IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 18TH NOVEMBER 2005 / 27TH KARTHIKA 1927

CRL.A.No. 754 of 2001()

SC.78/1997 of I ADDL. SESSIONS COURT, KOLLAM

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APPELLANT:

PRABHAKARAN ALIAS KOLAMBI,
S/O.NEELAMBARAN, PRAMOD VILASATHIL
VELIYAMKIZHAKKEKARA MURI,
VELIYAM VILLAGE, CONVICT NO.4349,
CENTRAL PRISON, POOJAPPURA, THIRUVANANTHAPURAM-695 012.

BY ADV. SRI.B.JAYASURYA

RESPONDENTS:

STATE OF KERALA.

BY PUBLIC PROSECUTOR SMT.PRAISY JOSEPH

` THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18/11/2005, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.HEMA, J.

CRL. A. NO.754 of 2001

Dated this the 18th day of November, 2005

JUDGMENT

The appellant herein was charge sheeted for the offence under Sections 302 and 447 of the Indian Penal Code (`I.P.C' for short). After trial, he was acquitted of offence under Section 447 IPC and convicted and sentenced for offence under Section 304(1) I.P.C. and sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs.50,000/-in default to undergo rigorous imprisonment for two years. If the fine is realised, it was ordered to be disbursed to the legal heirs of deceased Damodaran. The appellant challenges the said conviction and sentence passed against him in this appeal.

2. According to prosecution, on 23.7.1994 at about 3.45 p.m., the appellant stabbed the deceased Damodaran on his chest with MO1 knife and he succumbed to the injury on the same day at about 4.30 p.m. on the way to the hospital. The incident was occurred in the property of the deceased Damodaran where he has allegedly trespassed. The motive alleged for the offence is that there was a quarrel between the appellant and deceased Damodaran, since the latter had taken away the grass which was kept by his wife. The deceased was infuriated by washing of the grass in the water tank of deceased Damodaran, against the instruction given not to wash the grass there. The act of the deceased Damodaran was questioned by the accused on the

crucial day and following this, the accused stabbed the deceased with MO1.

3. PWs 1 to 12 were examined and Exhibits P1 to P14 were marked on the side of the prosecution. MOs 1 to 12 were also marked. On the side of the accused DWs 1 and 2 were examined and Exhibit D1 was marked. Considering the evidence adduced in this case, the court below found that the accused had stabbed deceased Damodaran with MO1 which has resulted in his death on the same day and that the injury is sufficient in the ordinary course of death. The court found that the accused acted at the spur of the moment carried away by his emotions in a heat of passion upon a quarrel on provocation and hence the offence made out is only under Section 304(I) IPC. He was convicted for the said offence and acquitted of other offences.

4. To prove the prosecution case, the prosecution relied upon ocular evidence, medical evidence, dying declaration and recovery of weapon at the instance of the accused, pursuant to a statement given under Section 27 of the Evidence Act. The only eye witness to the occurrence is PW2. PW2 gave evidence that he was questioned at the time of inquest and that the incident happened at about 3.30 p.m., while he was walking along a road near the quarry. Deceased Damodaran was coming through his property and the accused was found walking behind him. Suddenly deceased Damodaran turned back and the accused stabbed deceased Damodaran on the left side of his chest with knife MO1. He identified MO1 as the knife used by the accused for commission of offence. He also said that he heard the cry of PW3, the daughter of

deceased Damodaran. It was then that he knew about her presence in the scene. The accused ran away from the seen towards the east and then towards the west. He was also carrying the bloodstained knife. PW2 also deposed that PW1 came to the spot and the deceased told him that he was stabbed by Prabhakaran. Deceased Damodaran had by that time fell down. He was removed to the hospital.

