

(1958) 12 KL CK 0017
In the High Court Of Kerala
Case No : Criminal Appeal No. 102 of 1958

Ramakrishna Panicker

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 17-12-1958

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 235, 537
Penal Code, 1860 (IPC) — Section 304, 323, 71

Citation : AIR 1959 Ker 372 : (1959) CriLJ 1331

Hon'ble Judges : Koshi, C.J.;Vaidialingam, J

Bench : Division Bench

Advocate : Mathew Muricken, Thomas P. Mathekkal, V.S. Muthathu, P. Karunakaran Nair, C.K. Sivasankara Panicker, George K. Nair and M.M. Cherian, for the Appellant; Public Prosecutor, for the Respondent

Judgement

Koshi, C.J.—This Criminal Appeal arises out of the judgment and order of the learned Additional Sessions Judge of Kottayam in Sessions Case No. 87 of (1957) on the file of the Kottayam Sessions Court. There were "two accused persons in the case. Accused 1 stands convicted u/s 304(2) and u/s 323, I. P. C. He has been sentenced to undergo rigorous imprisonment for 4 years for the first mentioned offence and like imprisonment for 6 months for the other. The two sentences are however "to run concurrently."

Accused 2, who stood charged with abetment of the offence u/s 304 (2) alleged to have been committed by accused 1 has been acquitted of that charge, but he has been convicted on a further charge u/s 323, I. P. C. for which also he was tried. For that offence he has been sentenced to undergo rigorous imprisonment for 6 months. Accused 1 and accused 2 have preferred this joint appeal against their convictions and sentences.

2. On the date of the occurrence forming the subject of the case, that is, 29-1-1957, accused 1 and accused 2 were both head-constables of police attached to the Kottayam East Police Station. At about 3 p.m. on that date

accused 1 found one Antony Devassia alias Pappayi drunk and behaving in a disorderly and riotous manner on the public road in front of the cycle shop of Pw. 13 on the Kottayam-Kumali road, not far away from the District Court buildings at Kottayam.

Devassia had taken a cycle from the shop of Pw. 13 on hire while the latter was absent from his shop and brought it back with its break damaged. Over that an altercation took place between Pw. 13 and Devassia and it was at that time accused 1 arrived there. Finding that Devassia was fully drunk and unable to take care of himself, accused 1 took him into custody and directed a police constable (Pw. 3) who was then there to take him to the East Police Station.

Pw. 3 acted accordingly and produced Devassia before the station with his report Ext. P2. That was at 3-40 p.m. The Sub-Inspector of Police (Pw. 17) received the report and made an entry in the general diary about it at 4 p.m., vide Ext. P. 4, the general diary entry, Pw. 4, a police constable to whom the Sub-Inspector then handed over the station charge and Pw. 2, the constable on sentry duty, were asked to keep Devassia under surveillance until after he recovered from the effects of the drink or until the Sub-Inspector returned to the station.

The Sub-Inspector returned to the station only at 6-30 p.m. vide Ext. P 17 the general diary entry. According to the prosecution soon after the Sub-Inspector left the station, accused 1 and accused 2 went there and they both belaboured Devassia. It would appear that accused 1 first gave two blows on Devassia's cheeks and then bending his head down gave him five or six hits with his elbows on Devassia's back.

Afterwards it is alleged that accused 1 raised Devassia's head by pulling his hair and fisted him twice in the region of his abdomen. While accused 1 was inflicting injuries on Devassia accused 2 was standing by the side of accused 1. Immediately afterwards he (accused 2) caught hold of Devassia and putting his head between his legs gave a few hits with the elbows on Devassia's back. Devassia got rather exhausted by the belabouring and at the instance of accused 1, two constables, Pw. 1 and Pw. 5 took him out into the courtyard so that fresh air might improve his condition.

He was also given some water to drink and later when his son, Pw. 11 came there, at the instance of Pw. 3 some soda-water was brought for him to drink. All these ministrations did him no good and accused 1 tried to make him get up by beating him with a stick (police lathi) on his feet. Accused 1 and accused 2 then told others that Devassia was merely pretending that he felt very bad. Later he was taken from the courtyard into one of the rooms of the station.

At about 6-30 p.m. the Sub-Inspector returned to the station and he found that Devassia's condition was rather precarious. Accused 1 and accused 2 were directed to take Devassia to the hospital and they did that in a car requisitioned by accused 1. On being taken to the hospital (District Hospital, Kottayam) Pw. 10, Assistant Surgeon, who examined Devassia found that he was dead and that

death must have occurred not less than half an hour before, but within two hours.

