
(2012) 01 KL CK 0141
In the High Court Of Kerala
Case No : Criminal Appeal No. 376 of 2007

Mammoonju @ Mohamed Kunju

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 12-01-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 105
Penal Code, 1860 (IPC) — Section 299, 300, 302, 304(1)

Citation : (2012) 1 KLJ 615

Hon'ble Judges : R. Basant, J; P.Q. Barkath Ali, J

Bench : Division Bench

Advocate : P.B. Ajoy, for the Appellant; Gikku Jacob (PP), for the Respondent

Judgement

R. Basant, J.—(i) Did the court below err in choosing to accept and act upon the oral evidence of PWs. 2, 8 and 9.

(ii) Is the appellant/accused entitled to any benefit of doubt.

(iii) Is the appellant/accused in the circumstances of the case entitled to the mitigative protection of Exception 1 and/or 4 of Section 300 I.P.C.

These questions are raised for consideration before us by the Learned Counsel for the appellant Mr. P.B. Ajoy in this appeal. The appellant, a person aged about 62 years on the date of the incident is alleged to have caused the death of his father-in-law Shahul Hameed, a person aged about 85 years by stabbing him with MO1 knife at 12.30 p.m. on 14.5.2000 at the residential building occupied by both.

2. Investigation commenced with Ext.P1-FI statement lodged by PW1, a son of the deceased. Investigation was completed by PW11, the Investigating Officer, who filed the final report/charge sheet before the learned Magistrate. The learned Magistrate, after observing all legal formalities, committed the case to the Court of Session. The appellant denied the charge framed against him under.

Section 302 I.P.C. by the learned Sessions Judge. Thereupon, the prosecution was directed to adduce evidence in support of its case. The prosecution examined Pws. 1 to 11 and proved Exts.P1 to P16. Mos. 1 to 4 were also marked.

3. The accused, in the course of cross examination of prosecution witnesses and when examined u/s 313 Cr.P.C, denied all circumstances which appeared in evidence and which were put to him. He took up a defence of total denial. He did not dispute his presence at the scene of the crime. But according to him, he did not know how the deceased had suffered the injuries. It was suggested clearly that the deceased must have suffered the injuries at the hands of PW.8, the wife of the appellant and the daughter of the deceased. The accused did not examine any defence witness when called upon to enter on his defence. Exts.D1 to D6 Case Diary contradictions were marked. We do note that two different contradictions have both been marked as Ext.D4. Thus actually 7 contradictions have been marked.

4. The learned Sessions Judge, on an anxious consideration of all the relevant inputs, came to the conclusion that it was safe to place reliance on the oral evidence of PWs.2, 8 and 9. Their evidence when accepted and acted upon clearly established the offence u/s 302 IPC, it was held. The learned Sessions Judge accordingly proceeded to pass the impugned judgment. The appellant was sentenced to undergo imprisonment for life and to pay a fine of Rs. 10000/- and in default to undergo rigorous imprisonment for a period of 6 months.

5. Before us, the Learned Counsel for the appellant and the learned Public Prosecutor have advanced their detailed arguments. The Learned Counsel for the appellant argues initially that reliance ought not to have been placed on the allegedly discrepant, uninspiring and contradictory testimony of Pws.2, 8 and 9. At any rate, the counsel argues, that the appellant is entitled to the benefit of doubt arising from the unsatisfactory nature of the evidence tendered by Pws.2, 8 and 9. Finally the Learned Counsel for the appellant argues that the learned Sessions Judge acted improperly in not at all considering whether the offence proved against the appellant would slide back to the offence of culpable homicide not amounting to murder by the play of the mitigative protection of Exception 1 and/or Exception 4 to Section 300 IPC.

6. The learned Prosecutor, on the other hand, contends that there is no semblance of doubt aroused from the totality of circumstances. Pws.2, 8 and 9 were rightly believed by the court below. A plea for the mitigative protection of Exception (1) and/or Exception (4) was not raised before the Sessions Court and the appellant is not entitled for such protection, contends the learned Public Prosecutor.

