

(2012) 02 KL CK 0071

In the High Court Of Kerala

Case No : Criminal Appeal No. 1467 of 2007

Gopinathan @ Chengannur Gopi

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 06-02-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173(2), 313, 357(1)

Evidence Act, 1872 — Section 105

Penal Code, 1860 (IPC) — Section 300, 302, 304(1)

Citation : (2012) 02 KL CK 0071

Hon'ble Judges : R. Basant, J;K. Vinod Chandran, J

Bench : Division Bench

Advocate : V. Philip Mathew, for the Appellant; Roy Thomas, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

R. Basant, J.—Was the Court below justified in placing reliance on the oral evidence of PWs 1, 2 and 4 about the incident proper?

2. Is the appellant accused entitled to claim the right of private defense?

3. At any rate is not the appellant accused entitled to claim the mitigative protection of exception 4 to Section 300 IPC.

4. Does the appellate judgment require and warrant interference on any count?

These are the questions raised before us by the learned counsel for the appellant Sri.V Philip Mathew.

2. The appellant, a person aged about 51 years on the date of occurrence has been found guilty convicted and sentence u/s 302 IPC to undergo imprisonment for life and to pay a fine of Rs. 35,000(Rupees Thirty five thousand only). Default sentence has been prescribed. An amount of the 30,000/- is directed to be paid to PW3, the wife of the deceased.

3. According to the prosecution the appellant had caused death of the deceased Sasi, a person aged about 41 years at about 9.30 p.m on 24.12.2002 by inflicting one stab injury with M.O1 knife in the pathway near the house of the deceased. Dispute relating to non payment of the price of the beef by the deceased to the appellant was the alleged motive.

4. Investigation commenced with Ext. P1(a) F.I.R registered on the basis of Ext. P1 F.I statement lodged by PW1, the brother of the deceased and an eye witness. Investigation was completed and final report was filed by PW14. The learned Magistrate after observing all legal formalities committed the case to the court of Session. The learned Sessions Judge took cognizance of the offence alleged against the appellant. The appellant denied the charge levelled against him by the learned Sessions Judge. Thereupon, the prosecution examined PWs1 to 14 and proved Exts.P1 to P17. M.Os 1 to 7 were also marked.

5. In the course of cross examination of prosecution witnesses and later when examined under 313 Cr.PC, the accused admitted his presence at the scene of the occurrence. He did not also deny the prosecution allegation that the deceased has suffered the injury with M.O1 weapon in the course of an incident between him and the deceased. He however, took up the stand that the deceased was the aggressor and he was a victim of aggression. In the course of the act of aggression by the deceased against him, he had tried to save himself and it is in the course of such attempt that the deceased suffered the fatal injury, it was contended. The accused did not examine any defence witnesses. Ext. D1, a case diary contradiction was marked when PW3 was cross examined.

6. The learned Sessions Judge came to the conclusion that it was absolutely safe to place reliance on the oral evidence of PWs 1, 2 and 4. Though PW2 had turned hostile to the prosecution the learned Sessions Judge placed reliance on such portion of testimony of PW2 which was in tandem with the statement given by him before the Investigating Officer. Though PW3, the wife of the deceased had also claimed to be an eye witness, the learned Sessions Judge did not place reliance on the oral evidence of PW3. Learned Sessions Judge came to the conclusion that the offence punishable u/s 302 IPC has been clearly proved against the appellant. Accordingly, the learned Sessions Judge proceeded to pass the impugned judgment.

7. Before us, the learned counsel for the appellant and the learned prosecutor have advanced their arguments. The learned counsel for the appellant contends that the learned Sessions Judge erred in placing reliance on the oral evidence of interested PWs 1 and 4. The oral evidence of hostile PW2 was worthy of complete acceptance. If the oral evidence of PW2 is accepted it is evident that the appellant is entitled to the right of private defence. At any rate, the appellant must be held to be entitled to the mitigative protection of exception 4 to Section 300 IPC. The impugned judgment hence warrants interference, contends the learned counsel for the appellant.

8. The learned prosecutor on the contrary contends that the court below erred in not placing reliance on the oral evidence of PW3. In any view of the matter the appellant is not entitled to claim any right of private defence. Protection of Exception 4 to Section 300 IPC is also not available to the appellant. In these circumstances, the appeal only deserves to be dismissed, contends the learned prosecutor.

