

Ashraf and Another Vs. State of Kerala

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Court : Kerala

Decided On : Jun-05-2015

Judge : Honourable Mr.Justice K.T.Sankaran

Appellant : Ashraf and Another

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALAAT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE K.T.SANKARAN & THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR FRIDAY, THE 5TH DAY OF JUNE 2015 15TH JYAISHTA, 1937 CRL.A.No. 1157 of 2010 (G) AGAINST THE

JUDGMENT

IN S.C.NO. 86/2009 OF THE SESSIONS COURT, MANJERI DATED 1911-2009 APPELLANTS:

1. AHRAF, S/O.MOIDU, THARAYIL VEEDU, VELLARKAD, ERUMAPETTY, PUNNAYOOR, THRISSUR DISTRICT.

2. NAVAS, S/O.MOIDU, THARAYIL VEEDU, VELLARKAD, ERUMAPETTY, PUNNAYOOR, THRISSUR DISTRICT. BY ADVS. SRI.N.J.JOHNSON SRI.T.K.AJITH KUMAR RESPONDENT: THE STATE OF KERALA, REPRESENTED BY THE STATION HOUSE OFFICER, PERUMPADAPPU POLICE STATION, BY THE PUBLIC PROSECUTOR, HIGH COURT OF

KERALA, ERNAKULAM. BY PUBLIC PROSECUTOR SRI.K.K.RAJEEV THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 05-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: K.T.SANKARAN & B.SUDHEENDRA KUMAR, JJ.

----- Crl.A. No.1157 of 2010
----- Dated this the 5th day of June, 2015

JUDGMENT

Sudheendra Kumar, J.

The appellants are the accused in S.C.No.86 of 2009 on the files of the Sessions Court, Manjeri, who in this appeal challenges the judgment of conviction and sentence passed by the court below under Sections 302, 323 and 341 read with Section 34 of the Indian Penal Code. The court below sentenced each of the appellants to imprisonment for life and a fine of Rs.10,000/- each with a default clause for rigorous imprisonment for one year each under Section 302 read with Section 34 IPC, rigorous imprisonment for three months each under Section 323 read with Section 34 IPC and a fine of Rs.500/- each with a default clause for simple imprisonment for one week each under Section 341 read with Section 34 IPC. Crl.A. No.1157 of 2010 ::

2. ::

2. There was dispute between the appellants and the deceased Ibrahim with regard to the payment of rent in respect of the building where the appellants were residing. The said building and other tenanted buildings of the deceased are called quarters. On 17.9.2002 at about 6.30 p.m., the deceased Ibrahim went to the quarters of the appellants to collect the rent. On the way, the deceased met the appellants. The deceased demanded rent from the appellants. There was an altercation. Thereafter, the first appellant Ashraf pushed the deceased towards the western side of the quarters. He also pulled the deceased down and restrained him there. Thereafter, the first appellant sat on the chest of the deceased and fisted him. While so, the first appellant directed the second appellant to bring a knife. Accordingly, the second appellant brought a knife. Thereafter, the second

appellant Navas stabbed on the nose and left side of the chest of the deceased with a knife. The deceased was immediately taken to Sukapuram Hospital at Edappal. However, on the way to the hospital, he succumbed to the injuries.

3. CW1 (not examined as he was not alive) witnessed the incident. He went to the police station and launched Ext.P18 Statement to PW21, who in turn registered Ext.P18(a) F.I.R. The CrI.A. No.1157 of 2010 ::

3. :: investigation was taken over by PW22 on 18.9.2002. He conducted the inquest on the body of the deceased at 8.30 a.m. on that day and prepared Ext. P4 inquest report. On that day at 12.15 p.m., PW22 visited the place of occurrence and prepared Ext.P1 scene mahazar. He arrested the appellants on 18.9.2002 at 8.30 p.m. On questioning the second appellant, the second appellant had given Ext.P19 disclosure statement and pursuant to Ext.P19 disclosure statement, MO8 knife was recovered by PW22 at the instance of the second appellant, as per Ext.P13 mahazar. After completing the investigation, PW22 laid the charge before the court.

4. In the trial, PW1 to PW22 were examined and Exts.P1 to P23(a) were marked for the prosecution, besides identifying MO1 to MO8. No evidence was adduced on the side of the defence.

5. We have heard the learned counsel for the appellants Sri.T.K.Ajith Kumar and the learned Public Prosecutor Sri.K.K.Rajeev.

