

Jayaraj Vs. State of Kerala

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Court : Kerala

Decided On : Jan-30-2014

Judge : Honourable Mr.Justice V.K.Mohanan

Appellant : Jayaraj

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE V.K.MOHANAN & THE HONOURABLE MR. JUSTICE B.KEMAL PASHA THURSDAY, THE 30TH DAY OF JANUARY 2014 10TH MAGHA, 1935 CRL.A.No. 1020 of 2009 () ----- AGAINST THE

ORDER

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JUDGMENT

IN SC732005 of ADDITIONAL DISTRICT COURT (ADHOC), TRIVANDRUM DATED 06/05-2009 APPELLANT(S) ACCUSED: ----- JAYARAJ, S/O MATHANKANI, THEKKUMKARA VEEDU, (VP IX/166), POTHACHRA, MONITHUKKU KOTTAKKAKAM MURI, VITHURA, THIRUVANANTHAPURAM DIST. BY ADV. SRI.SUMAN CHAKRAVARTHY RESPONDENT(S): ----- STATE OF KERALA, REP.BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. R1 BY ADV. PUBLIC

PROSECUTOR SRI. GIKKU JACOB. THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 3001-2014, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: V.K. MOHANAN & B. KEMAL PASHA, JJ.

..... Crl.Appeal No. 1020 of 2009
..... Dated this the 30th day of
January, 2014

JUDGMENT

Kemal Pasha, J.

The accused in S.C. No.73/2005 of the Additional Sessions Court(Adhoc-I), Thiruvananthapuram, who stands convicted under Section 302 IPC and sentenced to undergo imprisonment for life and to pay a fine of 25,000/-, in default, to undergo simple imprisonment for two more years, has come up in appeal.

2. The prosecution case is that on 15.1.2004 at 7.30 p.m., the accused inflicted a cut injury with MO1 chopper on the back of left knee of deceased Ratheesh, aged 22, who is none other than the son of the elder brother of the accused. The said injury was so severe that it resulted in Crl.A.1020/2009 -:

2. :- the death of the deceased prior to his reaching the Medical College Hospital, Thiruvananthapuram. The Doctor, who examined him at 9.30 p.m. on 15.1.2004, declared his death.

3. On the basis of Ext.P1 First Information Statement furnished by PW1, who is none other than the mother of the deceased, before PW11, Sub Inspector of Police, Vithura, he registered Crime No.16/04 of Vithura Police Station, through Ext.P11 FIR.

4. PW11 reached the Medical College Hospital at 11.30 a.m. on 16.1.2004, conducted inquest of the body and prepared Ext.P8 inquest report. On the same day, he reached the scene of occurrence by 4.30 p.m. and prepared Ext.P9 scene mahazar. The body was sent for postmortem examination.

5. PW5, who was the lecturer in Forensic Medicine and Assistant Police Surgeon of the Medical College Hospital, Thiruvananthapuram, conducted the postmortem Crl.A.1020/2009 -:

3. :- examination on the body of the deceased. She noted the following antemortem injuries:- "(1) Incised wound 9 x 3.5 x 3.6 cm obliquely placed, involving the back of left knee and adjacent part of thigh. The muscles in this region, popliteal vessels were seen cut and separated. Lateral condyle of femur was seen cut(2.2 x 0.2 x 0.3 cm). The wound had its maximum depth of 3.9 cm(including the cut in the bone) at its lower outer end. (2) Abrasion 3.5 x 1.5 cm on the back of the left thigh 17 cm above knee. (3) Multiple small abrasions over an area 3.5 x 0.5 cm, vertical on the back of right thigh, 9 cm above knee. (4) Abrasion 1.5 x 0.5 cm on the back of left leg 4 cm below knee." 6. The opinion as to the cause of death expressed by PW5 is that the death was due to the incised wound sustained to the deceased(Injury No.1).

7. PW6, Circle Inspector of Police, Palode, started Crl.A.1020/2009 -:

4. :- the investigation on 19.1.2004. On that day at 5 a.m. he placed the accused under arrest. He seized MO2 shirt worn by the accused through Ext.P4 mahazar. When questioned, the appellant furnished Ext.P5(a) information as follows: "I have placed the chopper beneath the table in the shed situated at the western side of the building being constructed by me. If I am taken there, I will show the same." 8. On the basis of Ext.P5(a) information and as led by the appellant, PW6 reached the said place and seized MO1 chopper, taken out and produced by the appellant, through Ext.P5 mahazar. He conducted and completed the investigation and laid the final report.