9. We have considered all relevant inputs. This appellate judgment is; is intended to be read and must be reckoned as continuation of the judgment of the trial court. In that view of the matter we do not think it necessary to re-narrate the oral and documentary evidence placed before the learned Sessions Judge. Suffice it to say that we have been taken in detail through the oral evidence of PWs1 to 14 and the contents of Exts.P1 to P17 and Ext. D1. We have also been taken through the charge framed by the learned Sessions Judge against the appellant and the answers given by the appellant in the course of his 313 examination. We shall refer to relevant materials specifically, wherever necessary in the course of discussions.

10. In as much as there is a claim for the right of private defence it will be apposite for us to remind ourselves about the law applicable. The burden rests always on the prosecution to prove charges against the indictee beyond reasonable doubt. This burden continues on the shoulders of the prosecution from the beginning to the end of the trial, whatever be the defence raised by the indictee in the course of trial. Under Section 105 of the Evidence Act the court is bound to presume absence of circumstances which would bring the case of the indictee within any one of the general exceptions to criminality under the Penal Code. This is only a rebuttable presumption. The burden rests on the accused to rebut the said presumption u/s 105 of the Evidence Act. The burden on the accused to rebut this presumption is not akin to the initial paramount burden on the prosecution. The prosecution has to prove its case beyond doubt. An accused claiming any of the exceptions to criminality need not prove his case to the hilt. He need not prove his case beyond doubt. He need prove his defence only by the test of balance of probabilities as in a civil case. Even when he does not succeed in establishing his special defence under any one of the general exceptions, he may still succeed in creating a reasonable doubt against the prosecution on one or the other of the ingredients of the offence alleged against the appellant. In that event also the appellant would be entitled for an acquittal - not because he has proved his claim for general exception to criminality, but because in the unsuccessful attempt to prove that exception he may have succeeded in generating a reasonable doubt on any one of the ingredients of the offence charged. The indictee would even then be entitled for an acquittal. An accused need not adduce any defence evidence to prove his entitlement to any of the general exceptions. He may rely on the broad probabilities emanating from the prosecution case, the favourable answers elicited from the prosecution witnesses in the course of the trial, the acceptable suggestions thrown at witnesses in the course of their examination, the specific stand taken in the course of examination

u/s 313 Cr.PC and every other circumstance available in the evidence adduced by the prosecution. That the indictee has not adduced any evidence cannot ipso facto be a reason to reject his claim for any of the general exceptions. In this case, the appellant has taken up a stand that he is entitled to the protection of the general exception of the right of private defence.

11. PWs 1 to 4 claim to be eye witnesses to the occurrence. PW1 is the brother of the deceased. PW4 is the wife of PW1. PW 3 is the wife of the deceased. PW2 is a person who was allegedly walking along with the accused and was present along with him when the deceased suffered the stab injury. PWs 1, 3 and 4 on hearing the commotion at the scene had allegedly run to the scene of occurrence and had seen the infliction of the injury on the deceased by the appellant with M.O1 weapon.

12. We thus have the evidence of PWs 1, 3 and 4 -brother, wife and sister in law of the appellant. All of them supported the case of the prosecution. We do also have the evidence of PW2. PW2 is an independent eyewitness to the occurrence. Admittedly, PW2, the deceased and the appellant were walking together from the bazar to the scene of occurrence. The deceased on the way had got into the house of his brother. PW5 is his sister in law. The wife of the deceased-PW3 Suma, was available in the house of PW5. The deceased allegedly left the articles purchased by him with his wife and wanted to proceed to the house on the north to fetch a torch. In the meantime PW2 and the appellant proceeded in front. The deceased followed them after the short interruption in the house of PW4. It was at this juncture that the alleged incident took place. PW2, the deceased and the appellant were together available at the scene admittedly. PWs 1, 3 and 4 had run to the scene of occurrence on hearing the commotion. This is the fact scenario in which the evidence has to be appreciated.

13. That injury was suffered by the deceased with M.O 1 weapon in the course of the incident which took place at the scene of the crime is not disputed. PWs 1, 3 and 4 had stated that they saw the deliberate infliction of injury by the appellant on the deceased. But according to the appellant the incident did not take place in that manner. It was the deceased who attempted to stab the appellant with M.O1. The appellant had tried to ward off the injury. In the course of the attempt by the appellant to ward of the injury, the deceased had suffered the injury with M.O1 weapon with which he was trying to attack the appellant. This is the crucial distinction between the case of the prosecution and the case of the appellant.

