IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

FRIDAY, THE 29TH DAY OF AUGUST 2014/7TH BHADRA, 1936

CRL.A.No. 383 of 2010 ( )

SC 25/2006 of ADDITIONAL DISTRICT & SESSIONS COURT (AD HOC) FAST TRAC COURT I, PATHANAMTHITTA.

APPELLANT(S)/ACCUSED NOS.1, 3, 4 & 5:
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1. PRAKASH @ SANTHOSH, S/O.BHASKARAN,
PULICHIMAMTHADATHIL VEEDU, KUMAREMPEROOR, THEKKEKARA
VADASSERIKKARA, RANNI TALUK, PATHANAMTHITTA DISTRICT.

2. PEETHAMBARAN, S/O.GOPALAN,
PULICHIMAMTHADATHIL VEEDU, KUMPLATHAMON
VADASSERIKKARA, RANNI TALUK, PATHANAMTHITTA DISTRICT

3. RAVEENDRAN, S/O.SUKUMARAN,
VADAKKETHIL VEEDU, EDATHARA, VADASSERIKKARA
RANNI TALUK, PATHANAMTHITTA DISTRICT

4. MOHANAN @ PODI, S/O.ULAKANKUTTY,
VAVOLIKANDOM, VADASSERIKKARA, RANNI TALUK
PATHANAMTHITTA DISTRICT

BY ADVS.SRI.V.SETHUNATH
SRI.K.HARIKUMAR
SRI.JACOB P.ALEX
SRI.JOSEPH P.ALEX

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SRI.ROY THOMAS.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12-08-2014, THE COURT ON 29.8.2014 DELIVERED THE FOLLOWING:

C.R.

THOTTATHIL B.RADHAKRISHNAN

&

P.B.SURESH KUMAR, JJ.

Crl. Appeal No.383 of 2010

Dated 29th August, 2014.

J U D G M E N T

P.B.Suresh Kumar, J.

Accused Nos.1, 3, 4 and 5 in Sessions Case No.25 of 2006 on the file of the Additional Sessions Court(Adhoc) Fast Track - I, Pathanamthitta are the appellants. They have been found guilty and convicted for the offences punishable under Sections 143, 147, 148, 302 and 307, read with Section 149 of the Indian Penal Code, hereinafter referred to as "the IPC" for short. For the offence punishable under section 143 of IPC, they were sentenced to undergo rigorous imprisonment for a period of 3 months each. They were also sentenced to undergo rigorous imprisonment for a period of one year each for the offence punishable under Section 148 of IPC. They were further sentenced to undergo rigorous imprisonment for a period of 3 years each for the offence punishable under

Section 307 IPC. They were further sentenced to undergo imprisonment for life and pay a fine of Rs.10000/-each, in default of which to undergo rigorous imprisonment for a period of one year each, for of the offence punishable under Section 302 IPC.

2. The case set up by the prosecution is as follows:- On account of previous enmity, the accused formed themselves into an unlawful assembly and in prosecution of their common object of committing the murder of PW5, on 21.2.2004 at about 8.30 p.m., they beat PW5 with firewood logs and in the course of the attack on PW5, one vikraman and PW4, who are his close relatives, intervened and then the accused caused injuries on them also with the firewood logs carried by them and among them, vikraman succumbed to the injuries sustained by him in the said occurrence.

3. A case was registered by Perunadu Police on 22.2.2004 on the basis of Ext.P2 F.I. Statement given by PW4. PW22 commenced the investigation. He conducted the inquest of the dead body, prepared the scene mahazar, arrested the accused and effected recovery of the material objects. PW25

completed the investigation and submitted the final report against the accused, alleging commission of the offences referred to above.

4. On appearance, the accused pleaded not guilty. Consequently, the prosecution was called upon to adduce evidence in support of its case. The prosecution, thereupon, examined 25 witnesses as PW1 to PW25 and marked 27 documents as Exts.P1 to P27. The prosecution has caused the identification of 10 material objects also.

