

**Saidalavi and Others Vs. State of Kerala**

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**Court :** Kerala

**Decided On :** Feb-04-2014

**Judge :** Honourable Mr.Justice V.K.Mohanan

**Appellant :** Saidalavi and Others

**Respondent :** State of Kerala

**Judgement :**

IN THE HIGH COURT OF KERALAAT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE V.K.MOHANAN & THE HONOURABLE MR. JUSTICE B.KEMAL PASHA TUESDAY,THE4H DAY OF FEBRUARY201415TH MAGHA, 1935 CRL.A.No. 1746 of 2009 (C) ----- AGAINST THE

JUDGMENT

IN SC3242004 of ADDL.SESIONS COURT (ADHOC-III), MANJERI DATED3107-2009 APPELLANTS/ACCUSED: ----- 1. SAIDALAVI, S/O.MOIDEEN KOYA PUTHENPURAYIL, UNNIYAL, THEVAR KADAPURAM.

2. SAID, S/O.MAMUKOYA, CHOKLEENTEPURAKKAL, UNNIYAL, THEVAR KADAPURAM.

3. UMMER, S/O.SAIDALIKUTTY, KAKKANTEPURAKAL, UNNIYAL, THEVAR KADAPURAM.

4. MAMUKOYA, S/O.HAMZAKUTTY, PUTHENPURAYIL, UNNIYAL, THEVAR KADAPURAM.
5. KOYA @ MOIDEEN KOYA, KAKKANTEPURAKKAL, UNNIYAL, THEVAR KADAPURAM.
6. ASHRAF, S/O.YAHU, KAKKANTEPURAKKAL, UNNIYAL, THEVAR KADAPURAM.
7. ALIKUTTY, S/O.KHADER, PUTHENPURAYIL, UNNIYAL, THEVAR KADAPURAM.
8. LATHIEF, S/O.KUTTIPOKKAR, JARAKKADAVATH VEEDU, UNNIYAL, THEVAR KADAPURAM.
9. SURFUDHEEN, S/O.KHALIDKUTTY, THAYUMMANTEPURAKKAL VEEDU, UNNIYAL, THEVAR KADAPURAM.
10. SHAMSU, S/O.SAIDALIKUTTY, CHEKKUMADATH VEEDU, UNNIYAL, THEVAR KADAPURAM.
11. KUNHIMARAKKAR, S/O.CHIERYABAVA, PUTHENPURAYIL, UNNIYAL, THEVAR KADAPURAM.
12. GAFOOR, S/O.BEEPATHU, JARAKKADAVATH VEEDU, UNNIYAL, THEVAR KADAPURAM.
13. ABDULLA KOYA, S/O.HAMZA, JARAKKADAVATH VEEDU, UNNIYAL, THEVAR KADAPURAM.
14. MAJEED, S/O.MUHAMMED, PALLICHANTEPURAKKAL, UNNIYAL, THEVAR KADAPURAM.
15. SALIM, S/O.HAMZA, JARAKKADAVATH VEEDU, UNNIYAL, THEVAR KADAPURAM.
16. SAIDU, S/O.KUNHIMUHAMMED, VELUTHAMOIDEENTEPURAKKAL, UNNIYAL, THEVAR KADAPURAM. BY ADVS.SRI.P.VIJAYA BHANU

SRI.M.REVIKRISHNAN

RESPONDENT/COMPLAINANT:

----- STATE OF KERALA REP. BY PUBLIC  
PROSECUTOR, HIGH COURT OF KERALA ERNAKULAM. BY PUBLIC  
PROSECUTOR SRI.JIKKU JACOB THIS CRIMINAL APPEAL HAVING BEEN  
FINALLY HEARD ON 04-02-2014, THE COURT ON THE SAME DAY DELIVERED  
THE FOLLOWING: [CR] V.K.MOHANAN & B.KEMAL PASHA, JJ.

..... Crl. Appeal No.1746 of 2009  
..... Dated this the 4th day of February,  
2014

## JUDGMENT

~ ~ ~ ~ ~ Kemal Pasha, J.

