

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

MONDAY, THE 12TH DECEMBER 2005 / 21ST AGRAHAYANA 1927

CRL.A.No. 962 of 2003(C)

SC.93/1996 of ADDL. SESSIONS COURT (ADHOC), KALPETTA
.....

APPELLANT:

GEORGE @ KUTTAPPAYI,
CONVICT NO.8635,
CENTRAL PRISON, KANNUR.

BY ADV. ADV.PRAMOD J.DEV(STATE BRIEF)

RESPONDENTS:

STATE OF KERALA, REPRESENTED BY A
C.I. OF POLICE, MANANTHAVADY, WYNAD

BY PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 12.12.2005, THE COURT ON 12/12/2005 DELIVERED THE
FOLLOWING:

K.HEMA, J.

CRL.A.NO.962 of 2003

Dated this the 12th day of December, 2005

JUDGMENT

The appellant was charge sheeted for offences under Sections 302 and 506 of the Indian Penal Code ('IPC', for short). After trial, he was convicted and sentenced to undergo 10 years rigorous imprisonment under Section 304(I) of IPC by the Additional Sessions Judge. The said conviction and sentence are challenged in this appeal.

2. According to prosecution, the incident occurred on 9.5.1991 at about 1.30 p.m. from the mud road lying about 65 meters on the south-eastern side of the house of PW6. The accused stabbed the deceased Thommi on the head and when he fell down he stabbed him in quick succession on the stomach and chest. PW1 tried to intervene while he turned to him. PW1 ran towards the eastern side through the road. The accused also left the scene. PW1 and others went to the deceased Thommi and tied the wound with a towel. He was taken to the hospital and on his way he was declared dead at the hospital. The incident occurred since the deceased Thommi tried to intervene in a quarrel.

3. PWs 1 to 13 were examined, Exhibits P1 to P10 and MOs 1 to 13 series were marked. The lower court on an analysis of the evidence found the accused not guilty of offence under Section 302 IPC, but he was found guilty of offence under Section 304(I) IPC. The court below also found that there is no evidence to support the charge under Section 506(II) IPC that the said charge does not stand proved. According to the court below, the accused committed the offence without pre-meditation. He was a hot-tempered man and he

was provoked by the interference made by the deceased, when the accused was having some quarrel with his own brother and relative and hence he committed the offence at a stage when he lost his sense. It was also found that "the possibility of violent attitude being aroused because of the mental illness suffered by him cannot be totally ruled out".

4. To prove the prosecution case the prosecution examined PWs 1 to 6 who are the alleged eye witnesses. PWs 1 and 2 are brothers who are independent witnesses to the occurrence. PW6 is the brother of the deceased Thommi with whom there was an alleged altercation immediately prior to the incident. PW6 turned hostile to the prosecution. He did not state anything regarding the incident. He only said that he saw the deceased Thommi falling down. His evidence is of no use to the prosecution to prove the actual incident.

5. However, PWs 1 and 2 stood by the prosecution. Both of them gave evidence that the incident happened when they were working in the property of the accused and that there was an altercation between the accused and PW6 at about 12.30 p.m. and both of them were taken to their respective houses by the persons who were working in the property. Thereafter they heard a cry, when PW1 and PW2 were taking food after about 1 p.m. and they rushed to the scene. They saw the accused standing by the side of the road near the house of PW6, carrying a knife in his hand. The deceased Thommi went to the accused and told him to go to the house and that the issue can be settled etc.

6. But the accused immediately stabbed the deceased Thommi on his head. The deceased Thommi fell down while he stabbed him in quick succession with the knife. PW1 tried to

intervene. But the accused turned to him while he ran away. Later the accused left the place and the witnesses came to the scene and dressed the injury of the deceased Thommi. He was taken to the hospital, from where he was declared dead.

