

(2008) 12 KL CK 0057

In the High Court Of Kerala

Case No : Criminal Rev. Petition No. 3539 of 2008

John Varghese

APPELLANT

Vs

Central Bureau of Investigation

RESPONDENT

Date of Decision : 16-12-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 227, 228

Penal Code, 1860 (IPC) — Section 220, 227, 228, 228(1)(a), 299

Citation : (2009) 1 KLJ 452

Hon'ble Judges : M. Sasidharan Nambiar, J

Bench : Single Bench

Advocate : C.C. Thomas, M.G. Karthikeyan and Nireesh Mathew, for the Appellant; M.V.S. Namboothiry, (SC. C.B.I.) and C.M. Nazar (P.P.), for the Respondent

Judgement

M. Sasidharan Nambiar

1. Revision petitioners in CrI. R.R 3539/2008 is the first accused and revision petitioners in CrI. R.R 3718/2008 are accused 2 to 5 in S.C. 309/2007 on the file of Additional Sessions Court, (CBI/SPE-II), Ernakulam. Revision petitions are filed challenging the order passed by the learned Sessions Judge after hearing the prosecution and the defense u/s 228 of Code of Criminal Procedure, framing charge for the offence u/s 304 IPC. Prosecution case is that first accused was working as Sub Inspector of Police, second accused as Head Constable and accused 3 to 5 as Constables of Alappuzha South Police Station during 1998 and in furtherance of their common intention they arrested deceased Thangal Kunju on 8-8-1998 and took him into custody from his residence and while he was in custody they voluntarily caused hurt to Thangal Kunju on his head and legs and also caused hurt to his wife Radhamani and grievous hurt to their son Binoj, by using lathi and hands and wrongfully confined deceased Thangal Kunju and inflicted the injuries which caused his death and thereby committed offences punishable under Sections 220, 323, 324, 325, 447, 451, 466, 304 and 509 read with section 34 IPC. After the case was committed to the Sessions Court and the

accused appeared, as provided u/s 227 of Code of Criminal Procedure prosecution and the defense were heard. The accused together had filed Crl. M.P. 1294/2008 for an order of discharge of the offence u/s 304 of IPC and contended that as no offence is exclusively triable by the Sessions Court is involved, the case is to be transferred to Chief Judicial Magistrate. Learned Sessions Judge dismissed Crl. M.P. 1294/2008 holding that charge for the offences u/s 220, 323, 324, 447, 451, 466, 304, and 509 read with section 34 IPC was already framed. Revision petitions are filed challenging the dismissal of the application as well as framing of charge for the offence u/s 304 IPC.

2. Learned counsel appearing for the revision petitioners, and Standing Counsel appearing for CBI were head.

3. Learned counsel for the revision petitioners submitted that the post-mortem certificate establish that deceased Thangalkunju did not sustain any fatal injury and the cause of death was due to occlusive coronary heart disease and not the injuries sustained. It was argued that prosecution has no case that any of the accused were aware that the deceased was suffering from coronary heart disease and the statement of the widow of the deceased reveal that even family members are unaware of the heart ailment and therefore when the injuries sustained by the deceased are not likely to cause the death of an ordinary human being, in the absence of knowledge of the accused that the deceased was suffering from coronary heart disease, it cannot be said that the injuries if any, were inflicted with the knowledge that it is likely to cause the death of the deceased and therefore no offence u/s 304 IPC is attracted and if that be the case no offence exclusively triable by the Sessions Court is involved and hence Sessions Judge should have transferred the case for trial to Chief Judicial Magistrate in respect of the remaining offences.

4. Learned Standing Counsel appearing for the CBI justified the order passed by the Sessions Judge contending that when the accused in furtherance of their common intention wrongfully confined the deceased it is likely to cause his death is to be imputed and therefore Sessions Judge was justified in framing charge for the offence u/s 304 IPC.

5. Revision petitioners are not challenging the framing of charge for the remaining offences and their grievance is only against framing of charge for the offence u/s 304 of IPC. Their case is that as no offence exclusively triable by the Sessions Court arises, Sessions Court cannot try the case and as provided under clause (a) of sub Section (1) of Section 228, the Sessions Judge is bound to transfer the case to the Chief Judicial Magistrate and therefore the framing of charge for the offence u/s 304 IPC is to be set aside.

