

(1959) 06 KL CK 0013
In the High Court Of Kerala
Case No : Criminal Appeal No. 440 of 1958

Vijayan

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 22-06-1959

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 148, 149, 162, 324

Citation : (1959) KLJ 664

Hon'ble Judges : S. Velu Pillai, J

Bench : Single Bench

Advocate : C.K. Sivasankara Panicker, for the Appellant; M.K. Abdulla, for the Respondent

Judgement

Velu Pillai, J.—The appellant, who was the first accused at the trial before the Sessions Court of Kottayam, and nineteen others were tried for offences alleged to have been committed by them as members of an unlawful assembly. The appellant alone was convicted, the convictions being for offence u/s 326 read with Section 149 I.P.C., and u/s 148 I.P.C.; he was sentenced to undergo rigorous imprisonment for two years for the former, and for one year for the latter conviction. The charge was laid by the Police after investigation against twenty persons, of whom one died before the trial commenced in the Sessions Court. It would appear that on the 3rd June, 1958, P.W. 6 had filed a petition, Ext. P. 5, at the Vaikom Police Station, complaining of thefts of agricultural produce in his property by certain tenants. P.W. 2, a Police constable on duty at the Vaikom Police Station, proceeded to the spot on the 4th June, 1958, for investigating into the petition on complaint and was accompanied by P.W. 1, another Police Constable, attached to the same Police Station. They learnt, that P.W. 6 had gone to Alwaye and therefore they came to Thevalakkattu Purayidom, in which P.W. 3, the son of P.W. 6, was attending to the plucking of cocoanuts from the trees. P.Ws. 1 to 3 had their meal in Thevalakkattu Purayidom and when P.W. 1 was about to have a chew, a few men, stated to be accused 1 to 7 and deceased Krishnan came there and belaboured P.W. 1. They were soon

joined by others. Some of them attacked P.W. 2 as well. P.Ws. 2 and 3 then ran away from the place to the opposite bank of a thodu or canal on the northern side; but P.W. 1 was bound hand and foot, and lay there injured. The accused soon left the place. P.W. 2 hurried to the Police Station and gave the first information, Ext. P. 2, upon which P.W. 13, the Sub-Inspector of Police, registered a case and proceeded to the scene of occurrence and investigated the case. This is the substance of the case against the accused.

2. P.W. 1 was examined by P.W. 8, the Civil Surgeon-in-charge of the Vaikom Hospital, and he observed eight injuries, being contusions on the cheeks, on the neck, on the eyelids, on the back and on the right thigh, and abrasions on different parts of the body. Some of these injuries could be caused by hitting with a hard substance like M.O. 1, coconut, and the abrasions on the hands and legs could be caused by tying with a rope. P.W. 2, who was also examined by P.W. 8, had an abrasion on the left scapula and a contusion on the left elbow, which could be caused by hitting with a stone like M.O. 4. There is no reason to disbelieve the medical evidence in support of the above.

3. Of the eye-witnesses to the occurrence, P. Ws. 4 and 5 were not acted upon by the learned Judge, who tried the case. Likewise, the testimony of P.W. 2 also could not be acted upon as to the identity of the assailants, because that was the first occasion on which he was visiting the locality. He had not seen any of them before, and he admitted, that he mentioned the names of accused 1 to 6 in Ext. P. 2 after having ascertained their names through some one else; but the first accused, the appellant, was well-known to both P. Ws. 1 and 3 and with regard to his identity the learned Judge had no difficulty in accepting their evidence. At the same time, though P.W. 1 had testified to some of the individual acts committed by the first accused and others, P.W. 3 did not specify such acts, although the trend of his evidence was, that the first accused was one, in the group of men who came to Thevalakkattu Puryidom and attacked P.W. 1. The learned Judge therefore acted upon the testimony of P.W. 1, only to the extent it received corroboration from that of P.W. 3, and came to the conclusion that the first accused and a large number of persons, more than five in all, attacked and belaboured P.W. 1, inflicting the injuries on him, as members of an unlawful assembly, who had a common object to inflict grievous hurt to P.W. 1. The convictions of the first accused were based upon this finding and were not for the individual acts stated to have been committed by the first accused and sworn to by P.W. 1.