5. PW2 is an independent witness to the occurrence. Nothing is brought out in his evidence to show that he falsely implicated the accused in the crime. There is no reason for this witness either to support the prosecution or to speak against the accused. His evidence stands undiscredited in cross-examination. There is no material contradiction or omission in his version. He has stood at the test of cross-examination. He deposed that he saw the accused going behind deceased Damodaran and stabbing just once. His evidence is supported by the medical evidence also, which reveals that the deceased Damodaran had sustained one incised injury on the chest which can be inflicted by a weapon like MO1.

6. The evidence of PW2 is supported by evidence of PWs 3 and 4 also. PW3 is the daughter of deceased Damodaran who said that one Lalitha, PW4 came to her house and said that there was some quarrel between the accused and deceased Damodaran and she rushed to the scene and found the accused drawing out a knife from the chest of deceased Damodaran and running away. She cried aloud and by the time PW1 had also reached the scene. There is no reason to disbelieve PW3.

7. Though the witness was cross-examined at length, her presence at the scene is not doubtful. Nothing is brought out to show that she could not have reached the place of occurrence when she saw the accused drawing out the knife. Though she is the daughter of deceased Damodaran, that reason alone will not be sufficient to discard her evidence. She did not give an exaggerated version, but only spoke about a part of the incident. The presence of accused at the scene and his involvement at the occurrence is corroborated by the evidence of PW3.

8. PW4 is another witness who supported the prosecution case. PW4 is also an independent witness who was working in the quarry. According to her, the accused had come to her on the date of occurrence at about 3.45 p.m. and asked for a hammer and she said that it was not available and that could be given tomorrow. He went away. At that time, the deceased Damodaran was there and accused picked up quarrel with him asking him as to who was he to remove the grass washed by his wife etc. PW4 felt that there will be a quarrel and immediately she rushed to PW3 and informed her that there was a quarrel between the accused and the deceased Damodaran. She also said that PW3 rushed to the scene and by the time PW4 reached the scene she found PWs 2 and 3 near the deceased Damodaran. But the accused was not present at the scene at that time.

9. There is no reason to disbelieve the evidence of PW4 also. She has not stated anything with respect to the incident in which the accused stabbed the deceased Damodaran. She only saw a part of the incident in

which she felt that there can be a quarrel between the accused and the deceased Damodaran on account of some dispute. Learned counsel for appellant vehemently contended that none of these witnesses can be believed because they have suppressed genesis of the incident and they have not stated whole truth before the court. He has drawn my attention to the evidence of PW6. PW6 is the doctor who gave evidence that on 24.7.1996 at about 11.50 a.m. he examined the accused and issued a wound certificate and he had noted on the body of the accused, the following injuries:

"(1) Abrasion on left check 1 x 1/2 cm with surrounding induration 2 x 3 cm.

(2) Diffused Abrasion on left knee."

The fact that the accused had injuries on his body at the time of examination by the doctor on the next day at 11.50 a.m. cannot be disputed in the light of the evidence of PW6. But the question is whether injuries were sustained on the course of incident or not.

10. The mere presence of some injuries on the accused cannot lead to an inference that the accused sustained those injuries in the course of the same incident. The accused is putting forward a defence that the injuries were sustained by him in the course of the same incident. If that be so, this fact must be brought out in evidence. But, the evidence in this case does not probabalize the defence version that the

injuries were sustained by the accused at the time of occurrence in the course of the incident.

11. The reasons are as follows: The prosecution witnesses, PWs 1, 2 and 3 had seen the accused immediately after the incident. But none of them had seen any injury. The defence was also not able to establish or probabalise that these witnesses were suppressing the injuries which the accused had allegedly sustained in the course of the incident. None of the witnesses have a case that the accused had injuries on his body during the incident. The accused himself did not tell the doctor, that the injuries were sustained in the course of the incident. On the other hand, the evidence given by PW6, doctor is that the injuries were sustained during a fall.