9. On the side of the prosecution PWs.1 to 11 were examined and Exts.P1 to P13 were marked. After closing the evidence of the prosecution, the appellant was examined under Section 313 Cr.P.C. The appellant denied the incriminating circumstances appeared in the evidence Crl.A.1020/2009 -:

5. :- against him. On hearing the prosecution and the defence, the court below found that no grounds were made out to acquit the accused under Section 232

Cr.P.C. and thereby, the appellant was called upon to enter on his defence. DW1 was examined on the side of the appellant. The court below found the appellant guilty of the offence punishable under Section 302 IPC, convicted him thereunder, and sentenced him as aforesaid.

10. We heard the learned counsel for the appellant Sri.Suman Chakravarthy and the learned Public Prosecutor Sri.Jikku Jacob. The learned counsel for the appellant has strenuously argued that the appellant is entitled to 'benefit of doubt' and, therefore, he is entitled to an acquittal in this case. The learned Public Prosecutor has argued that there is sufficient evidence adduced by the prosecution in this case to prove the guilt of the accused and there is absolutely nothing to interfere with the conviction and sentence passed by the court below. Crl.A.1020/2009 -:

6. :- 11. We have gone through the evidence adduced by the prosecution and also the documents produced and marked. PW1 is none other than the mother of the deceased. She has fully supported the prosecution case. Her version is fully consistent with what she had stated in Ext.P1 F.I.Statement. It has come out that in the evening the appellant had uttered abusive words by standing in front of the courtyard of the house of the deceased. The appellant is residing just in the neighbourhood of the deceased. After some time, again the appellant uttered abusive words by standing at the boundary of the property of PW1. There were property disputes in between the parties and thereby parties were in loggerheads. Hearing the abusive words, the deceased went out and questioned the appellant. The appellant with MO1 chopper inflicted a cut on the back of the left knee of the deceased thereby, the deceased cried aloud. PW1 also cried aloud, which invited the attention of the public. On a careful consideration of the evidence of Crl.A.1020/2009 -:

7. :- PW1 and the contents of Ext.P1, we are satisfied that her evidence is fully corroborated by the contents of Ext.P1 and there is absolutely nothing to disbelieve her versions. Even though the learned counsel for the appellant has argued that PW1 is an interested witness, we are not impressed by considering the fact that being the mother of the deceased she would be most interested in

getting adequate sentence to the actual culprit.

12. PW2 is the sister of the appellant. She has also stated in evidence that on hearing the cries of the deceased she rushed to the spot with a kerosene lamp and saw the deceased in an injured state, and also the appellant who was running away from the scene of occurrence with a chopper. There is absolutely nothing to disbelieve the versions of PW2 also, especially because of the fact that she is none other than the sister of the appellant. She is more related to the appellant than to the deceased. Her evidence also clearly corroborates all the material Crl.A.1020/2009 -:

8. :- particulars in the evidence of PW1.

13. PW3 is the driver of the car, by which the deceased was taken to the hospital. According to PW3, the deceased was taken to his car by around 7.45 p.m. PW4 is a person who rushed to the spot on hearing the cries. According to PW4, on seeing him, the deceased told him that he was cut by his father's own brother Jayarajan (appellant). Even though the said narration by the deceased cannot be admitted in evidence as *res gestae*, as the answer was given to a query posed by PW4, it was a circumstance that at the first opportunity he was informed by the deceased that it was the appellant who inflicted injury on him. Along with others, PW4 took the deceased to the hospital. It has come out in evidence that on the way to the hospital they got down at Vithura Police Station, informed the matter and then proceeded to the hospital. It seems that PW4 and others who had taken the deceased to the hospital may not have realised the seriousness of the injury and they Crl.A.1020/2009 -:

9. :- might not have thought about the imminent death of the deceased.

14. On considering all the evidence and the documents in this case, it has clearly come out that injury No.(1) sustained to the deceased, as noted in Ext.P2 postmortem certificate, is proved to be an injury caused by the appellant by cutting with MO1 chopper. It has come out in evidence that it was the said injury which resulted in the death of the deceased.