5. After the evidence of the prosecution, the accused were questioned under Section 313 of the Code of Criminal Procedure. They denied the incriminating circumstances appearing against them in the evidence of the prosecution and maintained that they are innocent. Since this was not a case of no evidence for the prosecution, the accused were called upon to enter on their defence. The accused, however, chose not to adduce any evidence.

6. The Court of Session, on an evaluation of the evidence on record, found that the accused are guilty of the offences alleged against them, and convicted them.

7. We have heard Adv.Sri.Joseph P.Alex for appellant Nos.1 to 3, Adv.Sri.V.Sethunath for appellant No.4 and the learned Public Prosecutor, Sri.Roy Thomas, for the State.

8. Whether the prosecution has succeeded in establishing the guilt of the accused is the point to be decided.

9. Injuries found on the body of the deceased, as recorded in Ext.P6 post mortem certificate read thus :

> (1) Lacerated wound, 7x1 cm, bone deep, oblique, on right side of top of head, front inner end 3 cm outer to midline and 8 cm above eyebrow.
>
> (2) Lacerated wound, 6x1 cm, bone deep, sagittaly placed on the top of head in the midline, 10 cm above root of nose.
>
> (sagitally placed was four front to the back in the midline)
>
> (3) Multiple small contused abrasions over an area, 5x3 cm, on right side of forehead, just outer to midline and 2 cm above eyebrow.
>
> On dissection scalp tissues on front and top of head showed contusion 18x10 cm, involving its entire thickness. Skull showed comminutted fracture over an area 10x7 cm involving right parietal and right side of frontal bone. Anterior cranial fossa also showed fracture fragmentation. Differ subdural and sub arrchancial bleeding on both sides of brain. Gyri of brain flattened and sulci narrowed.
>
> (4) Lacerated wound, 10x0.5x0.2 cm, oblique, on right side face,

upper outer end being 1 cm, in front of top of ear and lower inner end at middle of right cheek.

(5) contused abrasion 3x2 cm, over left cheek.

(6) Multiple small contused abrasions over an area, 3x2 cm, on the front of nose.

(7) Lacerated wound, 4x1.5x0.5 cm, on the inner aspect of middle of lower lip.

(8) Multiple small abrasions over an area, 3x2 cm, on front of left knee.

(9)Lacerated wound, 1.5x0.5 cm, skin deep, on the middle of left palm.

(10) Abrasion, 2x1 cm, on the back of left hand.

The opinion as to the cause of death recorded in Ext.P6 is that the death was due to head injury. The doctor, who conducted the post mortem examination, was examined as PW11. He has reiterated and confirmed the contents of, and the findings in Ext.P6 post mortem certificate. In addition, he has also deposed that the injury Nos.1, 2, 3, 4 and 7 found on the body of the deceased could be inflicted with Mos.1 to 3 firewood logs and the rest of the injuries could be inflicted with Mos.4 and 5. From Ext.P6 post mortem certificate and the evidence of

PW11, it is established that the death of Vikraman was a homicide.

10. It is seen from the materials on record that the prosecution was relying on the oral testimonies of Pws.1, 4 and 5 and the attended circumstances to bring home the guilt of the accused. Ext.P7 site plan shows that the scene of occurrence was inside a market and there was a toddy shop and a saw mill close to the scene. PW1 was the cook in that toddy shop. He deposed that he knows the assailants and the injured, including the deceased. According to him, on the relevant day, all of them had consumed toddy from the shop. PW1 explained that after the assailants and the injured left the shop, he heard a hue and cry from the market and he saw the deceased lying dead in the market. He had also deposed that there was a quarrel between the accused and the injured inside the market. PW1 did not claim that he had seen the occurrence.

11. PW4 was the brother-in-law of the deceased. As stated above, PW4 was the person who gave the First Information Statement. He deposed that on the relevant day,

he was assisting PW5, who is also his brother-in-law, in the construction of his house. According to PW4, the deceased was also assisting PW5 in the said work. After the work, all of them went together to the toddy shop near the market and consumed toddy. Thereafter, according to PW4, he was chatting with PW5 and the deceased inside the market, near the foot steps leading to the adjacent river. According to PW4, at that point of time, the accused came there and wanted them to leave that place. As they were not prepared to obey the directions of the accused, there was an altercation and a scuffle between them. PW4 has explained that after they dispersed, the accused went inside the market and came back with a few firewood logs and beat all of them with the said logs. According to PW4, the accused were beating PW5 and they beat him and the deceased also when they intervened and attempted to dissuade the accused from beating PW5. PW4 has identified Mos.1 to 5 firewood logs used by the accused for inflicting injuries on him and others.

