

**Nihas Vs. State of Kerala**

**Nihas Vs. State of Kerala**

**SooperKanoon Citation :** [sooperkanoon.com/719473](http://sooperkanoon.com/719473)

**Court :** Kerala

**Decided On :** Feb-02-2005

**Reported in :** 2005(2)KLT173

**Judge :** K.A. Abdul Gafoor and; R. Basant, JJ.

**Acts :** Code of Criminal Procedure (CrPC) - Sections 313; Indian Penal Code (IPC) - Sections 300

**Appeal No. :** C.R.A. No. 1931 of 2003

**Appellant :** Nihas

**Respondent :** State of Kerala

**Advocate for Def. :** Noorji Naushad, Adv.

**Advocate for Pet/Ap. :** P. Vijaya Bhanu and; P. Maya, Adv.

**Disposition :** Appeal allowed

**Judgement :**

**K.A. Abdul Gafoor, J.**

1. The appellants/accused are faced with conviction for the offence punishable under Section 302 read with Section 34. The-appellants are brothers. The deceased Nazimudeen is yet another brother.

2. Homicide of Nazimudeen is not disputed. As admitted by the prosecution, Nazimudeen was residing in another house nearby that of the accused along with PW.2, his wife. The deceased had a quarrel with his wife who fled away with her child from his house and took asylum in the house of the accused. The deceased followed her and asked his mother not to give her asylum. PW.1, the mother, kept her in a room to save her from the deceased. The deceased broke open the door and assaulted his mother and attempted assault on PW2. It was in that situation, the accused took MO1 chopper which was available in the front room of the house and inflicted injuries successively on the deceased. He succumbed to the injuries on the spot itself. It is also the prosecution case that one among them took a tapioca club from the adjacent room and had beaten the deceased.

3. The prosecution examined 14 witnesses, marked Exts.P1 to P18 and identified M.Os. 1 to 10. The accused attempted to plead that the occurrence had taken place in a different way, as spoken by PWs.1, 6, 8 and DW.1. The Court below considered the evidence on record and found that the prosecution has succeeded in proving the guilt of the accused and sentenced them to undergo life imprisonment and to pay a fine of Rs. 1000/- each. Default sentence was also imposed. This finding is assailed in this appeal.

4. Based on the evidence on record, two contentions are raised before us. It is submitted first of all that the deceased was in the habit of quarrelling with his wife and relatives. He was engaged in repossession of hire purchase vehicles on which monthly instalments were defaulted, at the instance of financiers. Several were therefore inimical towards him. Some of them came as spoken to by PW1, the mother of the deceased, in search of him and the incident occurred during the scuffle with them. Secondly, it is also submitted by the counsel for the appellants that the materials available on record show that the accused did have right of private defence and had exercised such right of private defence of the person of their mother, sister-in-law and also the property, their residential house.

5. PW.1 is the mother of the accused as well as the deceased. She will have the inclination to save her two sons, the accused. Her version cannot, in any way, be swallowed as such without due corroboration. Her version is that strangers had

come there in search of the deceased and in the scuffle with them, this occurrence had taken place. The evidence given in that regard by PWs.6 and 8 is only hearsay. The evidence of PW.1 thus remains uncorroborated. It is inconsistent with her earlier version. In such circumstances, that story has no sustenance. Ext.P14 F.I. statement given by the father of the accused and deceased immediately after the occurrence also does not support the version of PW.1. He could not be examined as he was no more at the time of trial. So the version of PW.1 cannot be accepted. That contention fails.

6. PW.2, the wife of the deceased is the only occurrence witness who supported the prosecution version. According to her, there was quarrel between the deceased and herself and she had to take asylum in the house of the accused where her in laws were residing and the mother-in-law kept her and her child safe in a room. The deceased broke open two doors of the house and attempted to assault her. In the course of that incident, the deceased had also slapped on the cheek of PW1, his own mother. It was at that time his brothers, the accused, caught hold of the deceased and took him to the room on the eastern side of the house and as he was also using force, one of them took a chopper lying there and inflicted the injuries. Another took a club from the adjacent bathroom and beat the deceased. The latter among the accused had also used M.O1 to inflict injuries on the deceased. The deceased succumbed to the injuries on the spot.

7. Ext.P8 is the Post Mortem certificate. It revealed almost 40 injuries on the deceased. Of course, injuries 1 to 15 and 19 and the consequential injuries were fatal according to (PW.7), the doctor who conducted autopsy. Death was the result of such injuries. It was also spoken to by him that those injuries could have been caused with M.O.1 chopper as well as tapioca club.

8. The inquest report, Ext.P9 contains the description about the scene of occurrence as well. But P11 sketch also gives an indication of the lie of the house. Two doors of the house were damaged and the shutters were lying on the floor where the dead body was found lying by the police. Admittedly, the occurrence was during night. It is further admitted by the prosecution that the incident happened in the house of the accused and that the deceased was residing in

some other house nearby. Ext.P18 report of the Forensic Science Laboratory discloses that the deceased had consumed alcohol.

