

(2023) 06 KL CK 0214

In the High Court Of Kerala

Case No : Criminal Revision Petition No.46 Of 2005

Prasad

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 15-06-2023

Acts Referred:

Code of Criminal Procedure, 1973 — Section 397, 401

Indian Penal Code, 1860 — Section 143, 147, 148, 149, 324, 326

Citation : (2023) 06 KL CK 0214

Hon'ble Judges : Bechu Kurian Thomas, J

Bench : Single Bench

Advocate : John Britto, C.A.Rajeev, Sreeja

Final Decision : Allowed

Judgement

Bechu Kurian Thomas, J

1. The revision petitioners are accused Nos.1 to 5 in C.C.No.554 of 1996 on the files of the Judicial First Class Magistrate's Court, Thiruvalla. They were indicted for the offences under Sections 143, 147, 148, 324 & 326 r/w Section 149 of the Indian Penal Code, 1860. By judgment dated 15.07.2000, revision petitioners were convicted for the aforesaid offences and sentenced to undergo rigorous imprisonment for one year each, for the offence under Section 148 of IPC, apart from rigorous imprisonment for one year for the offence under Section 326 IPC. No separate sentences were imposed for the offences under Sections 143, 147 and 324 of the Indian Penal Code, 1860. The appeal filed as CrI.A.No.154/2000 was dismissed by the Additional Sessions Court, Pathanamthitta by judgment dated 26.10.2004. The revision petitioners are thus before this Court challenging their conviction and sentence.

2. Prosecution alleged that on 09.02.1996, the accused had, after forming themselves into an unlawful assembly, in furtherance of their common intention and armed with deadly weapons, sprinkled chilly powder into the eyes of CW2

and assaulted him, inflicting serious injuries with sword sticks, on the back of his leg and caused a fracture, while other accused inflicted cut injuries with sword sticks on various parts of the body including fracture of the leg and thereby committed the offences alleged.

3. In order to prove the case, prosecution examined PW1 to PW6 and marked Ext.P1 to Ext.P6. The defence examined DW1 and DW2. However, no material objects were marked on behalf of the prosecution while the defence examined DW1 and DW2.

4. After analysing the evidence adduced, the trial court found the accused guilty of the offences and sentenced them to imprisonment as mentioned earlier, which was, in appeal, confirmed by the learned Sessions Judge.

5. The learned counsel for the revision petitioners vehemently contended that the trial court as well as the appellate court failed to consider the falsity of the prosecution case and the evidence including the serious infirmities. According to the learned counsel, the prosecution had failed to examine the Investigating Officer which has caused serious prejudice to the accused. The learned counsel also contended that none of the weapons of offence were recovered which clearly proved that the prosecution allegation was bereft of any credence and therefore, the benefit of doubt ought to have been accorded to the petitioners.

6. Sri.Sreeja V., the learned Public Prosecutor, on the other hand, contended that though the Investigating Officer was not examined, the same by itself is not a reason to interfere with the well considered judgment of the trial court as well as the appellate court. According to the learned Public Prosecutor, no prejudice of any nature has been occasioned to the accused due to the non-examination of the investigating officer. Further, the learned Public Prosecutor asserted that the prosecution witnesses had clearly spoken about the incident and also identified the accused and therefore, the concurrent findings of fact entered into by both the courts ought not to be interfered with in the limited jurisdiction exercised by this Court under Section 397 r/w Section 401 of the Code of Criminal Procedure, 1973.

7. I have considered the contentions.

8. Revision petitioners are the accused. The incident is alleged to have occurred on 09.02.1996. Accused are alleged to have acted in furtherance of their common object, after forming themselves into an unlawful assembly. The injuries inflicted on PW2 are serious in nature and are even grievous especially since fracture had occasioned. The first accused is alleged to have poured chilly powder mixed with water into the eyes of PW2 and inflicted a cut injury on his left leg, above the knee joint with a chopper, while A2 inflicted a cut injury on his head with a sword stick. A3, A4 and A5 are also alleged to have inflicted separate injuries with different sword sticks on PW2. The accused were identified during trial. The trial court as well as the appellate court has specifically found concurrently on the above issues.

9. However, one of the pivotal argument addressed by the learned counsel for the revision petitioners was with respect to the non-examination of the investigating officer. In the decision in *Ram Gulam Chaudhury and Others v. State of Bihar* [AIR 2000 1 SC 2842], while considering the question regarding non-examination of the Investigating Officer, it was held that though it is always desirable for the prosecution to examine the investigating officer, the non-examination by itself will not create any dent in the prosecution case or affect the credibility or trustworthiness of the testimony of the eye witnesses. The court went on to hold that in the absence of any prejudice to the accused, the non-examination of the Investigating Officer would not be fatal to the prosecution.

10. Bearing in mind the aforesaid principle, when the case of the prosecution is analysed, it is noticed that none of the weapons of offence were recovered in the instant case. PW2 in his evidence specifically deposed that the weapon of offence used against him was available with him itself and that, it was never recovered by the Investigating Officer. It was also stated that when the accused ran away, they left a sword stick at the place of incident and that was still available with him. It is crucial to note that PW2 is alleged to have been taken from the scene of occurrence immediately to the hospital. The weapon of offence, according to PW2, was lying there at the scene of occurrence itself when he was taken to the hospital. The non-recovery of the weapon of offence and the subsequent admitted availability of the weapon of offence with the injured PW2 creates doubt on the prosecution case. In this context, non-examination of the Investigating Officer assumes significance and creates doubt on the veracity of the prosecution case. The contention of the revision petitioners that non-examination of the Investigating Officer has caused prejudice to them hence assumes significance.

11. Apart from the above, the FI statement was recorded by the Investigating Officer, the place of occurrence noted in the scene mahazar was prepared by the Investigating Officer, blood stains were allegedly taken by the Investigating Officer from the scene of offence and the statement of PW2 that he continues to possess one of the weapons of offence are all crucial factors which could have been elicited through and proved or disproved by examining the Investigating Officer. The suspicious circumstances which have been pointed out as above, could have been put to the Investigating Officer and only the Investigating Officer could have explained those circumstances.

12. Viewed in the light of the above circumstances, this Court is of the considered view that non-examination of the Investigating Officer has caused serious prejudice to the revision petitioners. The non-examination of the Investigating Officers coupled with the prejudice caused to the accused and the circumstances pointed out above, clearly indicate that the benefit of doubt about the prosecution story ought to be accorded to the revision petitioners. In view of the above circumstances, it cannot be held that the prosecution had proved its case beyond reasonable doubt.

13. In the light of the above discussion, the conviction and sentence imposed

upon the revision petitioners in C.C.No.554/1996 on the files of the files of the Judicial First Class Magistrate's Court, Thiruvalla, as confirmed in CrI.A.No.154 of 2000 on the files of the Additional Sessions Court, Pathanamthitta, is hereby set aside and the accused are acquitted.

The criminal revision petition is allowed.