

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 30TH DAY OF MARCH 2015/9TH CHAITHRA, 1937

Crl.Rev.Pet.No. 1760 of 2003 ()

AGAINST THE JUDGMENT IN CRL.A 419/2001 of THIRD ADDITIONAL SESSIONS
COURT (ADHOC) (FAST TRACK COURTNO.1), THRISSUR DATED 28-06-2003

AGAINST THE JUDGMENT IN CC 178/1995 of J.M.F.C., CHALAKUDY DATED
17-08-2001

REVISION PETITIONERS/APPELLANT/ACCUSED NOS.1 TO 4,6 & 7:

1. VELAYUDHAN,
S/O. RAMAKRISHNAN, NJATTUVETTI HOUSE,
MATTATHUR VILLAGE.
2. ARAVINDAKSHAN,
S/O. AYYAPPAN, VALIAPARAMBIL HOUSE,
MATTATHUR VILLAGE.
3. SIVARAMAN,
S/O. RAMAKRISHNAN, NJATTUVETTI HOUSE,
MATTATHUR VILLAGE.
4. KOCHUGOVINDAN,
S/O. RAMAKRISHNAN, NJATTUVETTI HOUSE,
MATTATHUR VILLAGE.
5. THILAKAN,
S/O. KUNJILERAN, CHITTATHALIL HOUSE,
NADIPARA DESOM.
6. MANOJ, S/O. UNNIKRISHNAN,
NJATTUVETTI HOUSE,
NADIPARA DESOM.

BY ADVS.SRI.P.VIJAYA BHANU
SRI.TONY MATHEW

RESPONDENT/RESPONDENT/COMPLAINANT:

STATE OF KERALA REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY P.P.SRI.K.K.RAJEEV

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
30-03-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K. RAMAKRISHNAN, J.

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Crl.R.P.No.1760 of 2003
.....

Dated this the 30th day of March, 2015.

O R D E R

Accused 1 to 4 and 6 and 7 in C.C.No.178/1995 on the file of the Judicial First Class Magistrate Court, Chalakudy are the revision petitioners herein. The revision petitioners along with deceased 5th accused were charge sheeted by the Sub Inspector of Police, Vellikulangara police station under sections 143, 147, 148, 341, 324 and 326 read with section 149 of the Indian Penal Code.

2. The case of the prosecution in nutshell was that on 17.4.1995 at about 10 p.m the accused persons on account of previous enmity with PW1, at Chembuchira in Mattathur village formed themselves into an unlawful assembly with deadly weapons with a common object of causing hurt to PW1 and when PW1 reached there along with Pws 2 and 3, the first accused caught hold of him and wrongfully restrained him and second accused cut with a sword on both legs of PW1, third accused smothered him by closing his mouth and when he yelled out, 5th accused beat him with iron rod on both his legs and other accused persons pressed him down on the kayyala by the

side of the road and hit him with stones on his legs, hands and different parts of the body and they have done in furtherance of their common object and caused fracture to his leg, which is a grievous hurt and thereby all of them have committed the offences punishable under sections 143, 147, 148, 341, 324 and 326 read with section 149 of the Indian Penal Code.

3. After investigation final report was filed and the case was taken on file as C.C.No.179/1995 on the file of the Judicial First Class Magistrate Court, Chalakkudi. When the accused appeared before the court below, after hearing both sides charge under sections 143, 147, 148, 341, 324 and 326 read with section 149 of the Indian Penal Code was framed and the same was read over and explained to them and they pleaded not guilty. During the pendency of the proceedings, the 5th accused died and charge against him was abated and others were proceeded with trial. In order to prove the case of the prosecution, Pws 1 to 7 were examined and Exts.P1 to P4 and Mos 1 to 3 were marked on their side. After closure of the prosecution evidence, the revision petitioners were questioned under section 313 of the Code of Criminal Procedure

(hereinafter referred to as 'the Code' for short) and they denied all the incriminating circumstances brought against them in the prosecution evidence. They have further stated that they have not committed any offence and they are innocent of the same and PW1 was having several enemies and he is accused in several cases and he had misunderstood the accused persons as the persons who attacked him and falsely implicated them. No defence evidence was adduced on their side. After considering the evidence on record, the courts below found the revision petitioners guilty under sections 143, 147, 148, 341, 324 and 326 read with section 149 of the Indian Penal Code and convicted them thereunder and sentenced them to undergo rigorous imprisonment for one year each for the offences under sections 143 and 147 of the Indian Penal Code and further sentenced to undergo rigorous imprisonment for two years for the offence under section 148 of the Indian Penal Code and further sentenced to undergo rigorous imprisonment for three months for the offence under section 341 of the Indian Penal Code and further sentenced to undergo rigorous imprisonment for three years for the offence under section 326 of the Indian

Penal Code and further sentenced to pay fine of ₹5,000/- each for the offence under section 326 of the Indian Penal Code. It is further ordered that, if fine amount is realized, half of the fine amount be paid to PW1 as compensation under section 357(1)(b) of the Code. No separate sentence was awarded for the offence under section 324 of the Indian Penal Code.