12. Of course, learned counsel for the appellant submitted that no value can be attached to this version given by the doctor, because the accused gave the statement to the doctor while he was in police custody. It is clear from the evidence of PW6 that the accused was in the custody of the police, when he made the statement to the doctor. But, nothing is brought out in evidence to show that he was threatened by the police or he was instigated by the police or instructed by them to make false statement to the doctor regarding the cause of injury. The evidence of PW6 will not conclusively establish the presence of any of the police officers in the vicinity while the accused was examined by the doctor. Nothing was brought out from the evidence to show that the accused was examined by the doctor in the presence of any police officer.

13. If at all the petitioner had sustained an injury in the course of the incident, the nature of the injury noted in Exhibit P2 will show that the injury was on a visible part of the body, namely, cheek. Had there been such an injury, there can be no doubt that the eye witnesses would not have omitted to note such an injury on the accused. PW2 is an independent witness who has no axe to grind against the accused. He did not speak that the accused had any injury on his cheek. Nothing is brought out from his evidence to indicate that he was suppressing the injury which was sustained by the accused in the incident.

14. It is also relevant to bear in mind that this is not a case where the accused was prevented from going to a doctor, if at all he had sustained an injury in the course of the incident. The incident occurred on 23.7.1996 at about 3.45 p.m. But accused had not gone to any doctor till he was arrested on 24.7.1996 by the investigating officer, PW12. If the accused had a genuine case that he was injured in the same incident, there was no reason why he did not seek medical aid or treatment. It is not comprehensible as to why he waited until he was taken to the doctor by the police.

15. If the accused had a genuine case that he sustained the injury in the course of the incident in this case, the normal human conduct will be to go to the doctor immediately. In fact, it has come out in defence evidence itself that he had intended to go to the hospital and he had got into an autorikshaw also. He had also taken Rs.100/- from DW1. The evidence of PW8

would go to show that accused had gone in his autorikshaw. But the accused never went to the doctor. He had deposed that he had seen the accused at 4 p.m. on the date of occurrence at the house of Natarajan, DW1.

16. PW8 deposed that he found the accused and DW1 talking to each other. He had also stated that there was blood on the shirt and Kaili of the accused. But he did not say that the accused had any injury on his body. He also deposed that he had taken him in his autorikshaw and told him not to stop the vehicle, even if anybody showed any signal and requested him to take him to the police station. Though the vehicle was slowed down at the police station, he did not get down. But he wanted to go to some other place. Though he went from place to place in the autorikshaw of PW8, the evidence of PW8 also does not disclose that the accused did not want to go to hospital or to the doctor to take treatment.

17. PW8 specifically deposed in cross-examination that he had not seen any injury on the body of the accused and there was no bleeding below his left eye. No blood was seen on the body of the accused. There is no reason to disbelieve PW8 who is another independent witness. In fact, his evidence reveals that he is closely connected with DW1 who spoke for the accused. From the above discussion I find that the accused had a sufficient opportunity to go to a doctor and get himself examined. Nobody prevented him from going to a doctor, if at all he had any injury. The evidence of the defence witnesses also does not show how the accused had

sustained the injury. DW1 did not say that the accused was injured. Therefore, there is no evidence to show that the accused had sustained the injuries in the course of the incident in this case.

18. It is only if the injuries are sustained in the course of the incident that the prosecution has a duty to explain the same. It is also relevant to note that the injuries sustained by the accused are quite simple injuries as spoken to by PW6, doctor. Though the doctor would say that the injury on the neck could have been implicated by a hammer, no much value can be given to his evidence because he was not speaking with reference to any hammer at all. The hammer which was allegedly used by the accused was not available in court. In such circumstances, no inference can be drawn that the witnesses were suppressing the genesis of the incident or any part of the incident. Learned counsel for the appellant cited decisions reported in ***Lakshmi Siong and others v. State of Bihar*** (AIR 1976 SC 2263) and ***Samuelkutty v. State of Kerala*** (1998(2) KLJ 180) and vehemently contended that the court has to disbelieve the prosecution case and discard the same, since the injuries on the accused were not explained. The above decisions cannot be applied to the facts of this case, since there is nothing on record to establish that the injuries were sustained by the accused during the course of the incident in this case. Only if the injuries are sustained in the course of the same incident, application of the dictum laid down in the decisions would arise.