12. PW5, as mentioned earlier, is the co-brother of the deceased. He also gave evidence in tune with the

prosecution case, as deposed by PW4. In addition, PW5 has deposed that a few days prior to the occurrence namely on 18.02.2004, he cautioned and dissuaded the accused from playing cards at the bank of Pamba river, where ladies and children used to take bath, and they left the scene on that day with the threat that they will teach him a lesson. According to PW5, it was on account of the said reason, the accused caused the death of Vikraman and assaulted him and PW4.

13. PW10 was the doctor who examined PW4 on the date of occurrence and issued Ext.P5 wound certificate. The injuries noted by PW10 on the body of PW4 read thus:

1. Lacerated wound extending from medial end of right eyebrow to the middle of forehead 4x2x2 cm.
2. Lacerated wound right frontal area to the midline 4x2x2 cm.
3. Lacerated wound right parietal area 5x2x2 cm.
4. Lacerated wound at partietal area 3x2x2cm.

PW9 was a doctor attached to Muthoot Medical Centre, Kozhencherry, where PW5 was admitted and treated after the occurrence. PW9 proved Ext.P8 wound certificate issued from that hospital after examining PW5. Ext.P8 wound certificate indicates that on the date of occurrence at about 10.30 p.m.

PW5 was admitted to the Muthoot Medical Centre, Kozhencherry for treatment in connection with the injuries noted in the said certificate. PW22 was one of the investigating officers in the case. PW22 deposed that on questioning accused No.2, he disclosed that the firewood log used by him to beat the deceased and others was concealed by him and based on the said disclosure, PW22 recovered MO2 from the place shown by accused No.2, as per Ext.P10 mahazar. Ext.P10(a) is the disclosure statement of accused No.2 proved by PW22. PW22 also deposed that on questioning accused No.5, he disclosed that the firewood logs used by him and others are concealed by him and based on the said disclosure, PW22 recovered Mos.3 to 5 from the place shown by accused No.5, as per Ext.P3 mahazar. Ext.P3(a) is the disclosure statement of accused No.5 proved by PW22.

14. The altercation and scuffle between the accused on one side and Pws.4, 5 and the deceased on the other side has been spoken to even by PW1, who was declared hostile by the prosecution. The said evidence of PW1 has not been discredited in cross-examination. There was only

a suggestion to PW1 that he was giving evidence at the instance of Pws.4 and 5. The case of the prosecution that the deceased was beaten to death at the scene of occurrence on the relevant day is not seen disputed by the accused. The dispute is only as to the complicity of the accused. As stated above, PW5 has categorically stated in his evidence that the accused are known to him; that on 18.02.2004 when he cautioned and dissuaded the accused from playing cards at the bank of the river, where ladies and children used to take bath, they left the scene with the threat that they will teach him a lesson and that all of the accused had beaten him and others including the deceased, with the firewood logs carried by them. The said evidence was fully endorsed by PW4. The evidence tendered by Pws. 4 and 5 appeared to us to be natural and convincing. There is nothing on record to suspect the veracity of the evidence tendered by the said witnesses. The evidence of Pws.4 and 5 is corroborated to a certain extent by the evidence of PW1, though he turned hostile to the prosecution. The evidence tendered by Pws.4 and 5 is also corroborated by the recovery of MO2 firewood log from

accused No.2, as per Ext.P10 mahazar and the recovery of Mos. 3 and 4 firewood logs from accused No.5 as per Ext.P3 mahazar. The evidence tendered by Pws.4 and 5 is further corroborated by the evidence of Pws.10 and 11 doctors and Exts.P5 to P8 wound certificates.