6. PW14 is the doctor who conducted the autopsy on the body of the deceased and issued Ext.P10 postmortem certificate. CrI.A. No.1157 of 2010 ::

4. :: The following ante-mortem injuries were noted by PW14 in Ext.P10 postmortem certificate:- "Injuries (Ante-mortem):- 1. Incised wound 2.1x0.5x1 cm at the root of nose, vertically placed. There was a cut in the nasal bone for a depth 0.7 cm.

2. Linear abrasion 5x0.2 cm on the top of right side of head 5 cm above right eyebrow and 5.5 cm outer to midline.

3. Abrasion 7x3 cm on the back of right elbow and right forearm.
4. Abrasion 4.5x1.5 cm on the back of right upper arm 3 cm above elbow.
5. Linear abrasion 5.5x0.3 cm on the outer aspect of right side of abdomen horizontally placed 13 cm outer to midline and 5 cm below costal margin.
6. Abrasion 4x1.8 cm on the front of right knee.
7. Incised penetrating wound 2.9x1.1 cm on the lower part of left side of chest obliquely placed with its upper end placed, 18 cm below axilla. The upper end was split and lower end was sharply cut. The wound had cut the muscles of the left side of chest. It had entered the chest cavity by cutting the intercostals muscles and vessels between the 9th and 10th ribs on left side. It had pierced the lower lobe of left lung (2.8x0.5x1.5 cm). The left chest cavity contained Crl.A. No.1157 of 2010 ::

5. ::

700. ml of fluid blood. The left lung was found collapsed. The total minimum depth of the wound was 11 cm." PW14 opined that the death of the deceased was due to the incised penetrating injury sustained to the chest. Injury No.7 is the incised penetrating injury sustained to the chest. PW14 opined that injury Nos.1, 2, 5 and 7 could be caused with MO8 knife. It is the further evidence of PW14 that injury No.7 in Ext.P10 is fatal and sufficient in the ordinary course to cause death. PW14 specifically stated that the injuries noted in Ext.P10 could not be possible in a fall. Thus, it is proved from the evidence of PW14 that the deceased died due to the incised penetrating injury No.7 sustained to the chest of the deceased.

7. PW2 to PW6 are the occurrence witnesses examined by the prosecution to prove the prosecution case. But, none of the above witnesses had witnessed the entire incident in this case. Each witness had witnessed the incident partly.

8. PW2 was a tenant of the deceased and a neighbour of the appellants. She stated that on the fateful day, she saw the Crl.A. No.1157 of 2010 ::

6. :: deceased talking with the appellants regarding payment of rent. Thereafter, the first appellant caught hold of the hand of the deceased and both the appellants pushed the deceased to the western side of the quarters where PW2 and the appellants were residing. The deceased was then pushed down by the appellants. The first appellant sat on the chest of the deceased and directed the second appellant to bring a knife. Since PW2 had fear in her mind, she entered into her house and closed the door. The above incident was at about 6.15 p.m., as per the evidence of PW2. PW2 did not see the rest of the incident.

9. PW3 was a neighbour of the appellants. She stated that the incident in this case occurred at about 6.30 p.m. on 17.9.2002. Her evidence is that while she was proceeding for the evening prayer, she heard a sound. She opened the window. Then she saw the appellants pushing the deceased towards the northern side of the quarters of PW3. She shut the window and started her prayer. After the prayer, when she came out, she found the deceased Ibrahim with blood all over his body. He was limping. People also assembled there. The evidence of PW3 would show that she had seen the deceased immediately after the incident. She had also Crl.A. No.1157 of 2010 ::

7. :: seen the deceased and the appellants just before the incident.

10. PW4 was also a neighbour of the appellants. On the fateful day at about 6.15 p.m., while he was returning to his house after his job, he saw the appellants talking on the side of the road. He entered into his house and changed his dress. Then he heard a sound from the western side of the quarters of the deceased. He came out of the house. Then he found the deceased Ibrahim lying there. Blood was oozing out from the body of the deceased. He also found both the appellants moving away from there hurriedly. The deceased was taken from there in a Maruthi van by CW1 (not examined). PW4 identified MO4 lungie and MO5 shirt worn by the first appellant Ashraf and MO6 lungie and MO7 shirt worn by the second appellant Navas at the relevant time.