7. We have considered all the relevant inputs. An appellate judgment is and ought to be read in continuation of the judgment of the trial court. In that view of the matter, it is unnecessary for us to re-narrate the oral and documentary evidence relied on by the parties. Suffice it to say that the Learned Counsel have

read to us in detail the oral evidence of PWs. 1 to 10 and the contents. Exts.P 1 to P6 and the Case Diary contradictions (7 in all). We shall advert to specific relevant material, if necessary, in the course of discussions.

8. The prosecution examined PWs. 2, 8 and 9 as witnesses who had ocularly perceived the incident. The F. I. Statement was lodged by PW1, a son of the deceased, who resides in another house a little away from the house where the incident took place, He is not an eye witness. Information collected was given by him to the police in Ext.P1 F.I.S. The crime was registered on the basis of such Ext.P 1 F.I.S. The F.I.S. was lodged at 6 p.m. on 14-5-2000 the incident having taken place at 12.30 p.m. earlier on that day. We note that the F.I.R. had reached the learned Magistrate at 10.55 a.m. on 15-5-2000.

9. PW2 is a daughter of the deceased. PW8 is another (younger) daughter of the deceased. She is the wife of the appellant. PW9 is a neighbour who has his residence opposite to the house of the deceased on the other side of a panchayat pathway, which runs between the two houses. In the house of the deceased, the deceased was residing along with PW2 and her daughter. The appellant, his wife (PW8) and a daughter of the appellant also reside in the same house. Indications clearly suggest that though all of them were residing under a common roof, there were two kitchens in the house: one for the deceased, PW2 and her daughter and the other for PW8, the appellant and their daughter.

10. Be that as it may, it is very evident that PWs.2 and 8 were available in the house when the incident took place. Not a semblance of doubt is aroused in our mind about the actual presence of PWs.2 and 8 in the house at the relevant time. Even the accused does not appear to have a dispute on that aspect. Of course, the accused has raised a contention whether PW2 could have been present at such a vantage point as to witness the occurrence. The presence of PW8 at the scene of occurrence is unambiguously conceded by the appellant himself. PW9 resides in the house across the road. The precise distance between the house of PW9 and the house of the deceased cannot clearly be ascertained from the non-oral evidence. PW9 asserted that he had witnessed the occurrence through the window of his house, which was opened by him on hearing the commotion in the house of the deceased. PWs.2,8 and 9 were subjected to detailed cross-examination. They stood the cross-examination well. We must note that PW8 is none other than the wife of the appellant and PW2 is her sister. PW9 is a close neighbour and the cross-examination of PW9, which has been visited by us again, does not at all suggest that PW9 has any motive to falsely implicate the appellant or suppress any portion of the true incident that had taken place. It is unnecessary to expatiate further. We concur with the conclusion of the court below that the oral evidence of PWs.2,8 and 9 can safely be accepted and acted upon. When their evidence is accepted, it clearly shows that the two homicidal injuries found on the deceased described in Ext.P3 postmortem certificate were suffered by him at the hands of the appellant with a weapon like MO1. On that aspect of the matter we have absolutely no doubt. Innocuous inaccuracies,

inconsistencies and differences in the testimony of PWs.2, 8 and 9 do not at all succeed in generating any reasonable doubt in the mind of the court on the crucial question whether the injuries on the deceased were suffered by him at the hands of the appellant with a weapon like MO1. Later, we shall delve deeper into the question as to how exactly the incident had taken place. Suffice it to say that the court below has committed no error in coming to the conclusion that the injuries were suffered by the deceased at the hands of the appellant with MO1.

11. In this context we do not find merit in the contention of the appellant that really independent witnesses have not been examined. PW9 does not appear to us to be interested at all. PW8 we note was the wife of the appellant with whom he was residing. Children are born in that wedlock also. PW8 we do note is really a witness on whose testimony reliance can safely be placed even without independent corroboration. The fact that alcohol was present in the blood of the deceased and the children of the deceased incorrectly asserted that their deceased father did not use to consume alcohol is no reason, according to us, to reject the evidence of PWs.2 and 8.