14. The evidence clearly shows that the deceased, the appellant and PW2 were present at the scene of the crime. PWs 1, 3 and 4 had come to the scene of occurrence on hearing the commotion. They had seen the appellant inflicting the only stab injury on the deceased. He had suffered some other insignificant external injury and those injuries evidently were suffered by him when he fell after suffering the stab. The appellant had not suffered any injury admittedly.

15. Thus, the crucial question to be decided is whether the deceased suffered the

injury at the hands of the appellant in the manner spoken to by PWs 1, 3 and 4 or whether he suffered the injury accidentally when the weapon with which he was trying to attack the appellant got deflected on to his own body.

16. On this aspect, one should think that the evidence of PW11 Doctor, who issued Ext. P6 Postmortem certificate must be reckoned as crucial. PW11 tendered categorical evidence which probablises the version of PWs 1, 3 and 4. It is, significant that when PW11 was in the witness box not even a suggestion was thrown at him that the only stab injury suffered by the deceased could have been suffered by him when he attempted to attack another with MO 1 weapon and when attempt was made by such victim to ward off such infliction, the weapon got deflected onto his own body and he suffered accidental injury in that manner. To our mind the omission to cross examine PW11 Doctor on that aspect is most crucial. The precise distinction between the case of the prosecution and the case of the defence could have been effectively brought out by the appellant in the course of cross examination of PW11. Such an attempt is not made at all. This to our mind is certainly crucial.

17. The evidence of PWs 1, 3 and 4 cannot throw light on the precise genesis of the incident. Whether we go by the case of the prosecution or by the case of the defence it is evident that injury was suffered by the deceased with M.O1 weapon. About the precise commencement of the incident in which the deceased suffered injury with M.O1 weapon only PW2 could have thrown light. PW 2 is examined by the prosecution as an independent witness. But, he chose to turn hostile to the prosecution. He denied specific portions in his case diary statements which have been put to PW2, though we are perturbed to note that orderly procedure has not been followed in specifically marking those contradictions in the case diary statements. But we do note that six specific portions of the case diary statement were put to PW2. Though not formally marked, reliance has been placed on such case diary statement as is evidenced from the cross examination of PW2.

18. PW 2 choose to eat his own words and not conform to his version before the Investigating Officer. Thus the court does not have precise and acceptable evidence about the commencement of the incident.

19. Notwithstanding the absence of precise acceptable evidence about the commencement of the incident, we have clear indications as to how the incident started. We repeat that PW2, the appellant and the deceased were walking together from the local bazar along the pathway which leads to the scene of occurrence. The deceased had stepped by to the house of PW5 that is his brother's wife. His wife, PW3 was there. He left the articles purchased by him in that house and proceeded northwards to his house to fetch a torch. In the meantime PW2 and the appellant had walked ahead. It is thus that the deceased followed the appellant and PW2. At about the place where the deceased had to deviate from the pathway to go to his house an incident took place. If we go by the version of PW2 before the Police the deceased was the one who commenced a wordy quarrel. The bone of contention was the alleged liability of the deceased

to return certain amounts to the appellant. The appellant allegedly had insulted the deceased earlier on that score. This was questioned by the deceased at that point. A quarrel ensued. This sudden quarrel led to a fight - an altercation. In the course of such altercation the appellant according to PWs 1, 3 and 4 took out the weapon MO1 in his possession and stabbed the deceased. The accused would contend, and an obliging PW2 supports that contention now, that it was the deceased who embarked on an act of aggression against the appellant. The evidence of PW2 on this aspect does not commend itself for acceptance. He inherently does not inspire confidence. His deviation from his earlier statement before the Police confirms that it is unsafe to place reliance on the present version of PW2. The court below has chosen not to accept and act upon the oral evidence of PW3. We do not actually find convincing reasons for the court below to adopt that course. Going by the evidence of all the witnesses there was a commotion at the scene of the crime and PWs 1,3 and 4 had come running to the scene of occurrence from their houses and it was in the course of their journey to the scene of occurrence that they witnessed the occurrence. That the name of PW3 is not mentioned in Ext. P1 or that PW3, the wife of the deceased was not promptly questioned by the Investigating Officer are according to us not sufficient and convincing reasons to reject the evidence of PW3. Be that as it may the evidence of PW3 does not advance matters any further or farther than the version of PWs 1 and 4. Therefore whether the evidence of PW3 is believed or not believed, that does not affect the case of the prosecution.