The prosecution case depicts an unfortunate incident triggered from a trivial matter in which a so called religious leader attached to one of the factions was not permitted to make a speech in connection with a small customary competition, by the rival faction within the community. It is unfortunate that such factional feud within the community has culminated in a murder as the one in this case. Is it not a duty cast upon such so called, self proclaimed heads or leaders of such communal or political factions to see that such factional feuds or political rivalry, which may lead to Crl.A.1746/2009 :

2. : bloodshed and innumerable number of murders, are avoided? 2. A1 to A3 and A5 to A17 in S.C. No.324/2004 of the Additional Sessions Court (Adhoc-III), Manjeri, who stand convicted under Sections 143, 147, 148, and 324 and 302 read with Section 149 IPC, and each of whom stands sentenced to undergo rigorous imprisonment for six months under Section 143 IPC, rigorous imprisonment for two years each under Sections 147, 148 and 324 read with Section 149 IPC, and imprisonment for life and to pay fine of 10,000/- each, in default, to undergo simple imprisonment for one year, under Section 302 read with Section 149 IPC, have come up in appeal.

3. Originally, altogether 39 accused were indicted, out of whom A4, A18, A30 and A37 died prior to the completion of the trial, thereby the charges against them have been abated. The cases against A19 and A34 were not committed for trial as they are absconding. All the other CrI.A.1746/2009 :

3. : accused faced trial before the court below, out of whom the appellants were found guilty, convicted, and sentenced as aforesaid. A20 to A22, A24 to A29, A31 to A33, A35, A36, A38 and A39 were acquitted by the court below.

4. The prosecution case can be briefly stated as follows:- There was long standing political rivalry at the place called Thanur in between the workers of C.P.I.(M) political party and those belong to I.U.M.L. political party. There were a series of clashes between the workers of these two political parties. It is alleged that on 05.07.2001, there occurred a wordy altercation between two factions in Muslim community, namely 'A.P. Faction' and 'E.K. Faction', at Unniyal Mosque. It is alleged that those belong to 'A.P. faction' are the sympathisers of C.P.I.(M) political party and those of other faction are the sympathisers of I.U.M.L. political party. The wordy altercation occurred on 05.07.2001 was based on a trivial matter as a 'Musliar' attached to 'A.P. CrI.A.1746/2009 :

4. : faction' was not allowed to speak in the programme in connection with a 'defmuttu' competition conducted on 05.07.2001. As a continuation of the said incident, on 06.07.2001 at 5.30 p.m., the accused in the case, who belong to 'A.P faction' formed themselves into an unlawful assembly armed with deadly weapons like sword, hatchet, knife, stick, etc. near a basement, which was constructed for putting up the office of C.P.I.(M). It is alleged that, the said basement in existence was being used by the sympathisers and workers of C.P.I.(M) political party simply to assemble frequently.

5. It is alleged that the aforesaid unlawful assembly was formed with the common object of causing the murder and also for causing injuries on deceased Razik and PW2, PW4, PW8 and some other prosecution witnesses, who were not examined. When the accused persons were waiting with the said common object, deceased Razik, along with PW2, PW4, PW8 and some other charge witnesses, CrI.A.1746/2009 :

5. : came through the road. When they reached near the aforesaid basement, it is alleged that A4 inflicted a cut injury on the head of the deceased with MO3 hatchet, A5 and A6 stabbed on the back and flank of the deceased with MO4 series knives, and some other accused beat on the head of the deceased with sticks. It is alleged that the deceased, who sustained fatal injuries, died in consequence of the injuries sustained. It is further alleged that A10 stabbed on the left wrist of PW2 and A2, A14 and A39 beat CW6 with sticks. It is further alleged that A7 beat CW7 with a stick and A9 beat CW8 and CW9 with a stick. It is further alleged that A5 beat CW11 with a stick on his head and A15 pelted stones on CW10. The other accused beat them with sticks and pelted them with stones.

6. The deceased was taken to the Government Hospital, Tirur, where he was attended by PW10 Doctor. It has come out that the deceased was brought dead. PW10 prepared Ext.P6 wound certificate. Crl.A.1746/2009 :

6. :

7. On the basis of Ext.P4 F.I. Statement furnished by PW8, PW9 A.S.I. of Police, Thanur Police Station registered crime No.306/2001 of the Thanur Police Station through Ext.P5 F.I.R. The investigation was taken over by PW13 Circle Inspector of Police, Thanur, and the same was continued by his successor in office PW14 Circle Inspector. PW15, who is the successor in office to PW14, verified the investigation and filed the final report.