6. Section 227 of Code of Criminal Procedure provides that if, upon consideration of the record of the case and the documents produced by the prosecution and after hearing the submission of the accused and the prosecution, Sessions Judge considers that there is no sufficient ground for proceeding against the accused,

he shall discharge the accused after recording reasons for so doing. On the other hand, if on such consideration the Sessions Judge is of the opinion that there is ground for presuming that the accused has committed an offence, he has to proceed as provided under clause (a) or clause (b) of sub Section (1) of Section 228 of Code of Criminal Procedure. If the Sessions Judge is of opinion that there is ground for presuming that the accused has committed an offence exclusively triable by the court then as provided under clause (b) he shall frame a charge in writing against the accused and thereafter as provided under sub section (2), he has to read and explain the charge to the accused and record his pleading. On the other hand, if the Sessions Judge is of the opinion that there is ground for presuming that accused has committed an offence but that offence is not exclusively triable by a Court of Sessions, he may frame a charge and transfer the case for trial to the Chief Judicial Magistrate or any other Judicial Magistrate of First Class and direct the accused to appear before that court and thereupon such Magistrate shall try the offence in accordance with the procedure for trial of warrant cases instituted on a police report. In such a case Sessions Judge need not read and explain the charge or record the pleading of the accused. Therefore if the materials relied upon by the prosecution is not sufficient to presume that accused has committed an offence exclusively triable by the Court of Sessions, sessions Judge has to transfer the cases to Chief Magistrate or Judicial First Class Magistrate. In such a case Sessions Judge can frame the charge, though the charge need not be read and explained the accused as provided under sub section (2) of Section 228 of Code of Criminal Procedure. The question is whether on the materials, an offence u/s 304 IPC is attracted or not.

7. Post mortem certificate prepared by the team of Forensic Surgeons establish the following Antemortem injuries.

1. Contused abrasion of 1cm. x 0.8 cm x 0.1cm on the left side of forehead close to the middle of eye brow.
2. Contused abrasion 3 x 1cm on the left side of the forehead 0.5 cm outer end of eye brow.
3. Contused abrasion 1 x 1 x 0.1cm on the left side front of forehead 2 cm above and inner to injury No. 2 Underneath injuries No. 1 to 3 skull was intact and normal.
4. Abrasion 3 x 1cm on the front of left knee.
5. Partially healed scap formed abrasion of 0.5 x 0.5 cm on the back of proximal phalanx of left index finger.

No other injury was seen on any other part of the body.

Post-mortem certificate prima face show that those injuries were not the cause of death. After getting the report of chemical analysis, the doctors had recorded a specific finding that death was due to occlusive coronary heart disease is not the direct result of the antemortem injuries found on the body of the deceased. The

argument of the learned counsel appearing for the CBI is that those injuries had accelerated the death and as the injuries found on the body of the deceased had resulted in acceleration of the death, an offence u/s 304 IPC is committed.

8. Section 304 of Indian Penal code provides for punishment for culpable homicide not amounting to murder as provided u/s 299 of Indian Penal Code. u/s 299, whoever causes death by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. Therefore to attract an offence u/s 299, the accused should have caused the death by doing an act either with the intention of causing death or with the intention of causing such bodily injury which is likely to cause death or by doing an act with the knowledge that he is likely by such act to cause death. If the injury which caused the death was inflicted with the intention of causing death, definitely Section 299 is attracted. Similarly if the bodily injury was inflicted with the intention of inflicting the said injury which is likely to cause death, then also the offence comes u/s 299. Therefore in both the case intention to cause the death and intention to cause such bodily injury which is likely to cause death is necessary. In the third case, only knowledge that the act is likely to cause death is necessary. Therefore to attract an offence u/s 299, when there is no case that the accused had an intention to cause death or the accused had an intention to cause such bodily injury as is likely to cause death, there should be knowledge on the part of the accused that such injury is likely to cause death of the deceased. There is no case that the injuries found on the body of the deceased by themselves, individually or cumulatively is likely to cause death. Even if the injuries found on the body of the deceased are not likely to cause death of an ordinary human being, if the accused could be imputed with the knowledge that deceased was suffering from heart ailment and if such injury or injuries are inflicted on that person, it is likely to cause his death, then section 299 of Indian Penal Code would definitely be attracted.