4. It was first contended on behalf of the first accused, that on the findings, the convictions u/s 148, and by applying u/s 149 I.P.C., cannot be sustained, in view of the acquittal of the other accused, and reliance was placed on the decision of the Supreme Court in Prabhu Babaji Navle Vs. State of Bombay, , where it was held, that a conviction applying Section 34 I.P.C. cannot be sustained in the nature of the charge levelled against the convicted persons and others, that they had acted in pursuance of a common intention, when the others were acquitted;

but the law has been laid down differently in the case of an unlawful assembly in Dalip Singh and Others Vs. State of Punjab, and in Kapildeo Singh v. The King, AIR 1950 FC 80. It has been ruled in these cases, that notwithstanding the acquittal of some of the accused, if the court is able to find, that the convicted person and some others, though known or unknown, were members of an unlawful assembly, then the conviction of the known or identified person can stand. This was the finding of the learned Judge in the present case, and no exception can be taken to the conviction, on the ground of the acquittal of accused 2 to 19.

5. The chief ground, on which the testimony of P.W. 1 was attacked before me, was that a copy of the statement recorded from him u/s 162 by the Sub-Inspector of Police, was not furnished to the accused. It is seen that P.Ws. 1 & 2 testified, that P.W. 13 questioned P.W. 1 as he lay there when the Police party arrived, and he took notes of his statement; but the Public Prosecutor made a statement at the trial, recorded in the deposition of P.W. 1, that this witness was not questioned by P.W. 13 at the spot, the suggestion being, that what P. Ws. 1 and 2 stated was erroneous. P.W. 13 is the best person to state as to what he did actually, and the testimony of P. Ws. 1 and 2 at best, can only reflect their impression as to what P.W. 13 was writing at the spot. It was up to the Public Prosecutor in the court below, to elicit from P.W. 13, in the light of what P. Ws. 1 and 2 had said, as to whether he did question him there, and make a record of his statement u/s 162. This would have placed the matter beyond controversy, and would have shut out room for any argument about it. It is greatly to be regretted, that the Public Prosecutor in the court below has failed, in what seems to me, was his obvious duty. Counsel, who defended the accused in the court below did not also establish the basis of the present argument, by putting a direct question to P.W. 13, in view of the assertion that the Public Prosecutor had made at the trial, that there was no such statement. It was not contended before me by counsel for the accused, that no copy of the Police statement of P.W. 1 u/s 162 has been furnished to the accused. On the other hand, the stand taken by the Public Prosecutor before me was, that P.W. 1 was interrogated by P.W. 13, not at the spot, but later in the course of the investigation, and copies of all the statements had been furnished to the accused before the enquiry commenced. It was further proved by P.W. 13, that when he came there, P.W. 1 was unable to speak. This statement of P.W. 13 has not been dislodged by cross-examination and must stand. If so, this negatives the present argument, that P.W. 1 was questioned, then and there, and a statement was recorded forthwith. I am inclined to think, that the argument is based only upon the inadvertent or erroneous statements made by P. Ws. 1 and 2.

6. Another ground, on which the testimony of P.W. 1 and the whole prosecution case was attacked, was, that P.W. 3 did not support P.W. 1. I quite agree, that the evidence of P.W. 3 is lacking in details as regards the individual acts said to have been committed by the assailants, although the first accused was known to him; but in the general pattern of the occurrence, as sworn to by him, it is quite

clear, that he supports the prosecution case. He is a disinterested witness, and his testimony to the extent it goes, can be acted upon. He has sworn, that as they were seated there after their noon day meal, a few persons came along, the first accused being one of them. Then, one of them called P.W. 1 and as P.W. 1 advanced a little, the others, who have come, also came near, and all of them attacked P.W. 1. Then some others also came, and he saw P.W. 1 being attacked by all of them. He then escaped from the scene. Substantially, this is also the prosecution case. The learned counsel attempted to establish, that there was an appreciable interval of time, according to P. Ws. 1 and 2, between the first accused's calling P.W. 1, and the others joining the first accused in attacking him. The testimony of P.W. 2 does not lend itself to this construction. Though no doubt the first accused was the person, who advanced towards P.W. 1 according to P. Ws. 1 and 2, five or six men, who joined in the attack, had followed him closely, and it was after some time that the next group of men came there. The point to be noticed is, that the evidence of P.W. 3 is not inconsistent with that of P.W. 1 or with the prosecution case, though standing by itself, it does not establish all its details. That is why the learned Judge had chosen to treat his evidence as corroborating that of P.W. 1. The argument, that P.W. 1 would not have failed to specify the particular acts of the first accused, if he identified them, is not conclusive, to discard his testimony. On a reading of his testimony, it strikes me, that P.W. 3 is a truthful witness.