8. PW13 conducted the inquest of the body of the deceased on 07.07.2001 and prepared Ext.P19 inquest report, by which he seized the clothes found on the body of the deceased. The body was sent for postmortem examination. He prepared Ext.P2 scene mahazar by which he seized MO7 series and MO8 from the scene of occurrence. On the basis of Ext.P3(a) information allegedly furnished by A4 and as led by A4, PW13 reached the spot pointed out by A4 and seized MO3 and MO9 through Ext.P3 mahazar. The material objects were sent for chemical Crl.A.1746/2009 :

7. : analysis and PW14 obtained Ext.P20 report.

9. PW12, while working as Assistant Professor of Forensic Medicine at the Medical College, Kozhikode, conducted the autopsy on the body of the deceased on 07.07.2001 and prepared and issued Ext.P18 postmortem certificate. He noted the following antemortem injuries:- "(1) Incised wound 8 x 1 x 4 cm vertical on left side of face, at the root of ear, through tragus, extending to neck, upper end at the level of upper end of ear. The carotid sheath in the neck was cut and blood vessels (internal carotid artery and internal jugular vein were transected. (2) Vertical graze abrasion 5 x 1.2 cm, vertical on left side of face, upper end 1 cm to the left of eye. (3) Incised wound 3 x 1 x 0.5 cm bone deep, on left half of top of head, oblique, right front end 2 cm behind hair margin, 2 cm away from midline. Similar wound 1.5 cm long present 1 cm behind the back end and in line with the first one. Crl.A.1746/2009 :

8. : (4) Multiple abrasions over an area 9 x 4 cm vertical, on right side of face, back margin at root of ear, lower end 3 cm below ear lobule. (5) Incised puncture wound 3.2 x 1 x 1 cm vertical on outer aspect of right chest towards back, 13 cm below shoulder blade, lower end square cut and upper sharp cut. The wound was not entering in to chest cavity. (6) Incised puncture wound 1.5 x 0.5 x 1 cm vertical on back of left chest 6 cm away from midline 7 cm below shoulder, upper end square cut, lower sharp cut. The wound was not entering into chest cavity. (7) Abrasion 2 x 1 cm vertical at inner aspect of left leg." His opinion as to cause of death is that the death was caused due to the cut injury on the neck i.e., injury No.1 noted in Ext.P18.

10. We heard the learned Senior Counsel Sri.P.Vijayabhanu appearing for the appellants and the Crl.A.1746/2009 :

9. : learned Public Prosecutor Sri.Jikku Jacob in extenso. The learned Senior Counsel has argued that there is no sufficient evidence to connect any of the appellants with the crime and the court below has entered the conviction on the basis of mere surmises and conjectures thereby the conviction and sentence have resulted in substantial miscarriage of justice. It has been pointed out that the appellants are undergoing incarceration right from the conviction till now. Per contra, the learned Public Prosecutor has argued that there is sufficient evidence

to connect the appellants with the offences alleged against them and, therefore, the conviction and sentence are not liable to be interfered with.

11. The learned Senior Counsel for the appellants has guided us through the entire evidence of the prosecution witnesses and also the documents proved by the prosecution. According to the learned Senior Counsel, even if the evidence adduced by the so called occurrence Crl.A.1746/2009 :

10. : witnesses are accepted, their evidence are contradictory, which will not aid the prosecution in any manner. PW1, PW2, PW4 and PW8 are the occurrence witnesses relied on by the prosecution. Now, let us consider their evidence.