9. The evidence of PW.2 discloses that the deceased had quarrelled with her and he had come to the house of the accused in search of her. Thus, it is clear that the deceased not only committed house trespass during that night, but also committed house breaking as he had an intention to commit the offence at the house of the accused.

10. It has also come out in her evidence that the deceased had caused extensive damage to the house and slapped on the cheek of the mother of the accused and was after herself, the wife of the deceased herself. The obvious intention of the deceased was to assault PW.2 and whoever intervened to save her. In such a situation the accused did have full right of private defence not only of the person of their mother and sister-in-law, but also of their property viz., their dwelling house which had been damaged by the deceased. In such a situation, necessarily, they did have the right to avert further threat to the person and property. So right of private defence was available, undoubtedly.

11. It is not necessary for the accused to specifically plead in so many words that they acted in self defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such plea. It is trite that in a given case, the Court can consider it even if the accused has not taken that plea, if the same is available to be considered from the materials on record. Even the absence of such a plea in the statement under Section 313 Cr.P.C. taken from the accused, will not denude them of that right, if that can be made out otherwise. Even if the accused has adopted another alternate defence at the time of Section 313 statement, they cannot be denied of the benefit of this general exception if the Court can cull out materials from the evidence pointing to the existence of circumstances leading to that exception. Thus, in terms of the evidence of the most material occurrence witness, PW.2 in this case, it has to be held that the accused had only exercised the right of private defence of person and property.

12. The next question that arises for consideration, as contended by the Public Prosecutor is whether they had exceeded that right. It is submitted by the Public Prosecutor relying on Ext.P8 that almost 40 injuries were inflicted on the deceased. Most of the injuries had been on his head. One or two injuries would suffice to avert the threat. In such circumstances, it is clear from the evidence of PW7, the doctor that the accused had caused more harm than what was necessary for the purpose of such defence to avert the threat faced by them. So this is a case where they have exceeded their right of private defence of any kind and they have caused more harm than was necessary for the purpose of such defence. They cannot therefore even take shelter under Exception No. 2 to Section 300 IPC. They did have, thus an intention to cause such bodily injury as they knew to be likely to cause death. Therefore, they are not entitled to plead for a lesser sentence even, the Public Prosecutor submits.

13. A person exercising right of private defence cannot weigh in golden scales, in the spur of the moment and in the heat of passion, the number of injuries required to avert further threat to the person and properties; that too during night, when it came from a person who committed house trespass and house breaking. In such moment of excitement and disturbed mental equilibrium, it is often difficult to expect the parties to preserve composure and use only so much force in retaliation commensurate with the danger apprehended. As held by the Apex Court on several occasions such situations have to be pragmatically viewed and not with high powered spectacles or microscopes to detect marginal overstepping. Due weightage has to be given to and hyper technical approach has to be avoided in considering what happens on the spur of the moment on the spot and keeping in view normal human reactions and conduct where self preservation is the paramount consideration.

14. When we examine the evidence of Ext.PW.2 closely, who is none other than the wife of the deceased, we can really perceive what really had happened during that night in the house of the accused. The drunkard quarrelsome brother had come to their house, broke open two doors, slapped on the cheek of their mother and created terror to snatch away their sister-in-law. The accused had to protect their mother, their sister-in-law, her child and all the more their dwelling house. In

such circumstances, what would have been done by the two accused cannot be viewed in the cool atmosphere of the court room. They would have done whatever they could to avert the threat not only to the person of their kin, but also to their dwelling house. It has also come out in the evidence including that of PW.6 and 8 that whenever there were quarrels involving the deceased, none from the neighbourhood used to interfere. That also discloses what was the character and conduct of the deceased as also the state of mind of the accused at the relevant time. In such situation even if more injuries had been inflicted by the accused, we cannot decide, counting the number of injuries or considering the nature of the injuries sustained by the deceased, that the accused had exceeded their right of private defence. It is now trite law that the persons faced in such a situation cannot modulate the blows one after another to the minimum possible extent to avert the threat faced. He cannot weigh and modulate the response by making and weighing assessments in golden scales. Viewing in that angle, the evidence PW.2 reveals that the accused were only exercising legitimately their right of private defence to avert the threat. PW.2 herself deposed that they had done it as they were left with no other option So this is a case where homicide was justified so far as the accused were concerned. Necessarily, we are of the view that the conviction and consequent sentence have to be set aside and vacated.

Accordingly, the appeal is allowed. The conviction and sentence passed against the accused in S.C.No. 618/2000 on the file of the Additional Sessions Judge, Fast Track (Ad-hoc) No. II, Thiruvananthapuram are set aside. They are directed to be set at liberty forthwith, if they are not wanted in connection with any other case.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**