12. The defence of the appellant is in this context of great relevance. He admits his presence at the scene of the crime. He has no case that any one other than the deceased, himself and his wife (PW8) were present at the spot where the deceased sustained injuries. An attempt is made to vaguely suggest that the injuries may have been suffered by the deceased at the hands of PW8. Less said about this weird contention the better. The theory rebels against logic, reason and commonsense. PW8 is not even remotely shown to have any motive to indulge in any such conduct. The defence set up by the prosecution does also help us to rule out the possibility of the deceased having suffered the injuries in any other manner other than at the hands of the appellant with a weapon like MO1.

13. There is no attempt to set up a right of private defence. Even if the accused does not set up such a defence, if the plea emerges from the totality of circumstances, this Court is bound to consider the same. The burden u/s 105 of the Evidence Act rests clearly on the shoulders of the indicate to establish the defence of any general exception to criminality under the Indian Penal Code. The appellant has no such case. No such plea emerges from the totality of circumstances. In these circumstances, there can be no right of private defence in favour of the appellant

14. The injuries are described in Ext.P3. Injury No. 1 is the fatal injury. Any person who inflicts such an Injury on the deceased can safely be assumed to have intended to cause the death of the deceased. Under clause firstly of section 300 IPC the offence of murder defined u/s 300 IPC is thus clearly established. Moreover, the evidence reveals that the injury was sufficient in the ordinary course of nature to cause death. No semblance of doubt is there on the question that it was an intentional injury inflicted. Therefore, under clause thirdly of section 300 IPC (if not under clause firstly) the offence proved against the

appellant is the one the answers the definition of the offence of murder in the body of section 300 IPC.

15. It is true that the court below did not consider the plea for protection of exceptions 1 and 4 specifically. An accused need not specifically plead that his case comes under any of the exceptions. Even in the absence of such a plea, the court is bound to consider the availability of the mitigative protection of the exception u/s 300 IPC. The burden is always on the accused to show that he is protected by such exceptions u/s 300 IPC.

16. The Learned Counsel for the appellant contends that the appellant is entitled to exception one and or Exception 4 to section 300. We think it necessary to consider this contention in greater detail. For this purpose the precise commencement of the incident has to be ascertained, as revealed from the evidence of PWs.2, 8 and 9. Actually the evidence of PW9 is not very helpful to precisely understand the genesis of the incident. We have to rely on the evidence of PWs.2 and 8 to precisely understand the sequence of events, which led to the fatal injury being suffered by the deceased.

17. Both the deceased (father-in-law) and the accused (son-in-law) had on that morning gone to the local bazar. Indisputably there was a quarrel between the deceased and one Musaliar in the bazar. Details thereof are not available. Both the appellant and the deceased returned to their house by lunch time. The accused was served his lunch by P W8 his wife. The deceased was waiting outside in the varandha/sitout. The appellant/accused told his wife that the deceased had got involved in a quarrel in the bazar with a Musaliar and that he had allegedly got beaten up. The deceased took objection to that statement of the appellant. He picked up a quarrel thereafter. On this precise aspect, we find some disputes are there, but Exts.D1 and D2 contradictions marked read along with the evidence of PWs.2 and 8 on oath clearly and beyond the pale of controversy reveal that it is quite possible that the deceased had commenced the quarrel. The deceased abused the mother of the appellant. She was referred to insultingly by the deceased, a person aged about 85 years. The appellant was called by words etc.

18. The Learned Counsel for the appellant argues that such improper and indiscreet conduct on the part of the deceased must have operated as a provocation. It is thus that he claims the mitigative protection of exception one. The mere fact that in the course of a quarrel such a word was used by the deceased may not bring the case of the appellant within the sweep of exception one. We agree with the learned prosecutor on that aspect.