15. The learned counsel for the accused submitted that in the nature of the case, as set up by the prosecution, it was impossible for any one to notice the overt acts of each accused and the material objects used by them and therefore, the evidence tendered by Pws.4 and 5, as regards the sequence and particulars of the overt acts of the accused is too dramatic and cannot be accepted. He has also relied on the decision of the Apex Court in **Sevi v. State of T.N.** [1981 (Supp). SCC 43]. The decision relied on by the learned counsel is essentially a decision on the facts of that case and the facts of the present case have no comparison with the facts in the case decided by the Apex Court. Coming to the facts of the case in hand, we may point out that Pws.4 and 5 are persons who have sustained injuries in the very same occurrence and their evidence, according to us, is only in

regard to matters in respect of which, any other person in their position, would give evidence. There was therefore, absolutely nothing artificial or dramatic in their evidence. The finding of the Court of Session that the accused caused the death of Vikraman and assaulted Pws.4 and 5, is, therefore, in order, and we find no illegality or infirmity in the said finding.

16. Having come to the conclusion that the accused were the assailants, the question is as to the offences committed by them. It is trite that a lawful assembly can develop into an unlawful assembly in the course of an incident. It is also settled that direct evidence may not be available to prove the common object of an unlawful assembly and the same has to be gathered from the attended circumstances and the acts committed by the accused and the results thereof. Once the court holds that certain accused persons formed themselves into an unlawful assembly and an offence has been committed by any member of that assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person who at the time of

committing of that offence was a member of the same assembly is to be held guilty of that offence. After such a finding, it would not be open to the court to see as to who actually did the offensive act or require the prosecution to prove which of the members did which of the offensive acts. The prosecution would have no obligation to prove it. (See **Lalji and others v. State of U.P.** [(1989)1 SCC 437] and **Sudheer v. State of Kerala** [2006(1) KLT 309]). From the sequence of the events narrated by Pws.4 and 5, it can be safely inferred that after the initial altercation and scuffle between the accused and the injured, a common object was developed among the accused. The weapons used by the accused for the assault being only firewood logs, and since there was no attempt to assault the deceased until he intervened in the fight between the accused and PW5, the common object developed among the accused, could never be to commit the murder of Vikraman. The common object, in the circumstances, could only be to cause bodily injuries on PW5 and others. Further, the motive proved by PW5 is also not a motive sufficient enough for anyone to cause the death of

another. It has come out in evidence that all the accused and the injured, including the deceased, were drunk. Pws.4 and 5 were very specific in their evidence that the accused were attempting to cause injuries on PW5 and it was only when the deceased intervened, he was beaten by accused 1, 3, 4 and 5. It is thus evident that the accused had no intention to cause the death of the deceased, though their acts resulted in his death.

17.The learned counsel for the appellants submitted that at any rate, the case in hand is not a case of murder and at the most, the accused can be convicted only for culpable homicide, not amounting to murder. The learned Public Prosecutor, on the other hand, submitted that the proved facts establish a case of murder. In **State of A.P. v. Rayavarapu Punnayya,** (1976)4 SCC 382, the Apex court had laid down the broad guidelines as to the approach to be made by a court for deciding the question whether the facts proved in a given case would amount to murder or culpable homicide, not amounting to murder. Paragraphs 13 to 21 of the judgment, which are relevant in the context, read thus:

"13. The academic distinction between "murder" and "culpable homicide not amounting to murder" has vexed the courts for more than a century. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minutae abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	*Section 300*
A person commits culpable *homicide if the act by which* the death is caused is done —	*Subject to certain exceptions* culpable homicide is murder if the act by which the death is caused is done —
INTENTION	
(*a*) With the intention of causing death; or	(1) With the intention of causing death; or
(*b*) With the intention of causing such bodily injury as is *likely* to cause death; or	(2)With the intention of causing such bodily injury as the *offender knows to be likely* to cause the death *of the person to whom* the harm is caused; or
and	(3) With the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is *sufficient in the course of nature* to cause *ordinary* death; or
KNOWLEDGE	

(*c*)With the knowledge that the act is *likely* to cause death	(4) With the knowledge that the act is so *imminently dangerous that it must in all probability cause death* or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

14. Clause (*b*) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the "intention to cause death" is not an essential requirement of clause (2). Only the intention of *causing* the *bodily injury* coupled with the offender's *knowledge* of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by Illustration (*b*) appended to Section 300.

