
(2007) 02 KL CK 0072

In the High Court Of Kerala

Case No : Criminal A. No's. 1707, 1833 and 1851 of 2003 and 836 and 1098 of 2004

Sharafu alias Sharafudheen and etc.

APPELLANT

Vs

State of Kerala and etc.

RESPONDENT

Date of Decision : 23-02-2007

Acts Referred:

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 302, 34, 341, 357(3), 387

Citation : (2007) CriLJ 2908

Hon'ble Judges : T.R. Ramachandran Nair, J;J.B. Koshy, J

Bench : Division Bench

Advocate : P.F. Francis, in Cri A No. 1707/03, for the Appellant; K.M. Sathyanatha Menon in Cri. A. No. 1833/03, K.P. Mujeeb in Cri. A. No. 1851/03, P. Samsudin and P. Babu Karthikeyan, in Cri. A. No. 836/04, Babu S. Nair in Cri. A. No. 1098/04 and K.C. Santhosh Kumar, Public Prosecutor, for the Respondent

Judgement

J.B. Koshy, J.—Seven accused were charge-sheeted for offences punishable under Sections 341, 398 and 302 read with Section 34 of the Indian Penal Code. A5 and A6 were absconding and their cases were split up. Case of A3 was also split up as he was not found originally and that was separately tried in S.C. No. 41 of 2004. A1, A2, A4 and A7 faced trial in SC No. 221 of 2002. The Court charge is as follows:

The That at about 7.30 p.m. on 7-6-2000 all of you in furtherance of your common intention to commit dacoity came in a Maruthi van bearing Registration Number IN 9450 and that you had restrained the deceased Ganapathi and his son the de facto complainant, who were proceeding to their house after closing their jewellery shop, in their scooter No. KL-10E 28 and that the accused Nos. 1 and 2 among you had stabbed Ganapathy with a knife on his chest, back and neck and inflicted fatal injuries and that he had succumbed to the injuries at Government Hospital, Thirurangadi, and that accused Nos. 3 to 7 among you had acted in conjointly committing dacoity along with accused Nos. 1 and 2 and all of

you have committed offences punishable u/s 341, 396, 302 r/w. 34 of IPC at Chettipadi within the cognizance of this Court....

The Sessions Court convicted A1 and A2 for offence punishable u/s 302 read with Section 34 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 1,50,000/- each. They were also convicted for offence punishable u/s 387 of IPC and sentenced to undergo rigorous imprisonment for life. They were further found guilty for offence punishable u/s 341 and sentenced to undergo simple imprisonment for one month and to pay a fine of Rs. 500/- each. A3 (sole accused in S.C. No. 41 /2004) and A4 (S.C. No. 221/2002) were also convicted and sentenced to undergo rigorous imprisonment for life u/s 398, IPC with compensation of Rs. 50,000/- payable u/s 357(3), IPC. A7 was sentenced to undergo rigorous imprisonment for 10 years u/s 398, IPC and to pay a compensation of Rs. 50,000/- u/s 357(3), IPC. A3, A4 and A7 were also convicted for the offence punishable u/s 341, IPC and sentenced to undergo simple imprisonment for one month with a fine of Rs. 500/-. Even though the case against A3 was separately tried, the evidence relied on by the learned Sessions Judge were almost same in both the cases. Therefore, we are disposing all these appeals by this common judgment. The evidence of witnesses are also similar in character. Against the conviction and sentence first accused filed Cri. A. No. 1833 of 2003, second accused filed Cri. A. No. 836 of 2004, third accused filed Cri. A. No. 1098 of 2004, fourth accused filed Cri. A. No. 1851 of 2003 and seventh accused filed Cri. A. No. 1707 of 2003.