12. According to PW1, he saw the occurrence. It seems that he has clearly identified A1 to A19 before the court below. At the same time, it has to be noted that he has identified A2 as a person named 'Saidu' and A17 also as a person named 'Saidu'. It has to be noted that A2 is a person named 'Said', whereas the name of A17 is 'Saidu'. According to PW1, he could see A1 to A19 and others present at the scene of occurrence with weapons like sword, knife, hatchet being used for cutting ice, wooden stick and other iron weapons. It is alleged that they rushed to the deceased and A4 inflicted a cut on the left side of the deceased with MO3 hatchet. A5 and A6 inflicted stabs on the back and flank with MO4 series knives. Further, according to him, he saw A1 inflicting cut on the deceased Crl.A.1746/2009 :

11. : with a sword. It has to be noted that any such sword has not been recovered or identified. He has not stated the portion on the body of the deceased, where such a cut was allegedly inflicted by A1. PW1 has stated in evidence that he saw A7 beating CW11 with a stick. CW11 has not been examined by the prosecution. Thereafter, the other accused beat PW8 and one Shihabuddin and Anwar. When he (PW1) rushed to the spot, the assembly disbursed and the assailants took to heels. According to him, the accused as well as the persons who suffered injuries also disbursed and ran away. Thereafter, he could find the deceased lying in the coconut garden. It seems that he has not specified the proximity of the coconut garden with the scene of occurrence. It seems that he has identified MO1 shirt and MO2 pants worn by the deceased. He has identified MO3 hatchet, MO4 series

knives (2 in numbers), MO5 series sticks (18 in numbers) and MO6 series iron rods (9 in numbers). Crl.A.1746/2009 :

12. :

13. PW2 also identified A1 to A19. It seems that he has identified A2 as a person named 'Saidu', whereas he has identified A17 as the person named 'Said', which is contradictory to the prosecution case. According to PW2, the accused and the others were armed with knives, stones, hatchet, sword and wooden sticks. His version regarding the incident is that A4 inflicted a cut below the left ear of the deceased with MO3 hatchet, and A5 and A6 inflicted stabs on the back and flank of the deceased with knives. According to him, A5 stabbed on the back and A6 stabbed on the flank of the deceased with knives. He has specifically alleged that A1 inflicted a cut on the deceased with a sword; but, according to him, he did not know at which portion of the body of the deceased the said cut fell. He has stated in evidence that Ashraf (whether he has intended A7 or A34 is not clear, as the court below has not noted the rank number of the said accused) inflicted a blow on the head of CW11 with a stick. When he went forward to remove the said Crl.A.1746/2009 :

13. : accused, A10 stabbed on his left wrist with a knife. One 'Saidu' (whose rank number is also not noted) beat him with a stick. According to him, the accused beat on his right shoulder and neck and also on his thumb. According to him, he could see PW1 rushing towards the spot along with others and on seeing them, the accused as well as the persons suffered injuries ran away.

14. We have noted a disturbing attitude from the part of the court below in not recording the rank number of the accused in the deposition. It seems that apart from naming as Mamukoya and Koya, the witnesses have not pointed out those accused, who were present in the dock. Unfortunately, the court below has also not noted their rank numbers after their names. The said attitude of the court below assumes importance when the name of 'Saidu' is also dragged in. We do not understand as to whether the said 'Saidu' is A2 or A17. It seems that PW2 has also not identified any sword as the one allegedly used by A1. He Crl.A.1746/2009 :

14. : has not identified any of the weapons allegedly used by A5 and A6. Strangely enough, he has not identified any of the weapons allegedly used by any of the accused for inflicting harm on him. Another disturbing attitude from the part of the prosecution before the court below as well as from the part of the court below is that no effort was taken to show any of the said weapons to PW2, when he was examined.

15. Now, coming to the evidence of PW4, it seems that PW4 has also identified A1 to A19. His identification shows that A2 is one 'Saidu' and A17 is also another 'Saidu'. According to him, the accused and some others, who were present there, were armed with sword, hatchet, knife and sticks. A4 inflicted a cut below the ear of the deceased with a hatchet and A1 inflicted a cut on the deceased with a sword. A5 and A6 (we assume them as A5 and A6 from their names) stabbed the deceased on his back and flank with knives. According to him, the deceased fell down on getting injuries and when he went forward to lift the CrI.A.1746/2009 :

15. : deceased up, one Chokleentepurackal Saidu (neither A2 nor A17) threatened him and intimidated him by saying that his legs and hands would be fractured, in case he touches the deceased. Then, one Latheef (may be A9) beat him with a stick and Ashraf (may be A7 or A34) beat on the head of CW11. According to PW4, then he saw PW1 and others running towards the spot and on seeing them, the accused ran away. It seems that PW4 has identified MO3 as the hatchet used by A4 for inflicting cut on the deceased. It seems that other weapons were not shown to the witness and he has not identified any of the other weapons. It seems that he has not identified any of the weapons allegedly used by any of the accused to inflict injuries on him.