Pw. 10 gave due intimation about Devassia's death both to the police and the Magistrate and after some hurried consultations and exchange of letters between the district Magistrate (Judicial) and the District Collector (Additional District Magistrate) the Executive First Class Magistrate (Pw. 8) was asked to hold the inquest inquiry. The report of "the inquest held by him is Ext. P. 11. According to the Panchayatdars which took part in the inquest enquiry Devassia had died while he was in the police station in the custody of the police and as the result of the injuries inflicted upon him by the police.

On receipt of that report the District Superintendent of Police, directed the Deputy Superintendent of Police, Pw. 18, to register a case against the members of the police force who were responsible for the death of Devassia. Ext. P-19 is the first information report sent by Pw. 18 after he registered this case and in that report besides accused 1 & accused 2, Pw. 3 & Pw. 4 were also shown as accused persons. It will be remembered that it was Pw. 3 who took Devassia to the Police station as per the direction of accused 1 and that Pw. 4 was in charge of the station during the sub-Inspector's absence from 4 p.m. to 6-30 p. m.

Further investigation however showed that Pws. 3 and 4 had taken no part in belabouring Devassia and Pw. 18 accordingly sent a report (Ext. P-20) to that effect to the court on 2-2-1957. The final charge-sheet was therefore laid only against accused 1 and accused 2, accused 1 for causing hurt to Devassia (Section 323) and for causing his death by fisting him in the abdominal region and accused 2 for abetment of the latter offence and also for causing hurt to Devassia with his own hand. After the preliminary enquiry the case was committed to the Kottayam Sessions Court and as mentioned earlier, the Additional Sessions Judge, who tried the case, convicted accused 1 "both u/s 304(2) and Section 323 and accused 2 u/s 323.

3. Apart from the blows accused 1 is alleged to have inflicted on Devassia while the latter was in the police station, the prosecution had a further case that when he was taken into custody from the public road in front of the cycle shop of P. W. 13, accused 1 had given, a blow to Devassia's cheek asking him whether he was going about abusing anybody and everybody whom he met. Both P. W. 3 and P. W. 13 spoke about that fact. It would also appear that earlier in the day, that is, in the forenoon of 29-1-1957, accused 1 happened to meet Devassia on the public road a few furlongs to the west of the District Court buildings and when accused 1 called him by name, taking offence at the authoritarian tone in which he was called, Devassia abused accused 1.

The public road they met was close to the tailoring shop of P. W. 14 and the bakery run by P. W. 15. Both those witnesses have given evidence about that incident and also that Devassia even complained then that accused 1 had once beat him with the police baton. It was during the interval between this earlier incident and that at the shop of P. W. 13 at about 3 P. M. that Devassia hired a

cycle from the shop of P. W. 13 and used it for a jolly" ride as it were. During the course of that ride one of his sandals fell down and when attempting to pick that up without getting down from the cycle, he fell down and sustained some minor injuries.

It was then that one of the breaks of the cycle got damaged. P. W. 16 saw the attempt to pick up the lost sandal and the consequent fall of Devassia from the cycle. That occurred on the public road in front of the Holy Family School near the District Court and P. W. 16 was at that time a student of that school.

4. The foregoing are sonic of the earlier incidents which have a bearing on what is alleged to have taken place later within the confines of the police station. To return to the events that followed the inquest enquiry, after that enquiry the body was entrusted for autopsy to P. W. 9, the Civil Surgeon. His examination showed "that there were as many as eleven injuries on the body of Devassia. Ext. P-14 is the post-mortem certificate issued by him. It was held in the afternoon of 30-1-1957. Of the eleven injuries, the first seven in Ext. P-14 are mere abrasions on different parts of the body, which according to the prosecution were caused during the fall Devassia had earlier in the afternoon of 29-1-1957 while riding the cycle.

Of the remaining four, injury No. 8 alone was an external injury and the others were noticeable only after dissection. The four injuries alleged to be the result of the belabouring Devassia sustained at the police station are described as follows in Ext. P. 14;

"8. An oblique contusion $1\frac{1}{4}$ "x $1\frac{1}{2}$ " with two abrasions at the two ends of the contusion. The anterior abrasion is $1\frac{1}{8}$ "x $1\frac{1}{8}$ " and the posterior $1\frac{1}{8}$ "x $1\frac{1}{8}$ ". The conterior is situated $2\frac{1}{2}$ " behind and $1\frac{1}{2}$ " above the left anterior superior iliac spine.