11. PW5 is the daughter-in-law of the deceased. On the fateful day, she planned to go to the house of a relative along with the deceased and her children, as the said relative died. At that time, CW7 Gopalakrishnan (not examined) came there to

borrow money from the deceased. Then the deceased told the said Gopalakrishnan that he would collect rent from the quarters and give CrI.A. No.1157 of 2010 ::

8. :: the same to Gopalakrishnan. Accordingly, he went to the quarters along with the said Gopalakrishnan. PW5 saw both the appellants proceeding towards the quarters. After some time, she saw the appellants coming back hurriedly. PW5 was waiting in the Omni van in which she came there with the deceased. In a little while, she saw the said Gopalakrishnan(CW1) bringing the deceased. The deceased told PW5 that the second appellant Navas stabbed him. The deceased also told her that both the appellants assaulted him. She had given water to the deceased as requested by him. The deceased was immediately taken to Sukapuram Hospital. However, before reaching there, the deceased died.

12. PW6 was a neighbour of the deceased. PW6 stated that on getting information that somebody sustained injury, he rushed to the spot. Then, he saw the deceased Ibrahim lying in the seat of a Maruthi van with blood all over his body. He asked the deceased as to what happened. Then the deceased uttered that the second appellant Navas stabbed him. The deceased was taken to the hospital. PW6 also accompanied the deceased to the hospital. After examining the deceased, the doctor declared that the deceased died. CrI.A. No.1157 of 2010 ::

9. ::

13. The evidence of PW2 to PW4 would show that they witnessed the incident only in part. PW5 and PW6 did not see the incident. PW5 and PW6 stated that the deceased told them that the second appellant Navas stabbed him with a knife. The learned Public Prosecutor has submitted that the evidence of PW5 and PW6 that the deceased told them that the second appellant Navas stabbed him with a knife, is admissible under Section 32(1) of the Evidence Act. The learned counsel for the appellants, on the other hand, has argued that the evidence of PW5 and PW6 with regard to the dying declaration made by the deceased, cannot fall under Section 32(1) of the Evidence Act, as the said dying declaration was not recorded by a Magistrate or a police officer or a doctor and consequently, their evidence cannot be used to bring home the guilt of the appellants. Clause (1) of Section 32 of the

Evidence Act provides that statements made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question, are themselves relevant facts. In the present case, the cause of death of the deceased comes into question. In the said circumstances, the statement made by the Crl.A. No.1157 of 2010 ::

10. :: deceased before PW5 and PW6 that the deceased was stabbed with a knife by the second appellant Navas is relevant.

14. The Apex Court in Prakash and another v. State of M.P. (AIR 1993 SC65) observed in paragraph 11 as follows:- "In the ordinary course, the members of the family including the father were expected to ask the victim the names of the assailants at the first opportunity and if the victim was in a position to communicate, it is reasonably expected that he would give the names of the assailants if he had recognised the assailants. In the instant case there is no occasion to hold that the deceased was not in a position to identify the assailants because it is nobody's case that the deceased did not know the accused persons. It is therefore quite likely that on being asked the deceased would name the assailants. In the facts and circumstances of the case the High Court has accepted the dying declaration and we do not think that such a finding is perverse and requires to be interfered with." 15. In Ramawati Devi v. State of Bihar (AIR 1983 SC164), the Apex Court observed thus: "A statement, written or oral, made by a person Crl.A. No.1157 of 2010 ::

11. :: who is dead as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question, becomes admissible under section 32 of the Evidence Act. Such statement made by the deceased is commonly termed as dying declaration. There is no requirement of law that such a statement must necessarily be made to a Magistrate. What evidentiary value or weight has to be attached to such statement, must necessarily depend on the facts and circumstances of each particular case." 16. In Bhajju alias Karan Singh v. State of Madhya Pradesh ((2012) 4 SCC327), the Apex Court observed thus: "The law is

very clear that if the dying declaration has been recorded in accordance with law, is reliable and gives a cogent and possible explanation of the occurrence of the events, then the dying declaration can certainly be relied upon by the Court and could form the sole piece of evidence resulting in the conviction of the accused. This Court has clearly stated the principle that Section 32 of the Indian Evidence Act, 1872 (for short 'the Act') is an exception to the general rule against the admissibility Crl.A. No.1157 of 2010 ::