16. From the evidence of PW2 and PW4, it has come out that PW1 could not have seen the incident in which the deceased or other injured persons sustaining injuries. Their specific version is that on seeing PW1 rushing to the scene, CrI.A.1746/2009 :

16. : the assailants as well as those who sustained injuries disbursed and ran away from the scene. Therefore, the versions of PW1 have become doubtful in the light of the versions of PW2 and PW4.

17. PW8 is the other witness relied on by the prosecution to prove the occurrence. He has also identified A1 to A19. His evidence does not give a vivid picture of the incident. According to him, the accused and the other persons along with them were armed with sword, knife and wooden reaper. By using the same, he along with CW14, one Ali Akbar, Razik (may be the deceased), Rasheed, Mohammed Bava, Kunhumon, Shihab, Anwar and Basheer were attacked. He attempted to take the deceased for taking him to the hospital. At that time, A1 and A2 'Saidu' intimidated him and threatened him by stating that they would beat and injure on his legs and hands and uttered that let him die by lying there. Subsequently, the deceased as well as the injured persons were taken to the CrI.A.1746/2009 :

17. : Government Hospital, Tirur and the Doctor declared the death of the deceased. It was he who furnished Ext.P4 F.I.Statement. He identified his signature in Ext.P4.

18. The aforesaid versions are the evidence being relied on by the prosecution to canvass for the conviction of the appellants. Now, let us examine the medical evidence in the matter. PW12 has clearly stated before the court below that injury Nos.1, 3, 5 and 6 noted in Ext.P18 could be caused by the use of MO9. MO9 is a folding knife recovered by PW13 through Ext.P3. Then, he gave the opinion that injury Nos.1, 3 and 5 could be caused by the use of MO4 series knives also. Strangely, we have noticed that either the Prosecutor before the court below or the court below had not cared to show MO3 hatchet to question PW12 for getting an opinion as to whether injury No.1 noted in Ext.P18 could be caused by cutting with MO3. When it is alleged by PW1, PW2 and PW4 that A4 had made use of MO3 for inflicting a cut below the ear of the deceased, the CrI.A.1746/2009 :

18. : prosecution was duty bound to show the said weapon to PW12 while he was in box and to obtain an expert opinion as to whether the said injury, i.e., injury No.1, could be caused by using MO3. The said lapse on the part of the prosecution and the court below assumes importance when there is an allegation that A1 had made use of a sword for inflicting a cut on the deceased. This assumes further importance when PW12 has clearly stated that injury No.1 is not a stab injury, whereas it is a slash injury. When there is an allegation that A1 had

made use of a sword (which is not recovered or identified) to inflict a cut injury on the deceased, the prosecution ought to have obtained the opinion of PW12 by showing MO3. We do not understand as to why the said weapon was deliberately suppressed by the prosecution when PW12 was examined. Especially when PW12 had given a clear opinion that injury No.1 noted in Ext.P18 could be caused by using MO9 knife or MO4 series knives, the prosecution ought to have shown MO3 to CrI.A.1746/2009 :

19. : PW12 and obtained his clear cut opinion in the matter.

19. Apart from all the above, the learned Senior Counsel for the appellants has brought to our notice the fact that the overt act alleged against A1 is made as an interlineation in Ext.P4 F.I.Statement. Of course, the same assumes importance especially when it has been brought out that Section 161 Cr.P.C.statements of PW1, PW2, PW4 or PW8 do not contain any such overt acts against A1. A1 is a prominent leader attached to a political party in the locality and was the then Panchayat President. Over and above it, it seems that even though such an allegation has been made against A1, there was no attempt from the part of PW13 or the other investigating officers to effect the recovery of any such sword allegedly made use of by A1. The cumulative effect of all the above doubts clearly points towards the possibility of his false implication in the case as rightly pointed out by the learned Senior Counsel. If as a matter of fact, his involvement was there, definitely in the CrI.A.1746/2009 :

20. : normal course, the statements of PW1, PW2, PW4 and PW8 under Section 161 Cr.P.C. would have contained such a version. The said omissions have been clearly brought out by the learned counsel for the accused before the court below.

