directed an amount of Rs.4,000/- to be paid to PW1 as compensation out of the fine amount under Section 357(1)(b) of Code of Criminal Procedure. It is seen from the records that parties appear to be relatives and the incident itself had occurred on account of some misconception of removal of a wooden bridge that was placed across the canal which was being used as a bridge by PW1 to go to his house. Further, first accused also would have been aged now. Considering these aspects, this court feels that some more leniency can be shown and reducing the imprisonment to 15 days and directing the revision petitioner to pay a compensation of Rs.10,000/- instead of fine to PW1 in default to undergo simple imprisonment for one month will be sufficient and that will meet the ends of justice. So, the sentence imposed by the court below and modified by the appellate court as against the revision petitioner is set aside and the same is further modified as follows:

The revision petitioner is sentenced to undergo simple imprisonment for 15 days and also to pay a compensation of Rs.10,000/- in default to undergo

simple imprisonment for one month more under Section 357(3) of the Code of Criminal Procedure. If the compensation amount is realised, the court below is directed to pay the same to PW1. Three months time is granted to the revision petitioner to serve the sentence and deposit the compensation awarded before the court below. Till then, the execution of sentence is directed to be kept in abeyance.

Office is directed to communicate this order to the concerned court immediately.

Sd/-
K.Ramakrishnan, Judge.

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[True copy]

P.A to Judge