19. In addition to the ocular evidence, medical evidence is also available. PW10 is the doctor who had issued the postmortem certificate, Exhibit P5. He has noted that the deceased Damodaran had sustained an injury as injury No.1 which is as follows:

> "Incised penetrating wound 2.3 x 0.5 cm. horizontally placed on the front of left side of chest, the inner sharply cut end was 7 cm. outer to midline and 14 cm. below the upper end of breast bone. The outer end of the would showed splitting of tissues. The chest cavity was seen penetrated by cutting the 5th rib. underneath the upper lobe of left lung was transfixed. Pericardium and front wall of the right ventride were seen cut and the wound terminated in the interventricular septum 2 cm. below the atrioventricular ring. The pericardium cavity contained 200 ml. of fluid blood and the left chest cavity contained 1250 ml. of fluid blood. The left lung collapsed. The would was directed backwards upwards and to the right for a total minimum depth of 5 cm."

20. PW10 deposed that the injury would be sufficient in the ordinary course of nature and that a person can die within a few minutes of sustaining such injury theoretically. The evidence of PW7 doctor would show that the deceased Damodaran was taken him to hospital on 23.7.1999 at 4.30 p.m. and he died as recorded in Exhibit P3. Thus it is clear that the deceased Damodaran had sustained incised injury which has resulted in death within 45 minutes of the incident. It is also seen from the evidence of PW10 that the injury could be caused by MO1. The evidence of PWs 1, 2 and 3 will indicate that

MO1 was the knife which was used for the incident and the doctor's evidence corroborates their evidence to the effect that the injury sustained by the deceased Damodaran could be inflicted by MO1. The medical evidence also thus corroborates the ocular evidence.

21. Next is the recovery of the weapon, MO1 at the instance of the accused. PW12, the investigating officer deposed that he had arrested the accused near the house of the sister of the deceased and at 9.45 a.m. on 24.7.96 on the very next day. Pursuant to a statement given by him, the weapon, MO1 was recovered and a mahazar was prepared on the same day at 10.15 a.m. The disclosure statement is also marked as Exhibit P8(a). Though PW8 is an official witness, I do not find any reason to discard his evidence. The evidence of PWs 1, 2 and 3 shows that the accused had MO1 in his hand. MO1 was seen in the hands of the accused at the time of occurrence as well as after the incident. PW8 also deposed that he had seen MO1 in his hand. He identified MO1 from the court as the weapon carried by the accused when he saw him after the incident at about 4 p.m. i.e., after 15 minutes of the incident.

22. The evidence of DW1 also shows that the accused had a knife in his hand when he saw him at 4.45 p.m. on the date of occurrence. The fact that the accused was in possession of MO1 which was identified as the weapon of offence is clearly established in this case and it is only probable that he alone will be knowing the place where it is hidden. The recovery of MO1 in pursuance of Exhibit P8(a) disclosure statement from a

hidden state also supports the prosecution case.

23. In the light of the above discussion, I find that the prosecution has proved beyond doubt that the accused had caused an injury on the deceased Damodaran by stabbing him with MO1 on his chest which has caused to his death as disclosed by the medical evidence and other evidence. Though the accused was charge sheeted for offence under Section 302 IPC, it is seen that he was convicted only for offence under Section 304(I) IPC on the ground that the incident occurred was at the spur of the moment carried away by his emotions in a heat of passion upon a quarrel etc. The State has not filed any appeal. In the above circumstances, I find that there is ground to interfere with the sentence.

The appeal fails and is dismissed.

K.HEMA, JUDGE

vgs.

K.HEMA, J.

CRL.A.NO.754 OF 2001

JUDGMENT

18.11.2005