20. We have further noticed that A10 had sustained two serious injuries as is evident from Ext.D8 wound certificate, which was proved by the learned defence counsel through PW10. PW10 has clearly stated that the said injuries were on the vital part of the body and in fact, it could have even caused the death of A10. Strangely enough, the prosecution has not cared to explain in any manner as to how A10 suffered the said two serious injuries. It seems that there might have occurred an incident wherein there was attack and counter attack. It is not clear as

to who attacked and who counter attacked. The prosecution evidence as a whole is shabby. The true genesis of the incident, which culminated in the death of the deceased has Crl.A.1746/2009 :

21. : not come out.

21. It is evident that both the groups were in rivalry even prior to the incident. Apart from their affiliation to two political parties, there were rivalry on account of factional feud within the community also. It is true that it is an unfortunate incident triggered from a trivial matter in which a 'Musliar' of one of the factions was not permitted to speak. It is unfortunate that the said communal factions within a community have triggered the incident and kindled the attack, which led to the loss of a precious life. We do not know whether any of the leaders of the community might have noted down it. Is it not a duty cast upon such so called, self proclaimed heads or leaders of such communal or political factions to see that such factional feuds or political rivalry, which may lead to innumerable number of murders and untoward incidents, are avoided. In case such self proclaimed heads or leaders of such communal or political factions are unable to maintain communal or Crl.A.1746/2009 :

22. : political harmony from top to bottom, we are compelled to say, they are not fit to be styled as leaders! 22. The possibility of the false implication of A1 in the case to give the incident a political colour apart from the factional disputes between the two factions of the same community, also raises serious doubt in the prosecution case. The learned Public Prosecutor has pointed out that A1 is a close relative of PW8. Unfortunately, it seems that they have given more importance to their factions than their blood relation. The possibility of the false implication of A1 in the case coupled with the unexplained serious injuries sustained to A10, raise further doubt in the prosecution case. On account of the non-explanation of the said serious injuries sustained to A10, it could also be said that the true genesis of the incident has not been revealed. Over and above it, the mode in which the prosecution was conducted before the court below and also the attitude of the court below in recording the evidence without showing the proper Crl.A.1746/2009 :

23. : identification of the accused also raise serious doubts in the prosecution case.

23. Apart from all the above, it seems that the learned Public Prosecutor is not presently relying on the evidence of PW12 in its entirety. If the prosecution had any disagreement with the evidence tendered by PW12 in open court, the prosecution could have put questions that could be put in cross examination to the said witness under Section 154 of the Indian Evidence Act with the permission of the court below. When such a course was not adopted, the prosecution cannot be heard to say that the prosecution is not relying on certain portions of the evidence of PW12 at present. In fact, the prosecution cannot complain about the evidence of PW12, especially when MO3 weapon was not shown to PW12 at the time when he was examined.

24. From all the discussions made above, we fully agree with the learned Senior Counsel appearing for the appellants that there are no sufficient materials in this case CrI.A.1746/2009 :

24. : to connect the appellants with the offences alleged against them. All the appellants are entitled to the benefit of doubt. It seems that the prosecution has failed to prove the guilty of the appellants beyond doubt. Matters being so, the appellants are entitled to be acquitted in this case. In the result, this Criminal Appeal is allowed, the conviction and sentence passed by the court below are set aside, and all the appellants are acquitted. They shall be released forthwith, in case their presence in custody is not required in connection with any other case against them. The Registry is directed to send the gist of this judgment forthwith to the concerned prison, where the appellants are undergoing incarceration. Sd/- (V.K.MOHANAN, JUDGE) Sd/- (B.KEMAL PASHA, JUDGE) aks/05/02 // True Copy // PA to Judge

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