12. :: of hearsay evidence. Clause (1) of Section 32 makes the statement of the deceased admissible, which is generally described as a "dying declaration"." 17. In *Ashabai and another v. State of Maharashtra* ((2013) 2 SCC224, the Supreme Court held as follows: "There is no particular form or procedure prescribed for recording a dying declaration nor it is required to be recorded only by a Magistrate. As a general rule, it is advisable to get the evidence of the declarant certified from a doctor. In appropriate cases, the satisfaction of the person recording the statement regarding the state of mind of the deceased would also be sufficient to hold that the deceased was in a position to make a statement. It is settled law that if the prosecution solely depends on the dying declaration, the normal rule is that the courts must exercise due care and caution to ensure genuineness of the dying declaration, keeping in mind that the accused had no opportunity to test the veracity of the statement of the deceased by cross-examination. As rightly observed by the High Court, the law does not insist upon the corroboration of dying declaration before it can be accepted. The insistence of corroboration Crl.A. No.1157 of 2010 ::

13. :: to a dying declaration is only a rule of prudence. When the Court is satisfied that the dying declaration is voluntary, not tainted by tutoring or animosity, and is not a product of the imagination of the declarant, in that event, there is no impediment in convicting the accused on the basis of such dying declaration" 18. In *State of Madhya Pradesh v. Dal Singh & others* (AIR 2013 SC2059, the Supreme Court held thus: " The law on the issue can be summarised to the effect that law does not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. The person who records a dying declaration must be satisfied that the maker is in a fit state of mind and is

capable of making such a statement. Moreover, the requirement of a certificate provided by a doctor in respect of such state of the deceased, is not essential in every case." 19. In *Shudhakar v. State of Madhya Pradesh* ((2012) 7 SCC569, the Apex Court held that a dying declaration can be oral or in writing and any adequate method of communication, whether by words or by signs or otherwise, will suffice, provided the indication CrI.A. No.1157 of 2010 ::

14. :: is positive and definite.

20. The above discussion makes it clear that it is not necessary that the dying declaration must be recorded by a Magistrate or a police officer or a doctor. A dying declaration can be made to any person including a close relative of the deceased. The only thing is that the person to whom the dying declaration is made must be satisfied that the declarant was in a fit state of mind to give the declaration. The Court must also be satisfied that the deceased was in a fit and conscious state of mind to give the declaration at the time when he had given the declaration. The Court must be further satisfied that the witness to whom the dying declaration was given is a witness of credence.

21. The evidence of PW5 and PW6 clearly shows that the deceased was in a fit and conscious state of mind to speak and give the declaration. From the materials on record, we are fully convinced that the victim was in a sound state of mind to make the declaration as spoken to by PW5 and PW6. We are further satisfied that PW5 and PW6 are reliable witnesses. PW5 is the daughter-in-law of the deceased. She is not having any enmity towards the CrI.A. No.1157 of 2010 ::

15. :: appellants to falsely implicate them in a case like this. Since there was no ill-motive on the part of PW5 to falsely implicate the appellants, the evidence of PW5 with regard to the dying declaration made by the deceased can be safely accepted. PW6 is a neighbour and a friend of the deceased. PW6 is also not having any enmity towards the appellants to falsely implicate them in a case like this. Not even a suggestion was made during the cross-examination of PW6 that he had any ill-motive to implicate the appellants in this case. In the absence of any such ill-motive, the evidence of PW6 can be safely accepted. The above discussion makes it clear that the evidence of PW5 and PW6 with regard to the

dying declaration made by the deceased can be safely accepted. Since the declaration was made by the deceased with regard to the cause of his death, the said declaration is, no doubt, admissible under Section 32(1) of the Evidence Act.

22. It has been submitted by the learned Public Prosecutor that the statement made by the deceased to PW5 and PW6 falls under Section 6 of the Evidence Act also in addition to Section 32(1) of the Evidence Act. The principle embodied in Section 6 of the Evidence Act is usually known as the principle of *res gestae*, which CrI.A. No.1157 of 2010 ::

16. :: is a kind of exception to the rule against hearsay. What it means is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. To form a particular statement as part of the same transaction, utterances must be simultaneous with the incident or substantial contemporaneous that is made either during or immediately before or after its occurrence [See *Bhairon Singh v. State of Madhya Pradesh* (AIR 2009 SC2603)].