7. PWs 1 and 2 gave evidence corroborating each other in all material particulars. They are independent witnesses, who were working in the property of the accused. But a suggestion was made to PW1 that PW1, 2 and others attempted to trespass into the property of the accused and when his mother attempted to prevent the same she was assaulted and the accused was also stabbed by PW1, when he tried to run away. The same suggestion was put to PW2 that PW2 and others attempted to assault the accused and his mother when the incident occurred. These suggestions were denied by the witnesses. But the evidence in this case will disclose that the accused had some injuries on his body. He was admittedly having an injury of 4 c.m. length on his head, as disclosed from the evidence of PW13, investigating officer. PW13 also admitted that the accused had other injury also on his body, on the shoulder. In the remand report, it is seen recorded that when the accused was produced on 10.5.1991, there was an injury on the head and that he had also sustained injuries on various parts of the body. The learned Magistrate directed the Superintendent of Jail to give necessary medical aid to the accused. PW13 deposed that the accused was examined by a doctor in Mananthavady Government Hospital.

8. It is clear from what is discussed above that the accused had injuries on several parts of the body, including his head. He was also examined by the doctor. It is not understood how he sustained injuries. Evidence is not forthcoming on this aspect. Prosecution has

not explained how the accused sustained so many injuries. To a question whether the accused had a stab injury on his head, PW13 deposed that there was an injury of 4 c.m. length above the right ear on his head. He also stated that the accused had some aberrations on the left shoulder. His definite case is that he did not see any injury on the body. But this is not consistent with what has been recorded by the learned Magistrate in the remand report. There is absolutely no reason to discard the endorsement made by the learned Magistrate in the remand report. PW6 deposed that he did not think it necessary to collect the wound certificate relating to the injuries sustained by the accused and produce the same.

9. There is absolutely no evidence to show the nature of injuries sustained by the accused and as to how the accused sustained injuries. The presence of injuries on the body of the accused, in the light of the suggestions made by PWs 1 and 2 in cross-examination, has some significance. This cannot be ignored by the court while evaluating the evidentiary value of PWs 1 and 2. PW1 suppressed as to how the injury was sustained by the accused, though his evidence reveals that the accused had sustained injury. PW2 also tried to suppress the injury which was sustained by the accused. He pleaded ignorance of any injury having sustained on the accused. In the light of the endorsement in the remand report and the admissions made by PW13 investigating officer, regarding the presence of some injuries on the body of the accused and also examination made on him by the doctor, it is clear that PWs 1 and 2 were suppressing the truth regarding the sustaining of injury by the accused.

10. PW1 and PW2 ought to have explained how the accused sustained injuries. In the light of the suppression made by PW1 and

PW2, I find it difficult to believe their evidence. The prosecution has also not produced the wound certificate and explained the injuries sustained by the accused. The accused had given a statement at the time of questioning under Section 313 Cr.P.C. that he was assaulted at the scene of occurrence and he had also gone to the hospital. It is well settled that when the eye witnesses are suppressing the manner in which the accused sustained injuries, their evidence cannot be accepted for entering a conviction. It is not safe to act upon such version. Without knowing the manner in which the incident actually occurred, especially when the accused had a case of private defence and there is also evidence to show that he had sustained substantial injuries, the evidence of the victim or eye witness cannot be accepted to enter a conviction against the accused.

11. The lower court has not considered these aspects in the right perspective. The lower court has not dealt with the presence of injuries on the accused and the impact of the non explanation of such injuries by PWs 1 and 2. The mere recovery of MO1 at the instance of the accused will not be sufficient to hold the accused guilty of offence under Section 304(I) IPC. The prosecution has not proved beyond reasonable doubt that the accused has committed offence in the manner alleged by the prosecution and the accused is entitled to benefit of doubt.

12. It is also fairly pointed out by the learned Public Prosecutor that a counter case was also registered based on the statement given by the accused. But the case was referred by the police. But none of the records are produced by the prosecution in this case. It is the duty of the prosecution to place all the relevant materials before court so that the court can decide as to how and in

what manner the incident happened. In the absence of production of relevant materials before court, an adverse inference can be drawn against the prosecution.

13. The conviction and sentence passed against appellant are set aside and he is acquitted of offences under Sections 304(I) and 506(II) IPC, extending the benefit of doubt. He is set at liberty forthwith. The Registry shall issue release memo to the concerned jail authority forthwith.

This appeal is allowed.

K.HEMA, JUDGE

vgs.

K.HEMA, J.

CRL.A.NO.962 OF 2003

JUDGMENT

12.12.2005