19. We now come to the question whether the mitigative protection of Exception 4 is available. Though the prosecution initially attempted to advance a case that the appellant had a motive against the deceased, the court below did not accept that version. Though there are indications to suggest that the father-in-law and son-in-law used to quarrel, there is absolutely nothing tangible to suggest to the

court that there was any dispute regarding property and the appellant entertained any motive against the deceased on that score. A dispute on that day was the sequel to the information by the appellant of what had allegedly happened in the bazar between the deceased and the said Musaliar. It is at that juncture that the deceased used provocative and abusive words denigrating the mother of the appellant. There is absolutely nothing to indicate that there was any pre-meditation. There was a sudden quarrel, which was evidently unanticipated. The sudden quarrel developed into fight. It is in the course of the fight that the injuries were inflicted by the appellant on the deceased. A careful analysis of the evidence of PWs. 2, 8 and 9 must lead any prudent mind to such understanding of the genesis of the incident. The question now is whether the appellant is entitled to the mitigative protection of Exception 4. Our attention has been drawn to decisions in *Haridas v. State of Kerala*, 2012 (1) KLT 124 and *Johny v. State of Kerala*, 2010 (1) KLD 173, in which the plea of Exception 4 has been considered recently by this Court.

20. Exception 4 reads as follows:-

Exception 4. - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation.- It is immaterial in such cases which party offers the provocation or commits the first assault.

It is evident now that to attract Exception 4 the following ingredients must be shown to exist:-

- i) There must be no premeditation.
- 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.

21. These four circumstances must simultaneously coexist to entitle an indictee to the protection of Exception 4. We have already noted that there was no premeditation. The incident was on a sudden fight upon a sudden quarrel. Passion must have been running high. The deceased an 85 year old man, used provocative and abusive words against the mother of his son-in-law. If the son-in-law got triggered into passion that was quite understandable in the given circumstances. The only question that remains is whether the fourth ingredient has been satisfied. The offender must not have taken undue advantage or acted in a cruel or unusual manner. We have considered whether this fourth ingredient

has been satisfied. It is true that the deceased was a person aged 85 years and the appellant was a person aged about 62 years on the date of the offence. It is true that a weapon was used. It is true that a fatal injury was inflicted. We are unable to agree that these circumstances are sufficient to take the case out of the sweep of Exception 4. To deny the benefit of Exception 4, undue advantage, cruelty or unusualness of an exceptional variety has to be shown to exist. It is certainly not a case where the appellant had got himself armed with a weapon in order to attack the deceased. The weapon appears to have come in handy. A careful reading of the evidence of PWs.2 and 8 (taking note of the dichotomy, though insignificant in their testimony) must definitely suggest that the act was committed in the heat of passion. Going by the evidence of PWs.2 and 9 the incident cannot be bifurcated into two. PW8 appears to have attempted to suggest that the incident can be divided into two parts. It is not however possible to come to a safe conclusion that heat of passion must have died down between the two parts of the incident. That would be an unrealistic and unnatural approach to the conduct of persons charged with passion at the relevant time.

22 Taking all the relevant circumstances into account, we are satisfied that it would be absolutely safe to concede to the appellant the mitigative protection of Exception 4 to section 300 IPC. The offence slides back to the offence of culpable homicide not amounting to murder defined u/s 299 IPC punishable u/s 304 (1) IPC.

23. We now come to the question of sentence. The court below imposed the sentence of imprisonment in life and a fine of Rs. 10,000/- and a default sentence of rigorous imprisonment for a period of six months. We are satisfied that the sentence of life can be modified to a sentence of rigorous imprisonment for a period often years u/s 304 (1) IPC. The learned Counsel for the appellant argues that considering the age of the appellant (now about 73 years) and the period of imprisonment that he has already undergone (exceeding 5 years), the sentence may be modified and reduced to the period already undergone. We are unable to agree. A sentence consistent with the gravity of the offence has to be imposed. We are unable to agree that any sentence of substantive imprisonment less than ten years shall serve the interests of Justice, in the facts and circumstances of this case. We have conceded the benefit to the appellant and have held him to be entitled to the protection of Exception 4. But we are satisfied that the maximum term imprisonment often years has got to be imposed on the appellant. In the result:

- a) This appeal is allowed in part.
- b) The verdict of guilt, conviction and sentence imposed on the appellant is modified.
- c) He is found guilty, convicted and sentenced u/s 304 (1) IPC to undergo rigorous imprisonment for a period often years.
- d) The sentence of fine imposed and the default sentence are also upheld.