23. Section 6 of the Evidence Act reads as follows:- "6. Relevancy of facts forming part of same transaction-- Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places." Illustration (a) to the said Section is important in this context, which is extracted hereunder:- "A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or CrI.A. No.1157 of 2010 ::

17. :: after it as to form part of the transaction, is a relevant fact.

24. . It is clear from illustration (a) to Sec. 6 of the Evidence Act that the utterances made by the accused or the victim or the by-stander just before, during or immediately after the commission of a crime are relevant facts. A "by-stander" is a person who is present at the scene of occurrence. A person, who arrives the scene of occurrence after the commission of a crime, cannot be said to be a by-stander. Therefore, the utterances made by any such person, who reaches the

scene of occurrence after the commission of the crime, are not relevant under this section.

25. The word "transaction" in Sec.6 of the Evidence Act was interpreted by this Court in Ponnappan v. State (1994(2) KLT1027 thus:- "The word "transaction" in the section in its largest sense can be termed as the group of facts so connected together as to be referred to the crime itself. Whether a series of acts are so connected together as to form the same transaction is a question of fact. Proximity of time, continuity of Crl.A. No.1157 of 2010 ::

18. :: action and unity of purpose or design are factors governing the same question of fact." 26. The Apex Court in Gentela Vijayavardhan Rao and Another v. State of A.P. (1996 (6) SCC241 referring to Sec.6 of the Evidence Act held thus:- " The principle of law embodied in S.6 of the Evidence Act is usually known as the rule of res gestate recognised in English law. The essence of the doctrine is that a fact which, though not in issue, is connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. This rule is roughly speaking an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under S.6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication, then the statement is not part of res gestate." Crl.A. No.1157 of 2010 ::

19. ::

27. The Apex Court in Rattan Singh v. State of H.P. (1997 (4) SCC161 examined the applicability of S.6 of the Evidence Act to the statement of the deceased and held thus:- "Here the act of the assailant intruding into the courtyard during dead of the night, victim's identification of the assailant, her pronouncement that appellant was standing with a gun and his firing the gun at her, are all circumstances so interlined with each other by proximity of time and space that the statement of the

deceased became part of the same transaction. Hence it is admissible under S.6 of the Evidence Act".

28. A Division Bench of this Court in *Biju v. State of Kerala* (2006 (3) KLJ549) held thus:- "The test of admissibility of evidence as part of *res gestae* is that the declaration should be so contemporaneous, so intimately interwoven or connected with the transaction in issue, giving no room for any premeditation or opportunity for fabrication of evidence." CrI.A. No.1157 of 2010 ::

20. ::

29. Sec.6 of the Evidence Act is an exception to the general rule whereunder the hearsay evidence becomes admissible. But for bringing such hearsay evidence within the provisions of S.6, what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of *res gestae*, must have been made contemporaneously with the acts or immediately thereafter [(see *Sukhar v. State of U.P.* (1999 (9) SCC507)].

30. Where the transaction consists of different acts, in order that the chain of such acts may constitute the same transaction, they must be connected together by proximity of time, proximity or unity of place, continuity of action and community of purpose or design. The spontaneity of the statement is the guarantee of the truth. The reasons for its admissibility under Section 6 of the Evidence Act is that it is a part of the transaction and not merely because it is spontaneous. The statement is relevant only if it is that of a person, who had seen the actual occurrence and who uttered it simultaneously with the incident or soon thereafter as to make it reasonably certain that the speaker is CrI.A. No.1157 of 2010 ::

21. :: still under the stress of the excitement caused by his having seen the incident. In order to make the statement of a bystander admissible, it must have been made, at the time of transaction or shortly before or after it. The statement uttered or the act done must be a spontaneous reaction of the person witnessing the crime and forming part of the transaction. The bystanders' declaration must relate only to that which came under their observation.[See *Bhaskaran v. State of*

Kerala (1985 KLT122]. In the present case, the declaration was made by the victim himself, immediately after the incident of sustaining injury by him. In the said circumstances, the evidence of PW5 and PW6 about what the victim/deceased said immediately after the incident, is admissible under Section 6 of the Evidence Act. The above discussion would make it clear that apart from Sec.32 (1) of the Evidence Act, the aforesaid statement of the deceased can be admitted under Sec.6 of the Evidence Act on account of its proximity of time to the act of murder. In either case, whether it is admissible under S.32 (1) or under S.6 of the Evidence Act, it is substantive evidence, which can be acted upon with or without corroboration in finding guilt of the accused [(see Rattan Singh's case (supra)].
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22. ::