4. Aggrieved by the same, they filed Crl.A.No.419/2001 on the file of the Sessions Court, Thrissur, which was made over to Third Additional Sessions Court (Adhoc-I), Thrissur for disposal and the learned Additional Sessions Judge by the impugned judgment dismissed the appeal confirming the order of conviction and sentence passed by the court below. Aggrieved by the same, the present revision has been filed by the revision petitioners /accused 1 to 4 and 6 and 7 before the court below.

5. During the pendency of the revision, second revision petitioner died and none of the legal heirs have been impleaded. Since it is a revision, death of one of the revision petitioners will not end in abatement of the revision. So, the matter has been heard and disposed of on merit as against him as well.

6. Heard the counsel for the revision petitioners Sri. Vipin Narayan representing senior counsel Sri. P. Vijaya Bhanu and Sri. K.K. Rajeev, the learned Public Prosecutor appearing for the respondent.

7. The counsel for the revision petitioners submitted that the courts below have not properly appreciated the evidence. Further there are contradictions in the evidence of Pws 1, 2 and 5 regarding the manner in which the incident occurred and overt act alleged to have been attributed by each of the accused persons. Further, there are omissions and contradictions and the witnesses have made improvement in their statement. Further, there was delay in sending the First Information Report to court and the delay has not been explained and as such possibility of deliberation, discussion and false implication of accused cannot be ruled out. Further witnesses are relatives and interested witnesses and as such the courts below should not have relied on their evidence to convict the accused persons. He had also argued that investigation was conducted by a head constable, who is not competent to conduct investigation and as such the investigation is vitiated

and the revision petitioners are entitled to get that benefit. He had further argued that the sentence imposed is harsh.

8. On the other hand, the learned Public Prosecutor argued that Pws 1 to 3 and 5 have categorically stated that the accused persons have attacked the injured defacto complainant and merely because they are relatives and interested witnesses are not sufficient to disbelieve their evidence. But the court need only appreciate their evidence cautiously and if they are convincing, there is nothing wrong in convicting the accused persons based on their evidence. Further, delay in sending the First Information Report in court is not fatal and the First Information Statement was given without delay and the case was also registered promptly. Further in view of section 156(2) of the Code, even if investigation was conducted by an incompetent person, that will not vitiate the trial. Further, there is nothing to interfere with the concurrent findings of the courts below including the sentence imposed.

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

On 17.4.1995 at about 10 p.m while Pws 1, 2 and 5

were coming after seeing the first show cinema and when they reached near the place of occurrence, first accused stopped PW1 and caught hold of him and wrongfully restrained him and at that time second accused inflicted cut injury with MO1 sword and third accused closed his mouth and when he yelled out, the 5th accused beat him with MO2 iron rod on both his legs and accused 4, 6 and 7 made him to lay down on the stone kayyala and then hit him with MO3 series stones. When people gathered, they ran away from the place. Pws 2 and 3 took PW1 to Mupliyam in an auto rickshaw from there in a jeep to Aswini Hospital, Thrissur from where he was seen by PW3 who issued original of Ext.P2 wound certificate. While he was in the hospital, PW6 Head Constable attached to the police station went to the hospital on getting intimation from the hospital regarding the admission of PW1 there and recorded Ext.P1 statement of PW1 and came back to the police station and registered Ext.P4 First Information Report as Crime No.48/1995 of Vellikulangara police station against accused persons alleging offences under sections 143, 147, 148, 341, 324 and 326 read with section 149 of the Indian Penal Code and earlier

part of the investigation was conducted by him. He went to the place of occurrence and prepared Ext.P3 scene mahazer in the presence of PW4 and another and seized MO3 series stones from there after describing the same in the scene mahazer. He questioned the witnesses and recorded their statement. Thereafter investigation was conducted by PW7, the Sub Inspector of Police attached to that police station. He arrested accused 1 and 2 and produced them before court along with remand report. He completed the investigation and submitted final report.