9. On exploration the rectimuscles below the level of the umbilicus are congested with extravasation of blood between the layers of the muscles and "the tissues beneath and the peritoneum underneath is congested.

10. There is a bluish echymosed area $1\frac{1}{2}$ "x $3\frac{3}{4}$ " situated in the left 8th intercostal space in the mid-clavicular line.

11. A lacerated wound $2\frac{1}{2}$ " X $1\frac{1}{2}$ " X 1" on the gastric facet of the spleen".

According to Pw. 9 all the injuries noted on the body of Devassia were ante-mortem and the cause of death was syncope due to shock and haemorrhage. Haemorrhage was caused by injury No. 11. He further stated in his evidence that injuries Nos. 9 and 10 would be caused by fisting and that a fist at the seat of injury No. 9 or injury No. 10 could cause injury No. 11. Pw. 9 also was of the view that injuries Nos. 1 to 7, would be caused by a fall from a cycle. In cross-examination it was brought out that Devassia had an enlarged spleen and that a fist in the region of such a spleen could cause death.

An injury on the spleen as noted in Ext. P-14 was sufficient in the ordinary course of nature to cause death. From the medical evidence it is clear that it was because Devassia had a diseased spleen that a fist in that region brought about his death. It needs no saying that to the naked eye the diseased condition of the spleen will not be visible. It may also be noticed that there is no evidence that accused 1 or accused 2 knew that Devassia had a diseased spleen.

5. We will now turn to the evidence of the eye-witnesses. The prosecution examined four witnesses to prove the belabouring of Devassia by accused 1 and accused 2 at the police station. Those witnesses are Pws. 1 to 4. They are all police constables and Pw. 1 was on station duty between 1 and 5 P. M, on the date of the occurrence. Pw. 2 was on sentry duty during that period and it was Pw. 3 who produced Devassia at the station along with his report Ext. P-2. The general diary of the station shows that Pw. 3 was there even at 5 p.m. in Pw. 4 was in charge of the station during the sub-Inspectors absence from 4 p. m. to 6-30 p. m.

So the fact that the eye-witnesses were in the station premises from the time Devassia was taken to the station until he (or rather his body) was taken to the hospital is borne out by the general diary of the station. All these witnesses, say that accused 1 and accused 2 came to the station soon after the Sub-Inspector left the station at 4 p. m. and that after they came accused 1 first gave two blows to Devassia on his cheeks and then he hit him on the back with elbows and afterwards two licks were given in the abdominal region.

Accused 2 was all the time standing close to accused 1 and after the latter gave the abdominal blows, accused 2 put Devassia's head between his (the accused's) legs and hit him on the back with elbows. This is "the uniform course of the evidence of the four eye-witnesses and they all spoke to the ministrations Pws. 1 and 5 and later Pw. 3 did "towards Devassia after he appeared to have got completely exhausted. These eye-witnesses, as also Pw. .5 and Pw. 6, two other police constables who came there after 4 p. m., also spoke to accused 1 having beat Devassia on his feet with a view to make him get up.

According to accused 1 and accused 2 it was all Devassia's pretension that he was far too exhausted to walk or even to get up. The lower court has believed the evidence of PWS. 1 to 6 and we see no reason to take a different view about it. No doubt, as per the general diary after Devassia was taken to the police station it was only at 5.15 p. m., that accused 1 reported himself at the police station but admittedly his court work was over by noon or early in the afternoon as- there was no sitting in the Sub-Divisional Magistrate's Court where it was that work was assigned to him for that day. His own statement admits that he was free in the afternoon and he did not deny having directed Pw. 3 to take Devaseia to the police station round about 3 p. m.

According to accused 1, after that lie had gone to the Muttapmalam Post Office and when he returned from there to his quarters he had some visitors. He let in

no evidence to prove these facts and as stated earlier, "there is no reason to disbelieve Pws. 1 to 4 who gave evidence about the occurrence or of Pws. 5 and 6, who say that accused 1 was seen there long before 5-15 p. m. As for accused 2, he had left the station at 3-30 p. m., for surprise checking of motor vehicles, but that checking was conducted on the public road, in front of the District Court, not far away from the Kottayam East Police Station. The notes of his checking (Ext. P-12) show that between 3-30 and 5-30 p. m., he had checked only two vehicles one at 4-5 p. m. and the other at 4-30 p. m. The next one was only at 5-30 p. m.