31. The evidence regarding the discovery of MO8 knife by PW22 at the instance of the appellant is another piece of evidence connecting the appellant with the crime. The evidence of PW22 is that he arrested the appellants on 18-9-2002 at 8.30 p.m. and when questioned, the 2nd appellant had given Ext. P19 disclosure statement and pursuant to Ext. P19 disclosure statement and as led by the second appellant, MO8 knife was discovered by PW22 at the instance of the second appellant, as per Ext.P13 mahazar. The evidence of PW22 regarding the discovery of MO8 knife at the instance of the second appellant in pursuance to the disclosure statement given by the second appellant is, not doubt, admissible under section 27 of the Evidence Act. Ext.P17 report of chemical analysis would show that MO8 was stained with human blood. The blood stains on MO8 knife fastens the culpability of the appellants.

32. The evidence discussed above would show that PW2 to PW4 had seen part of the occurrence. There is absolutely nothing on record to indicate that PW2 to PW4 had any ill-motive to implicate the appellants in a case like this. The evidence of PW5 and PW6 is that the deceased had given dying declaration that the deceased was stabbed by the second appellant Navas. The deceased also told Crl.A. No.1157 of 2010 ::

23. :: PW5 that both the appellants assaulted him. The medical evidence of PW14 coupled with Ext.P10 postmortem certificate would show that the deceased died due to the incised penetrating injury sustained to his chest. Injury No.7 is the incised penetrating injury sustained to the chest. PW14 opined that injury Nos.1, 2, 5 and 7 could be caused with MO8 knife. Even though the appellants contended that the deceased sustained injuries in a fall, the evidence of PW14 clearly shows that the injuries sustained by the deceased could not be possible in a fall. Thus, the contention of the appellants that the deceased sustained injury in a fall is ruled out by the evidence of PW14. The evidence of PW22 regarding the discovery of blood stained MO8 knife at the instance of the second appellant supports the medical evidence of PW14. MO5 shirt worn by the first appellant at the relevant time contained human blood as per Ext.P17 report. The evidence on record shows that the first appellant had actively involved in the commission of the offence in this case. Therefore, it was only natural that MO5 shirt worn by the first appellant was stained with human blood. The evidence discussed above clearly shows that both the appellants had active participation in the crime, sharing common intention. Having meticulously gone through the evidence on record, we are CrI.A. No.1157 of 2010 ::

24. :: fully satisfied that the court below had correctly evaluated the evidence and reached the conclusion that the deceased died due to the incised penetrating stab injury inflicted on his chest by the second appellant with MO8 knife in furtherance of the common intention of both the appellants, as alleged by the prosecution.

33. Now the question to be considered is as to whether the offence committed by the appellants falls under Sec. 302 IPC or under Part I of Sec. 304 IPC. It is in the evidence that there was sudden quarrel between the deceased and the appellants. However, the sequence of events which led to the sustaining of injuries by the deceased is not available on record. The appellants were not carrying any weapon with them at the time of commencement of the quarrel. This itself would show that the act was not a pre- meditated one. There is also no material before the Court to indicate that the appellants took any undue advantage or the appellant acted in a cruel or shocking manner. The evidence on record would show that the 2nd appellant also sustained injuries in the incident. This itself would show that there

was scuffle between the appellants and the deceased. There is no reasonable or acceptable evidence as to how it started and who the aggressor CrI.A. No.1157 of 2010 ::

25. :: was. In the said circumstances, we are of the view that Exception 4 to Section 300 IPC is clearly attracted in this case and consequently, the offence falls under Section 304 Part-1 of the Indian Penal Code . In the result, this Criminal Appeal stands allowed in part. The conviction and sentence passed by the trial court under Section 302 read with Section 34 IPC stand set aside. The appellants are convicted under Section 304 Part-1 read with Section 34 IPC. Each of the appellants is sentenced to rigorous imprisonment for ten years each and a fine of Rs.10,000/- each with a default clause for rigorous imprisonment for two years each under Section 304 Part-1 read with Section 34 IPC. The conviction and sentence passed by the trial court under Section 323 read with Section 34 IPC and Section 341 read with Section 34 IPC stand confirmed. (K.T.SANKARAN) Judge (B.SUDHEENDRA KUMAR) Judge ahz/ani

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