10. PW1 is the injured in the case. Pws 2 and 5 are the eye witnesses to the incident. PW1 had categorically stated that on that day while he along with Pws 2 and 5 were returning home after seeing the first show cinema and when they reached in front of the the house of Appukuttan, the first accused came first and caught hold of him and wrongfully restrained him and at that time, others came and second accused cut him with a sword and the third accused closed his mouth when he tried to cry allowed and the 5th accused beat him with iron rod. Thereafter they made him to lay down on

the stone kayyala and then accused 4, 6 and 7 beat him with MO3 series stones. He had identified MO1 sword, MO2 iron rod and MO3 series stones as the weapons used for attacking him. It was admitted by him that some of the accused persons were accused in a murder case of his father and there was some enmity between them and he had also admitted that he is accused in some criminal case. He denied the suggestion that he is having other enemies and he had mistaken them as the persons attacked and falsely implicated them. Pws 2 and 5 also corroborated the evidence of PW1 regarding the manner in which the incident occurred and the manner in which the accused person attacked and inflicted injuries on him. It is true that Pws 2 and 5 are the relatives of PW1. But that alone is not sufficient to discard their evidence if their evidence is acceptable and believable. The evidence of Pws 1, 2 and 5 will go to show that they were coming together after seeing the first show cinema and it was at that time that the incident occurred. All of them have deposed that they have seen the incident and identified the accused persons in the moon light. Further, they were known to each other and they are from the

same locality also is not in dispute. So there is no difficulty for Pws 1, 2 and 5 to identify the accused persons as the persons, who attacked PW1 on that day.

11. It is settled law that, there is no rule that merely because the witnesses are relatives and interested witnesses, their evidence should not be accepted. But, court must be cautious in relying on their evidence, if it is not corroborated by independent witnesses. The incident occurred during 10 p.m. So it cannot be said that there will be independent witnesses available at that time. Further there is nothing brought out to discredit the evidence of Pws 2 and 5 regarding the manner in which the incident occurred and their presence at the place of occurrence. Except some minor deviation regarding overt act alleged to have been made by each accused, which is quite natural to happen due to lapse of time from the date of incident to the date of examination and that cannot be treated as material contradictions or omissions so as to disbelieve their case in toto, there is nothing brought out to disbelieve their evidence on this aspect. So, it is clear from the evidence of Pws 1, 2 and 5 that the accused persons have

attacked PW1 and caused injury to him and they formed unlawful assembly with the common object of attacking PW1 which is evident from the manner in which they attacked PW1.

12. It is true that First Information Statement in this case was recorded on 12.4.1995 at 8.30 p.m by PW6, the head constable attached to Vellikulangara Police station. It is seen from the First Information Report that on getting intimation from Aswani hospital, PW6, who in the GD charge, went to the hospital and recorded the statement and thereafter he came to the police station and registered Ext.P1 First Information Report. He had also noted the body mahazer of PW1. So it is clear from this that he was in charge of the police station at the relevant time. It is seen from the evidence that PW6 had conducted earlier part of the investigation and thereafter it was continued by PW7, the Sub Inspector of Police, who is the Station House Officer and submitted the final report.

13. It is true that section 156 of the Code deals with power of the Police Officer to investigate cognizable case, which reads as follows:

“156. Police officer's power to investigate

cognizable case:-(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned”.

14. So it is clear from the section that investigation in respect of cognizable offence has to be conducted by the station house officer. But subsection (2) of section 156 of the Code says that no proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate. So even if the investigation was conducted by an officer though not a station house officer, the

trial cannot be vitiated on that ground.

15. Section 2(o) of the Code defines 'station house officer', which reads as follows:

“officer in charge of a police station” includes, when the officer in charge of the police station is absent from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station-house who is next in rank to such officer and is above the rank of constable or, when the State Government so directs, any other police officer so present.

16. So an officer who is above the rank of a constable can be a station house officer in the circumstances mentioned therein. Further, a reading of Ext.P1 First Information Report will go to show that at the time when the case was registered, he was in GD charge of the police station. That shows that he was the Station House Officer at that time. Further, no question was put to Pws 6 or 7 regarding his competency to conduct investigation. The fact that merely because investigation was conducted by a subordinate officer who is not competent to conduct investigation will not vitiate the trial has been dealt with by the Hon'ble Supreme Court in the decision reported

in **H.N. Rishbud and another v. State of Delhi** (AIR 1955 SC 196), where it has been observed that a defect or illegality in investigation, however, serious has no direct bearing on the competence or procedure relating to cognizance or trial and it is saved by section 156(2) of the Code and it is a curable defect. The same view has been reiterated in the decisions reported in **Lilade Sitade Pavaiya and others v. State of Gujarat and others** (1983 CrL.L.J.934), **Murlidhar Singh and others v. State of Bihar** (2008 (1) Crimes 88) (Patna) and **Jai Prakash Dubey v. State of U.P** (2008 CrL.L.J. NOC 920) (ALL.). So the submissions made by the counsel for the revision petitioners that since major portion of the investigation was conducted by PW6 who is not competent under Section 156 of the Code to conduct investigation and as such trial is vitiated is without any merit in view of the bar under section 156(2) of the Code and the dictum laid down in the decisions cited supra and no prejudice has been established on account of such investigation being conducted by an officer who is not competent to conduct investigation. Further no question was put to these witnesses regarding this aspect as well. So under

the circumstances, that is not a ground to acquit the accused persons at this stage.