2. The prosecution case is that at about 7.30 p.m. on 7-6-2000, all the accused, in furtherance of their common intention to commit dacoity, came in a Maruthi van bearing Registration No. T.N. 23D/9450, that they restrained the deceased Ganapathi and his son (P.W. 1) who were proceeding to their house after closing their jewellery shop, in their scooter bearing Registration No. KL-10E.28, that the accused Nos. 1 and 2 stabbed Ganapathi with knife on his chest, back and neck and inflicted fatal injuries at Chettipadi, that he succumbed to his injuries on the way to Government Hospital, Thirurangadi and that accused Nos. 3 to 7 acted in conjoining, in committing dacoity along with accused Nos. 1 and 2. We are describing the array of witnesses as mentioned in S.C. No. 221 of 2002 (unless otherwise stated) for the purpose of convenience.

3. P.W. 1, son of the deceased Ganapathi, gave Ext. P1 F.I. Statement and Ext. P12 is the FIR. In Ext. P1 F.I. Statement, which was given without much delay, he stated that on 7-6-2000 at about 7 p.m. as usual he and his father, deceased Ganapathi, were proceeding to their house, after closing their jewellery shop at Chettipadi, in their Scooter bearing Registration No. KL 10E. 28. He was having about 1 1/2 Kgs of gold ornaments and he was seated as the pillion rider. When they passed Chettipadi railway gate, he saw a white Maruthi van following them. Several times he looked back and noticed the Maruthi van following them. When they reached very near to their house, he again looked back and he saw that the

sliding door on the left hand side of the Maruthi van was kept opened and he noticed that two persons were sitting and a person who was sitting on the left side had a knife with him. Apprehending danger, he asked his father to speed up the vehicle. But, when they came near Jameela Manzil, the Maruthi van overtook and blocked the scooter so that they cannot proceed further. The scooter capsized and both of them fell on the ground. Immediately, the person with the knife and the other person jumped out of the van. P.W. 1 and his father cried aloud and P.W. 1 ran towards the nearby house of Ravi. The neighbours including Sasi and Babu ran towards the place of incident. Sasi took Ganapathi in an autorickshaw to Chettipadi hospital and thereafter to the Government hospital, Thirurangadi. By the time P.W. 1 reached the hospital, his father died. He stated that his father was killed by the joint action of the driver and two persons mentioned earlier and body of the father was kept in the mortuary of the Government Hospital. This statement was given at 11 p.m. on 7-6-2000 itself. His deposition before the Court below was consistent with the F.I. Statement. Even though he was cross-examined by several advocates appearing for different accused, evidence of P.W. 1 was not shattered. Further, even in the deposition he stated that he saw only one person having knife (later identified as A1). He did not implicate other accused except the driver (A4), A1 and A2. He identified A4 as the driver in the Court. He identified A1 and A2 in the test identification parade conducted by the Judicial First Class Magistrate (P.W. 11). A4 was identified in the test identification parade¹ conducted by PAV. 12 (JFCM). The trial Judge who saw the demeanour of witnesses also believed the evidence of P.W. 1. After going through the evidence, we fully believe P.W. 1. If he had any intention to give further evidence, he could have stated that he had seen other persons carrying weapons etc., but, he stated that he has not seen others (that does not mean that there were no others in the van). He also stated that after A1 and A2 jumped out from the van, when the scooter fell down, he rushed with the gold. Earlier itself he felt that the Maruthi van was following them and he was under the apprehension of danger. Then they were cornered by the Maruthi van overtaking them, the door was opened and A1 and A2 jumped out of the van. Even though there was no time, he could identify the persons and those identifications were fortified in the test identification parade. He identified them in the Court also which is a substantive evidence.

4. P.W. 2 is the person who took the deceased to the hospital. Admittedly, he has not seen the incident. But, he also stated that on getting information from P.W. 1, he rushed to the spot and took the deceased to the hospital after seeing the deceased in such a condition. He further stated that since he had seen the scooter lying there, he only mentioned to the doctor that injury was caused due to road traffic accident. P.Ws. 3, 4, 5 and 6 are persons who were standing at the junction in the evening for purchasing articles etc. and they saw the Maruthi van going behind the scooter. It is a Tamil Nadu registration van and the van took a random turn and then followed the scooter. P.W. 3 identified A1, A2, A3, A4, A5 and A7. Similarly, P.W. 5 identified A1, A2, A3, A4. P.W. 4 who was declared

