

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

TUESDAY, THE 11TH DAY OF AUGUST 2015/20TH SRAVANA, 1937

Crl.Rev.Pet.No. 2839 of 2004

CRL.A. 80/1998 of I ADDL. SESSIONS COURT., THIRUVANANTHAPURAM
CC 643/1994 of J.M.F.C.-I,ATTINGAL

REVISION PETITIONER/1ST APPELLANT/1ST AC:

SAHADEVAN SANTHOSH,
CHARUVILA PUTHEN VEEDU, A.P.III/400, KOLICHIRA
AZHOOR VILLAGE.

BY ADV. SRI.R.BINDU (SASTHAMANGALAM)

RESPONDENT/RESPONDENT/COMPLAINANT::

STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

PUBLIC PROSECUTOR SMT.M.G. LISHA

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 11-08-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

RAJA VIJAYARAGHAVAN.V. J

Crl.R.P. 2839 of 2004

Dated 11th August, 2015

ORDER

1. In this revision filed u/s 397 r/w s.401 of the Code of Criminal Procedure, the petitioner who is the 1st accused in C.C.No.643 of 1994 on the file of the Judicial Magistrate of First Class-I, Attingal, for an offence punishable u/s 341, 323, 326 r/w 34 IPC, challenges the conviction entered and the sentence passed against him.

2. The case of the prosecution can be succinctly stated as follows:-

PW3, a tailor, is the de facto complainant, who, while returning back home on 12.4.1994 at 7.45 pm, was wrongfully restrained by the petitioner and was slapped asking whether he would give a

complaint before the police. PW3 responded by slapping him back and at that particular point of time, the petitioner called the 2nd accused. The 2nd accused came armed with a sword and inflicted a cut injury on the left thumb of PW3. On his attempt to block the attack, the bone of his left thumb got fractured. It is on these allegations that the petitioner and the 2nd accused is alleged to have committed the offence punishable as mentioned above.

3. On the accused pleading not guilty to the charge framed as against him by the trial Court for the aforementioned offences, the prosecution was permitted to adduce evidence in support of their case. To prove its case, PW1 to 8 were examined and Exts.P1 to P7 were marked. After the close of the prosecution evidence, the accused was questioned

u/s 313(1)(b) of the Cr.P.C with regard to the incriminating circumstances appeared against him for the evidence let in by the prosecution. He denied those circumstances and maintained that he is innocent. No defence evidence was adduced.

4. The learned Magistrate after trial as per judgment dated 5.2.1998, found both the accused guilty of the offence punishable u/s 341, 322, 323 and 326 r/w 34 IPC. The 2nd accused who is not before this Court was convicted u/s 326 r/w 34 IPC.

5. Against the above conviction and sentence, the petitioner along with the 2nd accused preferred Crl.A.80 of 1998 before the 1st Additional Sessions Judge, Thiruvananthapuram. As per judgment dated 25.3.2004, the learned Sessions Judge dismissed the appeal confirming the findings of the learned

Magistrate. The above concurrent findings are under challenge in this revision petition.

6. I have heard the learned counsel appearing for the petitioner and the learned Public Prosecutor.

7. It is submitted by the learned counsel appearing for the petitioner that the 2nd accused has not challenged the conviction and sentence passed against him .

8. The learned counsel appearing for the revision petitioner has fervently submitted that the Courts below have erred in law by convicting the petitioner under S. 326 of the IPC holding that he had shared common intent with the 2nd accused. It is his contention that the admitted case of the prosecution was that the petitioner and PW3 entered into a fracas

and they exchanged blows with their hands. It was thereafter, without any premeditation, that the 2nd accused had come to the spot and inflicted cut injuries on PW3 with a sword. According to the learned counsel, there will be no liability by reason of S.34 as the accused No.2 had acted independently of the petitioner and therefore, the accused would be liable for their individual acts alone.

9. I have gone through the evidence let in by the prosecution to appreciate the tenability of the contention raised by the learned counsel.

10. PW3 is the de facto complainant. PW1 and PW4 are eye witnesses who are cited by the prosecution. PW1 did not support the prosecution case and he has unequivocally stated before Court that he had no occasion to witness the incident. The evidence of

PW4 corroborates the evidence of PW3 in all material particulars. PW3 when examined before Court has stated that he was doing tailoring business and usually he closes the tailoring shop at 7.00 - 7.30 pm. On 12.4.1994, he had closed the shop at night and was returning back to his house. When he reached the pathway in front of Kolichira Coir Co-operative Society at about 7.45 pm, the 1st accused caught hold of his shirt and restrained him and then beat on his cheek asking whether he would prefer complaint to the police and PW3 responded by slapping back the petitioner. It was thereafter that the 1st accused had called the 2nd accused by name. At that particular point of time, according to the prosecution, the 2nd accused had come running with a sword in his hand and he had cut PW3 with the sword. PW3 attempted to ward off the same resulting in a fracture to his finger.

11. The evidence of PW3 is corroborated by the evidence of PW4. He has also stated that while on his way to his house, he had seen PW3 walking ahead of him. He has substantially corroborated the version of PW3 in all material particulars and both the Courts below have concurrently found that there is nothing to doubt their version. Even at the stage of hearing, the learned counsel appearing for the petitioner does not object to the findings entered into by the Courts below with regard to this particular aspect. The only contention is that the Courts below ought not have held that the petitioner had shared the common intention along with the 2nd accused.