15. Clause (*b*) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given *knowing* that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that *particular* person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to

cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given.

16. In clause (3) of Section 300, instead of the words "likely to cause death" occurring in the corresponding clause (*b*) of Section 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury *likely* to cause death and a bodily injury *sufficient in the ordinary course* of nature to cause death. The distinction is fine but real, and, if overlooked, may result in miscarriage of justice. The difference between clause (*b*) of Section 299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (*b*) of Section 299 conveys the sense of "probable" as distinguished from a mere possibility. The words "bodily injury … sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

17. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. *Rajwant* v. *State of Kerala*[1] is an apt illustration of this point.

18. In *Virsa Singh* v. *State of Punjab*[2] Vivian Bose, J. speaking for this Court, explained the meaning and scope of clause (3), thus (at p. 1500):

"The prosecution must prove the following facts before it can bring a case under Section 300, 'thirdly'. First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the

injury must be proved. These are purely objective investigations. It must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

19. Thus according to the rule laid down in *Virsa Singh case* of even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be "murder". Illustration (*c*) appended to Section 300 clearly brings out this point.

20. Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general — as distinguished from a particular person or persons — being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of a case, it will be convenient for it to approach the problem in three

> stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in Section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the *first* or the *second* part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304, of the Penal Code."

18. We have found on facts that the accused had no intention to commit the murder of Vikraman. But, it cannot be said that they had no knowledge that their act is likely to cause death. Therefore, the third clause of section 299 gets attracted. Then the question is whether it is a case coming within the fourth category of Section 300 of IPC. As explained by the Apex Court in the case referred to above, if the case

comes within the scope of the fourth category of cases under section 300, the accused are guilty of murder, otherwise they are liable only for culpable homicide, not amounting to murder. As stated above, the weapons used by the accused for inflicting injuries on the deceased and others were only firewood logs. It has also come out in evidence that injuries have been inflicted in the course of a fight, involving about eight persons. As observed by the Apex Court in the above referred case, if only it is revealed that the knowledge of the accused that their act is likely to cause death, is a knowledge of the highest degree of probability and the accused have committed the act without any excuse for incurring the risk of causing death or such injury, the accused can be convicted for murder. From the facts proved in this case, it cannot be said that the knowledge of the accused that their act is likely to cause death, is a knowledge of the highest degree of probability and despite that, they had committed the act, without any excuse for incurring the risk of causing death or such bodily injury as aforesaid. Therefore, we are of the view that the accused are guilty only of the offence punishable

under Part II of Section 304 of the IPC.

19. As we found that the accused are guilty only of the offence punishable under Part II of section 304 of the IPC, the finding of the court below that the accused are guilty of the offence punishable under Section 307 of the IPC, for causing on Pws.4 and 5 , has to be vacated. In view the said finding, for causing injuries on PWs.4 and 5, the accused are liable to be convicted only for the offence punishable under Section 308 of the IPC.

In the result,

(1) The criminal Appeal is allowed in part.

(2) The conviction of the appellants and the sentence imposed on them under Sections 307 and 302 of the IPC are set aside.

(3) The appellants are found guilty of the offence punishable under Part II of Section 304 of the IPC and sentenced to undergo rigorous imprisonment for a period of six years each .

(4) The appellants are found guilty of the offence punishable under Section 308 of the IPC and sentenced to undergo rigorous imprisonment for a

period of two years each.

(5) The sentences of imprisonment imposed on the appellants shall run concurrently.

(6) The appellants are entitled to set off, of the period, if any, undergone by them in custody in connection with this case, under Section 428 of the Code of Criminal Procedure.

Sd/-

THOTTATHIL B. RADHAKRISHNAN, JUDGE.

Sd/-

P.B.SURESH KUMAR, JUDGE.

tgs/smv

(true copy)