hostile identified A1, A4, A5 and A6. It is true that even though A4 was identified by P.W. 4, in one part of his statement it is recorded that he identified A4 sitting in the back seat. A4 at the sessions trial was arrayed as A3, but, that is due to different serial numbers given in the crime to the accused and there was no mistake. It was not very dark at the time of incident even though it is immediately after sun set. The doctor of the Government hospital who treated the injured when he was taken to the hospital deposed that the deceased was brought to the casualty at 7 p.m. So, it was before 7 p.m. the incident occurred. With regard to A3, apart from identification by P.Ws. 3 and 5 (in the second trial P.Ws. 6 and 8) as the man sitting in the front seat beside the driver, P.W. 7 (P.W. 15 in the second trial) found him at about 3 O'clock, while he was on duty, travelling in the Maruthi car. It is not disputed that all the accused herein were involved in various theft cases especially theft of vehicles and the above constable has stated that A3 was questioned by him in connection with earlier cases and since A3 was travelling in the Maruthi van, he just noticed the same even though he did not make any special entry as he was only travelling in the Maruthi van. But, number of the Maruthi van was also remembered by him and when the incident happened he co-related the same with the incident. Ext. P6 is the post-mortem certificate issued by P.W. 10 doctor. Ante-mortem injuries noted are as follows:

(1) Incised stab wound 3.5 ? 5 cm, 4 cm deep. Vertically oblique on the right of the front of chest with upper lateral square cut entry situated 4 cm to the right of mid-line and 2 cm above nipple level, lower medial pointed end 1.6 cm. to the right of mid-line and 11 cm below collar bone. The wound cut the pectoralis, major muscle underneath to a depth of 4.5 cm and was directed backwards laterally and slightly downwards.

(2) Incised penetrating wound 2 ? 4 cm ? 7.5 cm (depth) on the left side of front of chest. The wound entered into the left chest cavity and it effects pericardiac of heart. The same wound extended to the heart and left and right ventricle and also entered heart chambers and it is descending branch of the left coronary artery was also cut. Left chest cavity contained 550 grams of blood clots and 550 cc of fluid blood. Pericardiac sac contained 80 grams of blood clots and 60 cc of fluid blood. The wound also cut the upper opart of the 5th left rib.

(3) Incised stab wound 1.3 ? 0.3 cm. vertically on the left side chest with the upper pointed end and situates 15 on to the left of midline. The lower end was square cut. The upper end was 6.5 cm away from the nipple level.

(4) Incised stab wound 1.5 ? 0.3 cm., 2 cm deep oblique on the outer aspect of left upper arm with 8.5 cm before the tip of shoulder, cutting the muscle underneath.

(5) Incised stab wound 2.4 ? 0. 4 cm, 3 cm deep oblique, on the outer aspect of left upper arm with the upper back square cut end situates 5 cm above the joint line of elbow. The wound pierced the muscle also 3 cm.

(6) Injury is incised wound - 0.8 ? 0.3 ? 0.4 cm vertical on the inner aspect of left upper arm 7 cm above the joint line of elbow.

(7) Incised stab wound 2.4 ? 0.4 cm vertically oblique on the right side, penetrating the muscle underneath. The upper medium square cut and situated 3 cm to the right of mid line and 10 cm lacked the top of shoulder. The lower lateral pointed end was situated 4 cm to the right of midline. The wound pierced the muscle underneath to the depth of 5.5 cm and was directed forwards laterally and slightly upwards.

(8) Contused abrasion 4 ? 1.8 cm oblique on the lower half of front of left knee.

(9) Contused abrasion 2.3 ? 1 cm. transverse on the outer aspect of front of left knee. The injury was 1.8 cm lateral to injury No. 8.

(10) Contused abrasion 4 ? 2 cm transverse on the front of left leg 5 cm below injury No. 8.