7. So far as P.W. 1 is concerned, as stated earlier, there was no difficulty for him to identify the first accused. In fact, the first accused had been known to him ever since 1955. In that year the first accused had been placed in the lock-up in the Vaikom Police Station, when P.W. 1 was also attached to the same Station. Later, in the year 1957 the first accused was involved in another case, and on both these occasions, as seen from the testimony of the Sub-Inspectors of Police, who have been examined, P.W. 1 was deputed to make enquiries about the first accused. P.W. 1 has further sworn, that he had behaved somewhat harshly to the first accused when he was in the lock-up, and this was suggested by him in his testimony, as the motive for the latter to attack him. It was pointed out, that P.W. 1 had met the first accused often subsequently, and before the occurrence in the present case and therefore it was improbable, that the first accused would have assaulted P.W. 1 in this manner. It all depends, on the time and the opportunity for the first accused to act in retaliation. The evidence thus suggests that there was sufficient cause for ill-feeling towards P.W. 1, and it is no valid argument to that the first accused would have chosen some other occasion for the assault on P.W. 1. In discussing this motive the learned Judge has only observed, that the first accused would not have intended to kill him; in other words, the motive was not sufficient for committing murder. This may be so, as it appears also, from the nature of the acts committed; but there was sufficient motive for the first accused to cause harm to P.W. 1. It is also unreasonable to think, that P.W. 1 would have implicated the first accused, without any justification whatever. It is true, that his identification of the other assailants has

not been accepted by the learned Judge; but it must be mentioned, that this was because, there was no corroboration as to such identification from the other evidence in the case, and not, because the testimony of P. W, 1 was unreliable or unworthy of credit.

8. I therefore agree with the learned Judge in thinking, that the testimony of P.W. 1, corroborated as it is by that of P.W. 3, may be accepted so far as the first accused is concerned. It is true, that on this reasoning, the specific acts committed by the first accused cannot be found to be proved. None the less, the evidence does establish, that a group of men, who came at first, comprised the first accused that they were more than five in number, and that they delivered an attack on P.W. 1, as a result of which, he sustained certain injuries. A little after, they were joined by another group of men, who also took part in the attack. This shows, that all of them, including the first accused, were members of an unlawful assembly formed with the common object of inflicting grievous hurt to P.W. 1. Dangerous weapons such as M.O. 1 unhusked cocoanuts, M.O. 4 stones, and others were also used. It must therefore be found, that the first accused was a member of an unlawful assembly, of which some of the members, perhaps the first accused also, were armed with deadly weapons. There can be no doubt, that an unhusked cocoanut like M.O. 1 is a deadly weapon. The learned Judge has found, that none of the injuries by itself was grievous, though as a cumulative result of all the injuries, P.W. 1 had to undergo treatment as an inpatient for 28 days. Even if the first accused did not actually employ a deadly weapon himself, it must be held, that the offence was committed in the prosecution of the common object of that assembly, which was to inflict grievous hurt, and the members of the assembly, including the first accused, must have known that grievous hurt was likely to be caused. However, as no grievous injury was inflicted by any one of the accused, I consider, that the conviction of the first accused must be altered to one u/s 324 read with Section 149 I.P.C. He is convicted accordingly, and in view of the altered conviction, he is sentenced to undergo rigorous imprisonment for eighteen months. As it is not proved, that the first accused himself carried a deadly weapon, the conviction u/s 148 I.P.C. is altered to one u/s 147 I.P.C.; but I think, that no separate sentence is called for. The appeal is decided, subject to the above modifications.