12. The lower appellate Court has held that the narration of evidence by PW3 and 4 and the conduct of the accused and the way in which they assaulted

PW3 makes it amply clear that they had the common intention of inflicting injuries on PW3 and there was prior concert. It was holding so that the learned Sessions Judge came to the conclusion that the Court below has rightly invoked s.34 of the IPC.

13. The sequence of events in this case would reveal that PW3 was restrained by the petitioner while on his way back home and there was an altercation between them. PW3 was slapped by the petitioner and immediately PW3 slapped him back. It was at this particular point of time that the petitioner herein had called out the name of the 2nd accused. The 2nd accused had come running with a sword and had unilaterally cut PW3 on his finger, leading to the fracture. Question is whether in the facts of the instant case it can be inferred that accused Nos. 1 and 2 had nursed common intent .

14 . As per S 34 of the IPC, when a criminal act is done by several persons, in furtherance of common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. This section is intended to meet cases in which it may be difficult to distinguish between the acts of the individual members of a party or to prove exactly what part was taken by each of them in furtherance of the common intention of all. In other words, to constitute common intention, it is necessary that the intention of each one of them was known to the rest of them and was shared by them. The test to decide if the intention is common is to see whether the intention of one was known to the other and shared by that other. In drawing the inference, the true rule of law which is to be applied is the rule which requires that guilt is not to be

inferred unless that is the only inference which follows from the circumstances of the case and no other innocuous inference can be drawn.

15. Though establishing common intention is a difficult task for the prosecution, yet, however difficult it may be , the prosecution has to establish by evidence, whether direct or circumstantial that there was a plan or meeting of mind of all the assailants to commit the offence , be it pre arranged or on the spur of the moment, but it must be necessarily be before the commission of the offence. In a case where there is no direct evidence, the prosecution can also rely on circumstantial evidence.

16. In the instant case, neither PW3 nor PW4 says in their evidence that the petitioner and the 2nd accused had a pre-arranged plan to commit the

aforesaid offence. The circumstances also reveal that neither PW1 or the petitioner, who were standing together were aware that the 2nd accused was armed with a sword or that he intended to inflict an injury with a weapon. The fact that the earlier altercation between PW3 and the petitioner was with bare hands is also to be borne in mind.

15. It is by now settled by a catena of decisions that in the case of s.34 it is well established that a common intention presupposes prior concert. Several persons can simultaneously attack a man and each can have a same intention namely, the intention to kill and each can individually inflict a separate fatal blow and yet none would have common intention required by the section, because there was no prior meeting of minds to form a prearranged plan.

14. In **Krishna Govind Patil v. State of Maharashtra (AIR 1963 SC 1413)**, it was observed as follows:

"It is well settled that common intention within the meaning of the section implied a prearranged plan and the criminal act was done pursuant to the prearranged plan. The said plan may also develop on the spot during the course of the commission of the offence; but the crucial circumstance is that the said plan must precede the act constituting the offence. If that be so, before a court can convict a person under s.302 r/w s.34 of the IPC, it should come to a definite conclusion that the said person had prior concert with one or more other persons, named or unnamed, for committing the said offence."

15. Bearing this principle in mind, when the evidence let in by the prosecution and the judgment rendered by the Courts below are considered, it cannot be said that the prosecution has placed before the Court the circumstances under which it was inferred that there was the prior concert between accused Nos.1 and 2. It is true that prior concert and arrangement can and indeed often must

be determined from subsequent conduct, but in this case, there is nothing which could be referable to prior concert and prearrangement. In view of the above, I hold that the the conviction of the petitioner for offence under s. 326 r/w s. 34 of the IPC cannot be sustained.

16. Insofar as the offence u/s 341 and 323 is concerned, there cannot be any doubt with regard to the complicity of the petitioner.

17. In the result, the conviction and the sentence of the petitioner for the offence u/s 326 r/w 34 of the IPC is set aside. The conviction recorded u/s 341 and 323 of the IPC is confirmed. At this stage, the learned counsel appearing for the petitioner submitted that the incident had occurred in the year 1994 and more than 21 years have elapsed. The

petitioner was aged just 22 when the incident had taken place and the overt act committed by him was just a slap on the face of PW3. It is submitted that it will be a travesty of justice to sentence the petitioner to undergo imprisonment. In the nature of the offence committed, the injury caused to PW3 and the attendant facts, I am of the considered view that the sentence of imprisonment passed against the petitioner u/s 341 and 323 of the IPC can be avoided.

17. In the result, in modification of the sentence imposed by the Judicial Magistrate of First Class-I, Attingal, the petitioner is hereby sentenced to undergo imprisonment till rising of Court and to pay a compensation of Rs.2500/- to PW3 u/s 341 of the IPC and in default to undergo simple imprisonment for one month. In modification of the sentence

imposed u/s 323 passed by the learned Magistrate, the petitioner is sentenced to undergo imprisonment till rising of Court and to pay a compensation of Rs.2500/- to PW3 u/s 323 of the IPC and in default to undergo simple imprisonment for 15 days. The petitioner shall appear before the trial Court on 10.09.2015 to suffer the sentence.

The revision petition is partly allowed as above.

Sd/-
RAJA VIJAYARAGHAVAN.V.
Judge

MrCs

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P.S.ToJudge