The doctor also deposed that injury Nos. 1 to 7 could be caused with a sharp edged weapon like M04. It appears that M04 is a dangerous weapon. Length of M04 (blade portion) from the metal portion to the tip is 10.5 cm and its end is tapering. The width of M04 in the middle portion of the blade is 1.5 cm. Including the handle, total length is about 20 cms. All the injuries could not be caused with the knife M05 as width of it's blade is 2 cm - length is 9 cm. Total length is 20.5 cm. At bending point, the width of M05 is 2cm. the injuries with smaller length like injury Nos. 3 & 4 would not have been caused with M04. Injury No. 2 could be caused with MOS also. Injuries 8 to 10 could be caused, if that portion of the body coming into contact with any hard object or surface. Injury Nos. 8 to 10 could be caused due to a fall from a scooter. The evidence pointed out that it is not a road accident case as contended by the counsel.

5. As regards A1 and A2, we are of the opinion that A1 was identified by P.Ws. 1, 3, 4 and 5. Further, identification of A1 was fortified by the recovery of blood stained MO4 knife on the basis of the confession made by him which is admissible u/s 27 of the Evidence Act. (See Ext. P14 seizure mahazar of MO4 knife, Ext. P14(a) confession statement of A1). The medical evidence also shown that the incident was not merely a road traffic accident, but, the deceased was stabbed brutally and it can be possible that the injuries can be caused with M04 knife that was recovered from A1. His presence cannot be disputed. As regards A2 is concerned, it is true that he was not identified by P.W. 4 who was declared hostile, but, he was identified by P.Ws. 3 and 5 apart from P.W. 1. With regard to A2 also we have already stated that we fully believe P.W. 1. P.W. 1 identified A2, but, he did not state that A2 was having any weapon with him. P.W. 1 only stated that A1 jumped with the knife and A2 followed him and came near the scooter. Even M05 weapon was recovered on the basis of confession by A2 (See Exts. P15 & P15(a)). P.W. 1 or any other witness has not stated that they saw A2 with weapon. Here, on the basis of recovery of M05 knife alone it will be difficult to prove that A2 used the weapon. After P.W. 1 ran away any other members of the

gang in the van also might have used the weapon. In Ext. P15(a) confession statement by A2 there is no authorship of concealment. Disclosure of fact is only that A2 was aware of the place where M05 knife was kept, but, it will not prove that he kept the same. As regards A3 is concerned, even though he was seen only by P.Ws. 3 and 5 in a glimpse of time, he was identified in the test identification parade, but, there is no enmity attributed between P.Ws. 3, 5 and A3. It is true that apart from their evidence, the evidence of P.W. 7 (P.W. 15) that he has seen A3 in a Maruthi van fortified that A3 also was present in the van. As far as A4 is concerned, several times P.W. 1 looked back and in fact the van overtook them and cornered the scooter. Even though it is not specifically stated in the F.I. Statement that he identified the driver, he stated that several times he looked back and noted the driver of the van and the Maruthi van overtook the scooter and it was blocked. A4 was identified by all the four witnesses in the test identification parade. We believe the evidence of P.W. 1 which is corroborated by other evidence that A4 was driving the Maruthi van. With regard to A5 and A6, they were absconding. With regard to A7, only P.W. 3 identified him. We are of the opinion that identification by P.W. 3 alone, a single witness, is not giving confidence that A7 was with the other accused. His involvement in the incident is doubtful. Therefore, A7 is entitled to clear acquittal and he is acquitted.