15. According to PW5, the deceased died due to injury No.(1) noted in Ext.P2. PW5 was subjected to searching cross examination. According to PW5, injury No. (1) was on the vital part of the body, even though it was not a vital organ. It is true that 'popliteal vessels' were cut on account of the said injury. From the evidence of PW5 and the contents of Ext.P2, it is evident that the death had occurred on account of profuse bleeding from the said injury and on account of the loss of blood. It is true that immediate Crl.A.1020/2009 -:

10. :- medical intervention could have saved the life of the poor boy. At the same time, it is a fact that PW4 and others could reach the hospital only at 9.30 p.m.; almost after two hours, which could have resulted in the death. Of course, the said argument that immediate medical intervention could have saved the life of the deceased, is no longer available to the appellant, in view of the decision of the Apex Court in Morcha v. State of Rajasthan[AIR 1979 SC80 wherein the Apex Court had held: "The mere fact that if immediate expert treatment had been available and the emergency operation had been performed, there were chances of survival of the deceased can be of no avail to the appellant. Explanation 2 to Sec. 299 of the Indian Penal Code clearly lays down that where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skillful treatment the death might have been prevented." Crl.A.1020/2009 -:

11. :- 16. It has to be taken note of the fact that the scene of occurrence is in a forest area. We cannot find fault with PW4 and others who took much time in taking the deceased to the hospital.

17. The learned counsel for the appellant has finally argued that at any stretch of imagination, any intention to commit murder of the deceased cannot be attributed to the appellant as the incident had occurred without any 'premeditation'. The parties were in loggerheads for the last many years on account of property disputes. On an appreciation of the evidence of PW1 in the matter, it can be seen that the incident had occurred in the spur of a moment and in the course of a sudden fight. As laid down by the Apex Court, the 'fight' need not be a bodily one in between the parties; even wordy altercation between parties can be categorised

as a 'fight' within the meaning of Explanation 4 to Section 300 of IPC. It is true that by taking MO1 chopper in his hand, the appellant uttered abusive words which
Crl.A.1020/2009 -:

12. :- invited in the advancement of the deceased towards him, and during the course of such wordy altercation, the appellant inflicted injury No.(1) on the left leg of the deceased. The learned counsel for the appellant has pointed out that there is only one injury allegedly caused by the appellant and that injury itself is not on a portion which an ordinary human being considers as a vital portion of the body. It is true that PW5 has stated in evidence that it is a vital portion of the body, even though it is not a vital organ. An ordinary human being may not take note of the fact that 'popliteal vessels' are situated at that part of the body and the said injury would result in the death of that person. Matters being so, we fully agree with the learned counsel for the appellant that there was no premeditation or intention to cause the death of the deceased, in the mind of the appellant. Even though the learned Public Prosecutor has strenuously argued that the injury and the consequent death can be categorized as 'murder' as defined under Section
Crl.A.1020/2009 -:

13. :- 300 Thirdly, we are not impressed by that argument. It was a sudden fight, and the said injury was caused by the appellant in the heat of passion on a portion of the body which an ordinary man would not have considered as a vital portion of the body. As per Explanation 4 to Section 300 IPC, it is immaterial in such a case as to which party offers the provocation or commits the first assault. Therefore, there is no meaning in contending that the deceased had never attacked the appellant. On a consideration of all the materials available, we are of the considered view that the act committed by the appellant, which caused the death of the deceased, is covered by Explanation 4 to Section 300 of IPC and thereby, it is a 'culpable homicide not amounting to murder'.

18. The next question which arises for consideration is whether the said culpable homicide will attract 1st Part or 2nd Part of Section 304 IPC. When there was no intention, it clearly falls within Part II of Section 304 IPC. Crl.A.1020/2009 -:

14. :- 19. In this connection the learned counsel for the appellant has invited our attention to the decision of the Apex Court in Hem Raj v. State (Delhi Administration)[AIR 1990 SC2252. It was a case wherein the accused inflicted a single stab injury landing on the chest of the deceased. The occurrence admittedly had taken place in the spur of the moment and in heat of passion upon a sudden quarrel. According to the doctor the injury was sufficient in the ordinary course of nature to cause death and it was observed as under: "The question is whether the appellant could be said to have caused that particular injury with the intention of causing death of the deceased. As the totality of the established facts and circumstances do show that the occurrence had happened most unexpectedly in a sudden quarrel and without premeditation during the course of which the appellant caused a solitary injury, he could not be imputed with the intention to cause death of the deceased or with the CrI.A.1020/2009 -:

15. :- intention to cause that particular fatal injury; but he could be imputed with the knowledge that he was likely to cause an injury which was likely to cause death. Because in the absence of any positive proof that the appellant caused the death of the deceased with the intention of causing death or intentionally inflicted that particular injury which in the ordinary course of nature was sufficient to cause death, neither Clause I nor Clause III of S.300 IPC will be attracted.....' This Court while setting aside the conviction under S.302 convicted the accused under S.304 Part II and sentenced him to undergo rigorous imprisonment for seven years." 20. In Pappu v. State of M.P.[AIR 2006 SC2659 it was held: "The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case CrI.A.1020/2009 -:

16. :- within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is

not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'. It cannot be laid down as a rule of CrI.A.1020/2009 -:

17. :- universal application that whenever one blow is given, Section 302 IPC is ruled out. It would depend upon the weapon used, the size of it in some cases, force with which the blow was given, part of the body it was given and several such relevant factors. Considering the factual background in the case at hand it will be appropriate to convict the appellant under Section 304, Part II, IPC, instead of Section 302 IPC as has been done by the trial court and affirmed by the High Court. Custodial sentence of eight years would meet the ends of justice. The appeal is allowed to the aforesaid extent." 21. After discussing the ratio in Hema Raj's case (supra), Pappu's case(supra) and a series of other decisions rendered by the Apex Court, it was held in Gurmukh Singh v. State of Haryana[(2009) 15 SCC635: "In the instant case, the occurrence had taken place at the spur of the moment. Only the appellant Gurmukh Singh inflicted a single lathi blow. The other accused have not indulged in any over act. There was no intention or CrI.A.1020/2009 -:

18. :- premeditation in the mind of the appellant to inflict such injuries to the deceased as were likely to cause death in the ordinary course of nature." It was further held in paragraph 23: "Before we part with the case, we would like to clearly observe that we are not laying down that in no case of single blow or injury, the accused cannot be convicted under S.302 IPC. In cases of single injury, the facts and circumstances of each case has to be taken into consideration before arriving at the conclusion whether the accused should be appropriately convicted under S.302 IPC or under S.304 Part II IPC." 22. In paragraph 24 some factors which are required to be taken into consideration before awarding appropriate sentence to the accused, which are illustrative in character and not exhaustive are

given as follows: a) Motive or previous enmity; b) Whether the incident had taken place on the spur of moment; Crl.A.1020/2009 -:

19. :- c) The intention/knowledge of the accused while inflicting the blow or injury; d) Whether the death ensued instantaneously or the victim died after several days; e) The gravity, dimension and nature of injury; f) The age and general health condition of the accused; g) Whether the injury was caused without premeditation in a sudden fight; h) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted; i) The criminal background and adverse history of the accused; j) Whether the injury inflicted was not sufficient in the ordinary course of nature to cause death but the death was because of shock; k) Number of other criminal cases pending against the accused; l) Incident occurred within the family members or close relations; m) The conduct and behaviour of the accused after the incident. Whether the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment? Crl.A.1020/2009 -:

20. :- 23. In Gurmukh Singh's case(supra), the Apex Court converted the conviction and sentence of the appellant from Section 302 IPC to one under Section 304 Part II IPC and sentenced him to undergo rigorous imprisonment for seven years.

24. Regarding the sentence, we are of the view that while imposing the sentence this Court has to consider the crime and the criminal, as well as the victim. It has to be taken note of the fact that the deceased is hailing from poor circumstances. PW1 has lost the support of her young son, who was aged 22 at the time of his death. She has to be adequately compensated.

25. Matters being so, a sentence of rigorous imprisonment for 5 years and to pay a fine of 1 lakh, in default, to undergo rigorous imprisonment for two more years, under Section 304 Part II IPC, will meet the ends of justice in this case. Accordingly, we set aside the conviction and sentence passed by the court below and we convict the Crl.A.1020/2009 -:

21. :- appellant under Part II of Section 304 IPC. In the result, this Criminal Appeal is allowed in part and we convict the appellant under Part II of Section 304 IPC. He is sentenced to undergo rigorous imprisonment for five years and to pay a fine of 1 lakh, in default, to undergo rigorous imprisonment for two more years. Of course, the appellant is entitled to set off, of the period undergone by him in custody in connection with the investigation, inquiry and trial in this case, under Section 428 Cr.P.C, as against the substantive sentence of imprisonment. The fine amount, if paid, or recovered, shall be paid to PW1, as compensation under Section 357(1) Cr.P.C. V.K.MOHANAN, JUDGE B.KEMAL PASHA, JUDGE ul/-

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