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John vs the State of Kerala

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Court : Kerala

Decided On : Jun-28-2019

Judge : Honourable Mr. Justice Ashok Menon

Appeal No. : CRL.A/1325/2003

Appellant : JOHN

Respondent : The State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE ASHOK MENON FRIDAY, THE 28TH DAY OF JUNE 2019 / 7TH ASHADHA, 1941 CRL.A.No.1325 of 2003 AGAINST THE ORDER/JUDGMENT IN SC 250/2000 of ADDITIONAL SESSIONS COURT (ADHOC)-II, KOTTAYAM DATED 06-08-2003 APPELLANTS/ACCUSED NOS.1 & 2: 1 JOHN (A1) (DIED) S/O. JOSEPH, MANJAPPALLIL VEEDU, MANNAR KARA, KADATHURUTHY VILLAGE 2 M.J.T.RAJU @ THOMAS (A2) S/O. JOHN, MANJAPPALLIL VEEDU, MANNAR KARA, KADUTHURUTHY VILLAGE BY ADV. SRI.GRASHIOUS KURIAKOSE (SR.) RESPONDENT/COMPLAINANT: THE STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF

KERALA, ERNAKULAM. BY ADV. B.JAYASURYA, SR.PUBLIC PROSECUTOR THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 20.6.2019, THE COURT ON 28.06.2019 PASSED THE FOLLOWING: -2-

J U D G M E N T

[Crl.Appeal No.1325/2003] The appellants, father and son, are accused Nos.1 and 2 in SC 250/2000 on the file of the Additional Sessions Court (Adhoc)-II, Kottayam. They were convicted for the offence of fratricide by the first appellant in furtherance of common intention with his son, under Section 304 Part-I of the IPC and sentenced to undergo rigorous imprisonment for six years each and to pay a fine of Rs.5000/- each with default sentence of simple imprisonment for six months each. The third accused who was their worker, was disculpated.

2. The facts in brief are thus: Deceased Jose along with his wife (PW2), their two daughters and his mother (PW15) were residing in a

house adjoining property named Manjappillil at Kaduthuruthy Panchayat. He was cultivated the land. -3- His elder brother, the first accused, and sisters got into a litigation with him and pending suit,

a receiver was appointed. The usufructs from th

avoid confrontation with the deceased, the accused used to go to the property for extracting the usufructs during day time when the deceased was expected to be at his work place.

3. On 26.7.1999, the fateful day, first accused was informed by the owner of a neighbouring paddy land, about an arecanut falling down onto his

property and wanted the accused to remove it. Thus, accused Nos.1 and 2 together with the third accused, who is a labourer, went to the property with a chopper, with the intention to cut and remove the fallen aracanut tree.

4. The deceased, who was expected to be -4- in his school, was however on leave owing to fever.

The accused persons reached at the

indicate that the third accused had inflicted cut injuries on the left hand, face and nose with MO-2 sword-stick, while the second accused inflicted injuries on his right hand by means of MO-3 chopper. Thereafter, the first accused lifted a laterite stone and smashed it on the head of the deceased, which resulted in fracture of the skull. MOs 4 and 5 are the broken pieces of that laterite stone. The deceased was taken to the hospital but succumbed to the injuries.

5. The prosecution examined 15 witnesses as PWs 1 to 15, marked Exts.P1 to P12(b), and the material objects were identified as MOs 1 to 7. -5- After closing the evidence for the prosecution, the accused were confronted with the evidence against them under Section 313 of the Code of Criminal Procedure. On their side, Exts.D1 to D4 were marked.

6. On appreciation of evidence, the learned Additional Sessions Judge came to the

conclusion that none of the accused persons were

guilty under Section 302 read with Section 34 IPC. However, accused Nos.1 and 2 exercising their right of private defence, exceeded such right and were found guilty under Part-I of Section 304 IPC and convicted thereunder as stated earlier. The third accused was acquitted and set at liberty. Aggrieved by this finding, accused Nos.1 and 2 are in appeal.

7. The first appellant died pending appeal.

8. Heard the learned Senior Counsel Adv.Grashious Kuriakose appearing for the -6-

appellants, and the learned Public

cautious to exercise their right obtained in the auction by going to the disputed property to take usufructs only when the deceased was expected to be in his school. Unfortunately, on the fateful day, the deceased had not gone for work and were confronted by the deceased armed with MO-2 sword- stick. The fact that the deceased had confronted the accused armed with a sword by itself would indicate that he was the aggressor. He could not have normally raised objection against the accused taking usufructus from the disputed property. But he was under the impression that by cutting and removing the fallen aracanut tree, the accused were exceeding their right to take the usufructs. The accused were not armed with any weapon as such, except MO-3 -7-

chopper and MO-6 iron rode, which

the accused had a right of private defence of their body which they did. There is no dispute regarding this fact. Third accused, labourer, whose involvement has not been proved by the prosecution was acquitted, and his acquittal has not been challenged.