9. It is not disputed that the prosecution has no case that any of the accused had an intention to cause death of deceased Thangal Kunju. The injuries found on the body of the deceased by themselves are not likely to cause his death, if he was not suffering from any coronary heart ailment. Therefore it cannot be said that those injuries were inflicted on deceased Thangal Kunju with the intention that those injuries are likely to cause death. Therefore if a charge for the offence u/s 304 of Indian Penal Code is to be framed, there should be material to satisfy that the accused had knowledge that those injuries, if inflicted on the deceased would cause his death. That knowledge could be imputed only if prosecution has a case that any of the accused was aware that deceased Thangal Kunju was suffering from coronary heart disease. As pointed out by the learned counsel appearing for revision petitioners, even according to the widow of the deceased, family members were not aware of the heart ailment. If so, such knowledge cannot be imputed on any of the accused. If that be so, it cannot be said that the injuries found on the body of the deceased, even if were inflicted by any of the accused

in furtherance of their common intention, were inflicted with the knowledge that they are likely to cause his death. If so, section 299 of Indian Penal Code is not attracted. If Section 299 is not attracted, a charge for the offence u/s 304 IPC cannot be framed. A similar aspect was considered by a learned single Judge of this court in *Vijayan v. State of Kerala* (1991 (1) KLT 325). The learned single Judge held :-

There was no charge for murder. Therefore, the question of intention of causing such bodily injury, as the offender knows to be likely to cause death of the person on account of his peculiar physical condition coming under the second clause of S. 300 of the Indian Penal Code, does not arise for consideration. The charge was only that culpable homicide not amounting to murder, defined in S. 299 and made punishable under S. 304, was committed. Intention of causing death or such bodily injury, as is likely to cause death, does not arise under the circumstances of the case. Then the only question is whether death was caused by doing an act with the knowledge that he is likely, by such act, to cause death or not. If the appellant was unaware of the fact that the deceased was a heart patient (even if the prosecution case that the deceased was a heart patient is true), he cannot be fixed with the knowledge that the push and fall are likely to cause death.

The Apex Court in *Arun Nivalaji More v. State of Maharashtra* (2006) 12 SCC 613) laid the principles as follows :-

13. First it has to be seen whether the offence falls within the ambit of Section 299 IPC. If the offence falls u/s 299 IPC, a further enquiry has to be made whether it falls in any of the clauses, namely, clauses "Firstly" to "Fourthly" of Section 300 IPC. If the offence falls in any one of these clauses, it will be murder as defined in Section 300 IPC, which will be punishable u/s 302 IPC. The offence may fall in any one of the four clauses of Section 300 IPC yet if it is covered by any one of the five exceptions mentioned therein, the culpable homicide committed by the offender would not be murder and the offender would not be liable for conviction u/s 302 IPC. A plain reading of Section 299 IPC will show that it contains three clauses, in two clauses it is the intention of the offender which is relevant and is the dominant factor and in the third clause the knowledge of the offender which is relevant and is the dominant factor. Analyzing Section 299 as aforesaid, it becomes clear that a person commits culpable homicide if the act by which the death is caused is done-

(i) with the intention of causing death: or

(ii) with the intention of causing such bodily injury as is likely to cause death; or

(iii) with the knowledge that the act is likely to cause death.

14. If the offence is such which is covered by any one of the clauses enumerated above, but does not fall within the ambit of clauses. Firstly to Fourthly of Section 300 IPC, it will not be murder and the offender would not be liable to be

convicted u/s 302 IPC. In such a case if the offence is such which is covered by clause (i) or (ii) mentioned above, the offender would be liable to be convicted u/s 304 Part I IPC as it uses the expression "if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death" where intention is the dominant factor. However, if the offence is such which is covered by clause (iii) mentioned above, the offender would be liable to be convicted u/s 304 Part II IPC because of the use of the expression "if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death" where knowledge is the dominant factor.

After quoting the Dictionary meaning of knowledge in Black's Law Dictionary and Blackstone's Criminal Practice as well as the 11th Report of Law Commission of the United Kingdom Their Lordships held :-

19. Therefore, having regard to the meaning assigned in criminal law the word "knowledge" occurring in clause. Secondly of Section 300 IPC imports some kind of certainty and not merely a probability. Consequently, it cannot be held that the appellant caused the injury with the intention of causing such bodily injury as the appellant knew to be likely to cause the death of Shri. Ahirwar So, clause Secondly of Section 300 IPC will also not apply.

Applying these principles on the facts of the case, it is clear that the accused cannot be imputed with the knowledge that the injuries are likely to cause the death of deceased Thangal Kunju or that they inflicted the injuries with the knowledge that they are likely to cause his death by such act. Therefore the learned Sessions Judge was not justified in framing the charge for the offence u/s 304 IPC.

Criminal Revision Petitions are allowed. The order framing charge for the offence u/s 304 IPC is set aside. Learned Sessions Judge is directed to transfer the case to Chief Judicial Magistrate, Ernakulam which is the notified court for trial of the cases investigated by the CBI as provided u/s 228(1)(a) of Code of Criminal Procedure. The Chief Judicial Magistrate is to try the accused for the other offences. It is made clear that Chief Judicial Magistrate is at liberty to frame proper charge for the offences involved.