20. Who was in possession of the weapon? This is certainly an important fact. According to the prosecution, the appellant was in possession of MO1 when the incident started. According to the appellant the weapon was in the possession of the deceased. After the incident the weapon is not seen at the scene of occurrence. It is recovered by the Investigating Officer PW14 after he commenced investigation on the basis of the information furnished by the appellant in his confession statement. Under Ext. P4 seizure mahazar attested by PW8 MOs1, 4 and 5 were recovered by the Investigating Officer. PW8 is an attester to Ext. P4. We find no reason not to accept and act upon the evidence of PW14 about such recovery. The evidence of PW14 on this aspect is eminently supported by the contents of the contemporaneous seizure mahazar Ext. P4. Of course Ext. P4 is attested by PW8 who is none other than the brother in law of the deceased, that is the brother of PW3. Arguments are advanced that independent attester to Ext. P4 has not been examined. We do not find much substance in this contention as primarily we rely on the oral evidence of PW14 the Investigating Officer supported by contents of the contemporaneous seizure mahazar Ext. P4. Along with M.O 1 M.Os 4 and 5 clothes of the appellant were also seized under Ext. P4. All the three were found to be having human blood stains as per Ext. P17.

21. This evidence of recovery of M.O1 from the house of the appellant conveys to us that the weapon must have originally been in the possession of the appellant knocking the bottom out of the theory that deceased was in possession of the

weapon when the incident commenced. To this must be added the circumstance that no question was put to PW11 Doctor that the injuries could be suffered by the deceased with M.O1 in the manner alleged by the appellant.

22. The prosecution had wanted to examine PW9 a witness to prove that M.O1 did belong to the appellant. He turned hostile and therefore, that evidence did not help the prosecution at all.

23. Going by the earlier statements of PW2 before the Investigating Officer there is no semblance of even a possibility that the deceased had suffered the injuries when he tried to attack the appellant. That suggestion remains in the realm of an unsubstantiated suggestion. In any view of the matter the burden on appellant u/s 105 of the Evidence Act has not been discharged. The totality of circumstances do not succeed in generating any trace of doubt in our mind that the appellant must have been the victim of aggression and the deceased must have been the aggressor. There is in these circumstances no question of the appellant being entitled to any right of private defence.

24. The initial case of the prosecution has been proved beyond doubt. The burden on the appellant u/s 105 of the Evidence Act has not been discharged. His attempt to establish his plea of the right of private defence does not succeed in generating any reasonable doubt on any aspect of the prosecution case. In these circumstances, it has to be held that the prosecution has succeeded in proving that the deceased had suffered the injury as the result of deliberate infliction by the appellant with MO1.

25. The evidence clearly indicates that until they reached the point where the pathway to the house of the deceased separates from the main pathway there was no untoward incident. The learned counsel for the appellant advances a contention laboriously with the help of the scene mahazar that the scene of occurrence is at a point 5.75 meters to the southwest of the point where the pathway separates. The width of the pathway is itself 3.75 meters. In these circumstances, the location of the spot of incident in Ext. P3 scene mahazar - at a point 5.75 meters southwest of the point where the pathway to the house of the deceased separates from the main pathway does not at all succeed in generating any doubt in our mind on the question as to whether the deceased was the aggressor.

26. The sequence of events does not certainly reveal any motive for murder. A specific intention to cause death cannot be spelt out from the totality of the circumstances. Intention to cause death is not invariably insisted to attract the offence of murder defined u/s 300 IPC.

27. We have a look at the injury as described in Ext. P6. It is a very serious and fatal injury. It is 9 cm deep. It had injured the lung and had caused injury to the pericardium. The injury is sufficient in the ordinary course of nature to cause death. It was an intentional injury also. In these circumstances the offence u/s 300 IPC is clearly made out under clause thirdly of section 300.

28. Undaunted, the learned counsel for the appellant argues that at any rate, the appellant is entitled to the mitigative protection of exception 4 to section 300 IPC. We now have to consider that question.