10. Ext.P4 post-mortem certificate describes the injuries sustained by the deceased as thus:

1. Lacerated wound 2x2x1 cm. over the left parental eminance of the head. On dissection, the scalp tissue around showed 10x6x0.8 cm. Underneath the skull bone showed depressed comminuted fracture 8x5x0.2 cm. Corresponding to this the dura mater was torn and the brain showed laceration 2x1x0.8 cm. Subdural and suborachnoid spaces of the brain had diffuse haemorrhages. Sulci of brain narrowed and its gyri flattened. -8-

2. Incised wound with contused margins

15x10x6 cm. obliquely placed involving the front and outer aspect of right elbow and adjoining areas of the front of upper arm. Its upper front end was 13 cm. below the front fold of armpit. Underneath the brachial artery, the lateral epicondyle of the humerus and other soft tissues were seen cut and separated.

3. Incised wound with contused margins

13x9x5 cm. obliquely placed involving the inner and front aspects of right elbow and adjoining areas of the forearm. Its lower outer end was 24 cm. above wrist. The radial and ulnar arteries, nerves and other soft tissues were seen cut and separated. The tissues were seen cut and separated. The medial epicandyle and the olecranon process of the humerus were showed cut fracture.

4. Incised wound with contused margins 7x3x3 cm. horizontally placed on the back and inner aspect of left forearm 4 cm. above wrist. Underneath the ulna was cut and separated.

5. Incised wound with contused margins 8x2x0.8 cm. obliquely placed on the back and inner aspect of left forearm 2 cm. below the above injury. Underneath, the ulna showed a cut fracture.

6. Incised would 8x2x0.8 cm obliquely placed on the right side of the face. Its upper outer end was 3 cm. in front of the top of ear.

7. Incised would 3x0.5x0.5 cm. -9- vertically placed on the left side of the nose 1 cm. below its root.

8. Incised wound 8x2x0.5 cm. obliquely placed on the outer aspect of left forearm 8 cm below elbow, its lower end showed a tailing of another 2 cm.

9. Incised wound 3x0.1x0.3 cm. on the front of the root of right ring finger.

10. Two incised wounds 3x0.1x0.1

cm. and 2x1x0.3 cm. each horizontally placed one above the other 2 cm. apart involving the front aspect of right ring finger and the former one being just above its root.

11. Multiple superficial incised wounds over an area 5x3 cm. varying in sizes from 1x0.2x0.2 cm. to 3x0.2x0.2 cm. on the front of right thumb and adjoining areas of

the web spaces.

12. Incised wound 2x1x1 cm. on the back of the root of left ring finger.

13. Incised wound 1x0.5x0.5 cm. on the back of left thumb 3 cm. below its root.

14. Incised wound 5x2x1 cm. on the front of left index finger just below its root.

15. Incised wound 3x1x0.5 cm. on the outer aspect of left ankle.

16. Linear abrasion 1x0.1 cm. obliquely placed on the right side of the forehead. 4 cm. above middle of eyebrow.

17. Abrasion 4x2 cm. on the outer aspect of right arm 3 cm. below top of shoulder.
-10-

18. Abrasion 3x1 cm. on the outer aspect of right left 5 cm. below knee.

19. Multiple small abrasions over

an area 19x5 cm. on the outer aspect of left thigh just above the knee. There were 19 injuries. But injury No.1 to 3 are the fatal ones as testified by PW5 who conducted autopsy. Injury No.1 is the wound caused to his scalp due to the dropping of laterite stone on his head by the first accused. Injury Nos.2 and 3 are also serious injuries to the right hand which had cut the radial, ulnar and brachial arteries and nerves as well as had cut fractures. Even though they were very serious injuries, those could have

taken time to become fatal. But the first injury was definitely more fatal causing fracture of the skull with subdural and subarachnoid haemorrhages and that could have resulted in instantaneous death. However, the oral testimony of PW2, the wife of the deceased, indicates that even after the injuries, the deceased had asked for water and even directed

-11- her to call for a vehicle to take him to hospital.

11. The mother of the deceased and the

first accused, was examined as PW15. She to

hostile and the predicament of her supporting one of her sons could very well be understood.

12. The learned Senior Counsel Sri.Grashious Kuriakose submits that injury No.1 caused to the deceased which is proved to be most fatal of all injuries, was admittedly caused by the

first accused. The learned Sessions Judge's finding that the deceased, who was rendered immobile due to the sever cut injuries on both his hands, could no longer have attacked the accused so as to cause any further injury and therefore, the specific act of dropping laterite stone on his head by the first accused proved to be in excess of the right of

private defence exercised by the accused. The -12- learned counsel also draws attention of this Court to the nature of injuries sustained by the second accused. Ext.P6 is the wound certificate pertaining to the second accused and has been proved by PW7 Doctor attached to Specialists' Hospital, Ernakulam. The injuries described therein are as thus: 1. Incised wound on left little finger over middle of distal phalanx.