6. With regard to A1, considering the medical and other evidences, he is the person who attacked the deceased with the knife and, hence, his conviction and sentence u/s 302 of the Indian Penal Code is confirmed. Apart from the identification, the nature of injuries inflicted, the recovery and the medical evidence would show that M04 was with him and everything points out the guilt of A1 for murder and his conviction and sentence for the offence punishable u/s 302, IPC requires no interference. He was also carrying deadly weapon while committing the offence of dacoity and in that process committed murder. Therefore, his conviction and sentence u/s 396 read with Sections 398 & 341 of the Indian Penal Code needs no interference. As far as A2 is concerned, as deposed by P.W. 1, he also jumped out from the Maruthi van and he has actively assisted A1. However, possession of weapon with him is doubted as found earlier. The evidence would show that all the accused shared the intention to cause dacoity and since there is no other evidence that A2 shared the intention to kill the deceased, we are of the opinion that his conviction and sentence u/s 302 read with Section 34 is liable to be set aside on the benefit of doubt. With regard to the conviction u/s 398, IPC, we are of the view that since he was not having any weapon as deposed by P.W. 1, he cannot be found guilty u/s 397 or 398. Section 398 does not create any substantive offence, but, only regulates the measure of punishment in the commission of substantive offence of robbery or dacoity as held in *Emperor Vs. Nabibux Karimbux Mulla*, and *Mahendra Singh Vs. The State*, . In the charge sheet accused were charged u/s 396. Section 398 is referred only for the purpose of sentence. Hence, the argument that when Section 398 is attracted, life imprisonment cannot be awarded is untenable. Substantive offence here is Section 396. But, if Section 398 is attracted,

minimum punishment shall be seven years. Sections 397 and 398 cannot be used conjunctively or constructively as held by the Rajasthan High Court in *Paramjeet Singh Vs. State of Rajasthan*, . In fact, as held in various Court decisions, a person cannot be convicted u/s 398 unless he is armed with a deadly weapon while committing or attempting to commit robbery or dacoity. Admittedly, on the basis of the evidence of P.W. 1, A2 was not having any weapon with him. It is true that actual robbery did not take place because P.W. 1 ran away with the entire gold. When five or more persons conjointly commit or attempting to commit robbery, every person so committing, attempting or aiding is said to have committed dacoity as stated in Section 391. u/s 396, IPC it is stated as follows:

396. Dacoity with murder. - If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or (imprisonment for life), or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

In the case of committing dacoity (attempting to commit robbery conjointly by more than five persons is dacoity) if murder is caused, all persons who have conjointly committed the offence of dacoity are liable to be punished u/s 396, IPC. Dacoity begins as soon as an attempt is made to commit robbery by a gang of five or more persons and if a person is murdered during the attempt, every member of the gang are guilty u/s 396, AIR 1925 723 (Oudh) . It is not even necessary that murder need be previously in contemplation of the accused. Section 396 merely declares the liability of others as co-extensive with that of the actual murderer, if it occurs while committing dacoity as dacoity is a joint act. It is not necessary that others have taken part in the murder or aided the same or no intention to cause murder. See *Samunder Singh and Others Vs. State*, ; *Shivappa and Others Vs. Hyderabad State*, and *Karim Bakhsh v. The Crown* AIR 1923 Lah 329 (1) : 1924 Cri LJ 319. Here, A1, A2, A3, A4 and others attempted to commit dacoity. Identification of A7 was also not established. But, in the gang there were more than five persons. A2 is the person who jumped along with A1 who committed murder in this case of dacoity. So, his role is much more than other accused in this case. Considering the evidence adduced, the second accused (appellant in Cri. A. No. 836/ 2004) is convicted and sentenced to undergo rigorous imprisonment for five years with a fine of Rs. 50,000/- u/s 396 of the Indian Penal Code and in default of payment of fine, he shall undergo imprisonment for another one year. His conviction and sentence u/s 302 of the Indian Penal Code is set aside by giving the benefit of doubt. No interference is needed in his punishment u/s 341, IPC.

7. As regards A3 and A4 are concerned, they were not having any weapon. P.W. 1 did not see whether they jumped from the Maruthi van. A4 was the driver of the van in which A1 and gang came for committing dacoity. A3 was also in the gang and aided them. The Maruthi van itself will not come without a driver.

Hence, committing dacoity by A3 and A4 cannot be disputed and they are also convicted u/s 396 of the Indian Penal Code. But, considering the nature of their participation and also considering the evidence, we are of the opinion that justice will be met if they are sentenced to undergo rigorous imprisonment for one year and we do so.

8. A7 is given benefit of doubt regarding identification and he is acquitted. If fine amount is deposited, it should be refunded to him. Certified to the trial Court for due execution. All accused are entitled to the benefit of set off.

All the appeals are disposed of accordingly.