On the other hand, after 5-40 there was a vehicle available for checking almost every five minutes. The distance between the place where checking was going on and the police station being very short, he could easily have been present at the police station round about 4 O' clock to play the part he is alleged to have done in belabouring Devassia. The lower Court's finding that both these persons have participated in causing hurt on Devassia has to be accepted and we confirm that finding.

6. Next we may refer to the blow which accused 1 - is alleged to have given to Devassia on the road in front of the shop of Pw. 13. As stated earlier Pw. 3 and Pw. 13 have spoken about it. The lower court has accepted their testimony as true. "We also accept that evidence. The defence had an argument that the trial was bad for mis-joinder of charges and persons for having made this incident also the subject of the trial along with the incidents that happened later at the police station. The lower court has repelled that argument on the ground that the two incidents formed part of one and the same transaction.

We have noticed that Pw. 3 had stated that when giving a blow to Devassia On the public road, accused 1 had asked him whether he was going about abusing anybody and everybody. That evidently has reference to "the forenoon incident spoken to by Pws. 14 and 15. Presumably it is that incident which furnished the motive for the later belabouring at the police station. If that be so, the lower court's view that the two incidents formed part of one and the same transaction cannot be said to be an erroneous view.

Even if it were otherwise, it has not been shown that the so called misjoinder of charges or persons bad caused any prejudice to "the accused persons or occasioned a failure of justice. Clause (b) of Section 537, Criminal Procedure Code, reintroduced by the Criminal Procedure Code Amendment Act, XXVI of 1955, is a complete answer to the contention that the alleged misjoinder has vitiated the trial.

7. There is however another error in the charge, that is, to have framed a charge against accused 1 both u/s 304(2) and u/s 323. A reading of the charge shows that Section 323 in the charge against accused .1 related to the blow given to Devassia on the public road and to the blows inflicted on him by accused 1 at the police station except the two fists in the abdominal region and that the charge u/

s 304(2) related to the fists. When a person inflicts several blows on another and one or more of these blows prove fatal, it was not lawful to have one charge with respect to the fatal blow or blows and another with respect to the other blows. Illustration (a) to Section 71, Penal Code, may usefully be referred "to in this context,

A separate charge u/s 323 was uncalled for and the conviction and sentence for that charge are unsustainable. The conviction and the sentence the lower court passed against accused 1 u/s 323 are "therefore quashed. We have now to consider whether the conviction u/s 304(2) can be sustained or whether the conviction can only be for some minor offence.

8. Earlier in this judgment we have stated that according to the medical evidence in the case rupture or damage to the spleen would not have occurred but for the fact that that organ was diseased. There is no evidence that accused 1 was aware of that diseased condition. A fist in the abdominal region would not ordinarily cause any damage to a normal spleen. That is the effect of the medical evidence in the case. Accused 1 would not have intended to give Devassia anything more than a beating or a thrashing to teach him a lesson, as it were, for his impudence in using foul language against him a police officer, while they happened to meet on the public road.

It is in the circumstances of the case difficult to attribute to accused 1 any intention to cause death or any intention to cause such bodily injury as would in the ordinary course of nature cause death. Nor could accused 1 be taken to have even intended or knew it to be likely that the hurt which he was causing would be grievous hurt even though on account of the diseased condition of the spleen it got ruptured. Explanation to Section 322, Penal Code shows that a person is not said to voluntarily cause grievous hurt except when he both causes grievous hurt and intends or knows himself likely to cause grievous hurt.

In other words, a person can be convicted of grievous hurt only when the result and intention correspond -- see Gour's Penal Law of India (VI Edition. Vol. II p. 1472.) From the circumstances of the case nothing more than a simple hurt could reasonably be thought likely to ensue from the fists given to Devassia and as such even though the spleen got ruptured, accused 1 could not be convicted for any offence more serious than for causing simple hurt. Law is well settled that when the injury is not serious and there was no intention to cause death or grievous hurt, nor had the accused knowledge that it was likely to cause grievous hurt or death, a man is guilty of causing hurt and not death, even though death is caused.