17. It is true that though First Information Report registered on 12.4.1995 had reached the court on 14.4.1995. But it may be mentioned herein that investigation in the case was started on 13.4.1995 itself as the mahazer was prepared on that day and witnesses were questioned by PW6. So once investigation has already been started consequent to the registration of crime, mere delay in sending the First Information Report to court is not fatal and that will not affect the genuineness of the prosecution case (see **Dharamveer and others v. State of Uttar Pradesh** (2010 (4) SCC 469) and **Brahm Swaroop and another v. State of U.P.**(AIR 2011 SC 280). Further in the First Information Report, the names of the persons were clearly mentioned as well. Further the accused persons were known to the witnesses including the injured. So, the delay in sending the First Information Report in court is not fatal in the circumstances of the case and cannot be taken as a ground for acquittal.

18. Further, other contention is that original wound

certificate was not produced and marked and photo copy marked is not admissible in evidence. But it will be seen from Ext.P2 that it was attested by the doctor and the doctor who prepared the original namely PW3 had deposed in court that it is the photo state copy of the original wound certificate prepared by him and it contained his signature. Further, there is no dispute regarding the fact that the injured sustained injuries in the incident and the nature of the injury sustained is also not in dispute. The only dispute is that who had inflicted the injury. So under the circumstances, the evidence of the doctor coupled with Ext.P2 wound certificate will go to show that the injuries were sustained by the injured in the incident and he sustained serious injuries including fracture which is a grievous injury and the injuries could be possible by using weapons like Mos 1 to 3. Further, it is settled law that any defect in the investigation or flaw in the conduct of the case by the Prosecutors in not bringing the necessary materials before court is not a ground for acquittal, if eye witnesses to the incident have deposed before court and the court is satisfied with their evidence. So under the circumstances, the court below were perfectly justified

in convicting the revision petitioners for the offences under Sections 143, 147, 148, 341, 323 and 326 read with section 149 of the Indian Penal Code and rightly convicted them for the said offences.

19. As regards the sentence is concerned, the trial court has sentenced them to undergo rigorous imprisonment for one year each for the offence under sections 143 and 147 each and further sentenced to undergo rigorous imprisonment for two years under section 148 of the Indian Penal Code and further sentenced to undergo rigorous imprisonment for three months under sections 341 of the Indian Penal Code and further sentenced to undergo rigorous imprisonment for three years and also to pay fine of ₹5,000/- each under sections 326 of the Indian Penal Code. It is further ordered that if fine amount is realized, half of the fine amount be paid to PW1 as compensation under section 357(1)(b) of the Code. This was confirmed by the appellate court.

20. The prosecution has no case that the present petitioners were having any previous criminal background. It is true that they have brutally attacked PW1 and inflicted

grave injuries. So considering the circumstances, I feel that sentencing accused 1, 3, 4, 6 and 7 simple imprisonment for three months each for the offences under sections 143, 147 and 148 of the Indian Penal Code and further sentenced to undergo simple imprisonment for six months and also to pay fine of ₹5,000/- each, in default to undergo simple imprisonment for three months each and directing the entire fine amount, if realized to be paid to PW1 as compensation and directing the substantive sentence to run concurrently will be sufficient and that will meet the ends of justice. As far as the second accused, who is the second revision petitioner is concerned, since he is no more, the substantive sentence cannot be executed again and fine can be realized from the estate if any left by him in the hands of the legal representatives in accordance with law. So, the sentence is modified as follows:

Since the second revision petitioner, who is second accused is no more, the substantive sentence cannot be executed against him and fine imposed by the court below and confirmed by the appellate court and this Court can be realized from the estate, if any, left by him in the hands of the

legal heirs in accordance with law. Accused 1, 3, 4, 6 and 7 are sentenced to undergo simple imprisonment for three months each for each of the offences under sections 143, 147 and 148 of the Indian Penal Code and further sentenced to undergo simple imprisonment for six months and also to pay fine of ₹5,000/- each, in default to undergo simple imprisonment for three months each under sections 326 of the Indian Penal Code and directed the substantive sentences run concurrently. If fine amount is realized, the entire fine amount including fine to be realized from the estate of second accused is directed to be paid to PW1 as compensation under section 357(1)(b) of the Code. Set off is allowed for the period of detention, if any, already undergone by them under section 428 of the Code.

With the above modification of the sentence alone, the revision is allowed in part and disposed of accordingly.

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

K. RAMAKRISHNAN, JUDGE.

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