29. To extract exception 4, the following ingredients must be shown to be established.

- i. There must be no pre-meditation.
- ii. There must have been a sudden fight upon a sudden quarrel.
- iii. The act must have been committed in the heat of passion.
- iv. The offender must not have
 - (a) Taken undue advantage; or
 - (b) acted in a cruel or unusual manner.

Each ingredient must be established. They must be shown to exist simultaneously and cumulatively. It is only on proof of all the 4 requisites that a successful claim for protection of exception 4 can be raised.

30. On the specific facts in this case there is no case even that there was any premeditation for the appellant to commit murder. That there was no such premeditation is evident from the peaceful manner in which they reached the scene of occurrence. We find it absolutely safe to conclude that there would not have been any premeditation on the part of the appellant to commit the crime.

31. The evidence clearly indicates that there was a sudden quarrel. Till they reached the scene of the occurrence there evidently was no quarrel. Something happened at that point and the quarrel ensued. This quarrel developed in to a sudden fight. The second ingredient to attract exception 4 that there must have been a sudden fight upon a sudden quarrel is thus established clearly. If we go by the evidence of PWs 1, 3 and 4 or by the acceptable portion of the evidence of PW2, it is evident that there was a sudden fight upon a sudden quarrel and the crime was not premeditated.

32. Was the act committed in the heat of passion? This is the next question to be considered. Evidently, passion was running high. This is indicated by the evidence of PW2 to the extent to which it is supported by the earlier statement before the Investigating Officer. The deceased had to give certain amounts to the appellant. The deceased took objection to the appellant demanding it. It is thus that the incident commenced, even going by the very case of the prosecution as can be seen from their initial case reflected in the final report submitted under 173(2) Cr.PC. The other witnesses are not able to throw any light on the precise genesis of the incident. In these circumstances we find it safe to at least concede the benefit of doubt to the appellant on the question about the circumstances under which the incident precisely commenced. To that extent, the version of PW2 is supported by his earlier statement before the Investigating Officer. We

are satisfied that it can be assumed that the incident started when the deceased took objection to the appellant's earlier demands for money. Going by the version of PW2 the appellant had stated that he was not demanding such amount. Evidently then passion must have been running high. On this aspect, notwithstanding the absence of precise evidence, we choose to concede to the appellant accused the benefit of doubt and accept his case that passion must have been running high when the incident started.

33. Did the appellant take any undue advantage or act in any cruel or unusual manner. In *Johnny v. State of Kerala* reported in 2010 (1) KLD 173 and in *Haridas v. State of Kerala* reported in 2012 (1) KLT, the question has been considered in detail. The mere fact that a weapon was used is no reason to assume that undue advantage was taken or that the offender acted in a cruel or unusual manner. To take the case out of the sweep of exception 4 undue advantage, cruelty or unusual manner of an exceptional variety will have to be proved.

34. We need not repeat that exception 4 to section 300 humanely accepts that persons who have acted under the heat of passion without premeditation are entitled for mitigative protection (not absolution). Law accepts that persons are entitled to mitigation when they would not have resorted to such acts unless they were prompted by passion running high. At any rate, we are satisfied that the appellant can be held entitled to the protection of exception 4 to section 300. The challenge in this appeal can succeed only to the above extent. Conviction has to be altered and modified from Section 302 IPC to Section 304(1)IPC.

35. We now come to the question of sentence. The learned counsel for the appellant prays that the sentence may be reduced to the period of imprisonment already undergone. We are unable to accept the argument. We take note of the totality of circumstances including the period of detention already undergone. We take note of the circumstances pointed out by the learned counsel for the appellant about the illness of the child of the appellant. However, we are satisfied that imposition of sentence of rigorous imprisonment for a period of ten years alone shall meet the ends of justice. We are further satisfied that the sentence of fine and default sentence do not warrant interference. The direction to pay compensation out of the fine amount received u/s 357(1) Cr.PC is also upheld. The appeal succeeds only to the above extent.

36. In the result

a. The appeal is allowed in part.

b. The verdict of guilty is upheld, but the conviction and sentence are altered to 304 (1)IPC

c. The substantive sentence of imprisonment for life is reduced to rigorous imprisonment for a period of ten years.

d. The sentence of fine imposed and the default sentence are upheld.

e. All other directions issued by the court below are upheld.

Needless to say the appellant will be entitled to set off in accordance with law.