2. Incised wound on left hand, severed flexor tendons and digital nerves.

3. Fracture of 3rd, 4th and 5th metacarpals and severed medium nerve and ulnar nerve.

4. Incised wound on left wrist causing injury to ulnar artery and nerve just above wrist ulnar side; and

5. Laceration dorsum on right

hand, elbow right lateral side forehead left side. The injuries sustained by the first accused in accordance with Ext.P7 certificate are as follows: 1. Deep incised wound on the left elbow on lateral side.

2. Deep incised wound on left arm 5x1 cm.

3. Small laceration on right leg; and -13-

4. Small laceration lower lip.

The learned Senior Counsel submits that the injuries on the body of the second accused were all sustained on his hands and wrist which would indicate that he was defending himself and the injuries, particularly injury Nos.2, 3 and 4 were very serious, which had almost severed his left wrist and severed medium nerve and ulnar nerve and flexor tendons and digital

nerves and caused injury to his ulnar artery. Had he bled for some more time, it could have been fatal is the testimony of PW7.

13. The learned Senior Counsel argues that

with such injures as are stated in Ext.P6, the second accused could not be expected to retaliate and cause further injuries to the deceased. He could not have even lifted the stone to cause injury on the head of the deceased, whereas the first accused had not sustained such serious injuries as can be seen from Ext.P7 certificate. -14-

14. The oral testimony of PW2 would also indicate that the deceased had fallen down into the adjoining paddy land and while he was attempting to climb up to the property, the first accused dropped laterite stone on to his head. It is also pointed out that initially PW2 did not state anything about the use of the stone but when prompted by means of a leading question in chief examination by the Prosecutor, she admitted that the first accused had dropped laterite stone on the head of the deceased.

15. The charge sheet would state that the injuries on one side of the body of the deceased were caused with MO-2 sword-stick by the third accused and not by the first accused. But interestingly, PW2 during her examination had not attributed any overt act whatsoever to the third accused, which ultimately resulted in his acquittal.

16. The conclusion which the learned -15-

Senior Counsel wants to draw this court is that, if at all there was any excess of the right of private defence, it was only due to the act of the first accused and that particular overt act of dropping of the stone on the head of the deceased by the first accused could not be attributed to the second accused, who was incapacitated from causing any further injury to the deceased. Even Section 34 IPC could not be resorted to to rope in the second accused, as there was no intention on his part to do such an act, and little could he have thought of the first accused doing such act.

17. Per contra, the learned Public Prosecutor would argue that by virtue of Section 34 IPC, any act done by the first accused could also be attributed to the second accused as the attack was in furtherance of common intention. There is no doubt that invoking Section 34 IPC, the overt act done by one of the accused could also make the

-16- other accused liable, who was sharing a common intention with the accused who had exercised the overt act. In the instant case, it has to be understood that the common intention of the accused has not been proved beyond reasonable doubt. The third accused was present at the scene of occurrence and the charge sheet was framed attributing specific overt act on his part and he has been exculpated because of total lack of evidence against him. With the Injuries sustained by the second accused, it may not have been possible for him to retaliate with any further injury to the deceased. Blows of sword- stick and chopper caused injuries to both the deceased and the second accused, could have proved fatal. Had the deceased also been taken to the hospital before he was caused the fatal injuries on the head with the stone, he too could have survived like the second accused, who overcame his injuries. From the evidence of PW2, who is the sole witness to -17- the occurrence, it is clear that the injury inflicted with MO-4 and MO-5 laterite stone was the ultimate blow received by the deceased and that blow was inflicted by the first accused alone. Probably witnessing the nature of the serious injuries his son had sustained, the first accused must have formed an animosity towards his brother to commit the fratricide. But Section 34 IPC cannot be imported to the second accused as well because the allegation against him is only that he had inflicted injury on one hand of the deceased and nothing more.

Going by the evidence, it is adequately clear that the deceased was the aggressor and the accused had exercised their right of private defence. Therefore, I am of the opinion that if at all there was an excess of right of private defence, it could be attributed only to the first accused and not to the second accused. The second accused is therefore entitled to a clear acquittal exercising the -18- exceptions of the right of private defence. The conviction as against the first accused will have to be sustained. In the result, the Criminal Appeal is allowed in part. While sustaining the guilt of the first accused, the second accused is found not guilty by granting him the benefit of having exercised his right of private defence and he is set at liberty. The impugned judgment of the learned Additional Sessions Judge is modified to that extent. The second appellant/second accused is set at liberty, in case he is not required in connection with any other case. The bail bond if any executed by the second accused shall stand cancelled. Sd/- ASHOK MENON JUDGE jg

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