At p. 701 of Ratanlal's Law of Crimes (19th Edition) the commentaries refer to a line of cases where death ensued as a result of hurt caused to diseased spleen or other diseased organs and convictions were entered for causing simple hurt. The commentary under the heading "Hurt" may usefully be quoted here:

"Where the accused, having received great provocation from his wife, pushed her

with both arms so as to throw her with violence to the ground, and after she was down slapped her with his open hand, and the woman died on account of rupture of her spleen which was diseased, it was held that the accused was guilty of causing hurt. Similarly, where a wife died from a chance kick in the spleen inflicted by her husband on provocation given by her, the husband not knowing that the spleen was diseased, he was held guilty of causing hurt: The accused, dissatisfied and irritated by the lazy and inefficient manner in which a punkah cooly was managing a punkah, went up to him and struck him one or more blows.

The cooly was suffering from a diseased spleen and died from the injuries he had received. It was held that the accused was guilty of causing hurt. Where the accused threw a piece of a brick at the diseased which struck him in the region of the spleen and ruptured it, the spleen being diseased, it was held that he was guilty of causing hurt. The accused was charged with having caused the death of one N by kicking him over the region of the spleen, being enraged at the latter having allowed his goats to stray into his fields.

The medical evidence showed that the spleen of the deceased was enormously large, and slight injuries over the region of the spleen would be sufficient to cause its rupture which generally ended fatally. It was held that in the absence of satisfactory evidence to prove knowledge of the state of health of the deceased on the part of the accused, the conviction should be for hurt only." The cases depended upon by the learned author are: *Queen v. runchanun Tantee* 5 Suth WR (Cri) 97; *Queen v. Bysagoo Nosbyo* 1867 8 Suth WR (Cri) 29; *Empress of India v. Fox* ILR AH 522; *Empress of India v. Randhir Singh* ILR All 597; *Aiman* 1 All LJ 162. To this list may be added "the decisions in *Emperor v. Sabarali* AIR 1920 Cal 401; 21 Cri LJ 666; *Bhajan Das v. Emperor* AIR 1924 Lah 218; and *In re Marana Goundan* AIR 1941 Mad 560. Ratanlal's commentary at pp. 812 and 813 under the caption "Spleen Cases" may also usefully be referred to in this context. Gour deals with this topic at p. 1463 of Vol. II of the Penal Law of India (VI Edition).

9. We have not however overlooked cases or commentaries dealing with instances of persons causing hurt to a diseased spleen or heart or brains and death ensuing in consequence being convicted for causing grievous hurt or even u/s 304(2). Ratanlal's commentaries at pp. 700 to 701 under the caption "Death due to Diseased Spleen or Heart" (1) "Grievous Hurt" refer to several such instances. The commentaries at p. 818 under the heading "Diseased Spleen or Heart" may also be referred to for such cases. An examination of the facts of those cases would however show that those are cases where the court was able to infer that the offender intended to cause grievous hurt and such hurt also resulted from the action of the offender.

Some of those are also cases where weapons such as sticks or lathis were used or where there have been fractures of ribs or other bones but which fractures did not cause or lead to death. With a view to find out whether the case on hand would fall under that category of cases we have examined the decisions cited in

the commentaries and we have no Hesitation to hold that the line of cases cannot be taken to govern the present case. The decisions we have in mind and some of which are referred to in the commentaries at the page mentioned are Queen v. Megha Meeach 2 Suth WR Cri 39; Empress of India v. O'Brien ILR All 766; Empress of India v. Jdu Beg ILR All 776; Mahabir v. Emperor 19 All LJ 295; Bha-rat Singh v. Emperor AIR 1932 Oudh 279 ; Munni Lal Vs. Emperor, and Basant Singh Vs. State,

10. Conformably to the principles enunciated earlier and following the lead of the first batch of cases referred to in this judgment we alter the conviction of accused 1 from that u/s 304(2) to one u/s 323. The sentence has necessarily to be altered, but regard being had to the fact that accused 1 was misusing his position as a police officer to assault a helpless person whom he had taken into custody, we think it proper to sentence him to the maximum sentence prescribed for the-offence u/s 323, namely, rigorous imprisonment for 1 year. We award him that sentence. His appeal succeeds to the extent of mitigating the offence and reducing the sentence as above.

11. As for the appeal of accused 2 we have already found that he is seen to have taken part in belabouring Devassia. His conviction has therefore to be confirmed. He had no provocation whatever and he left his post of duty to join hands with his brother head-constable to be labour a "captive" in their hands. The sentence of 6 months rigorous imprisonment passed against him is in the circumstances not at all excessive. That sentence also is therefore confirmed.

12. Subject to the modifications with regard to the conviction and sentence passed by the lower court as against accused 1, the criminal appeal will stand dismissed. Order accordingly.

13. The appellants will surrender to their bail bonds.