

Shibu Vs. State of Kerala

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Court : Kerala

Decided On : Oct-31-1995

Reported in : 1996CriLJ1175

Judge : B.M. Thulasidas and; P.V. Narayanan Nambiar, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 143, 147, 148, 149, 302, 304, 307 and 342; Code of Criminal Procedure (CrPC) - Sections 313 and 357

Appeal No. : Crl. A. No. 552 of 1992

Appellant : Shibu

Respondent : State of Kerala

Advocate for Def. : K.I. Abdul Rashid, Public Prosecutor

Advocate for Pet/Ap. : B. Raman Pillai, Adv.

Judgement :

B.M. Thulasidas, J.

1. The appellant and five others were the accused in S. C. No. 63 of 1991 of the Additional Sessions Court, Pathanamthitta. They were tried for offences punishable under Sections 143, 147, 148, 342, 307 and 302 r/w. 149 I.P.C., the allegation being that they were members of armed unlawful assembly and in

prosecution of the common object they attacked PW-2 and the deceased Samuel at 9.15 p.m. on 11-10-1989 from the road in front of the shop of one George at Nellimala. PW-2 and Samuel sustained injuries to which the latter succumbed on the way to the Government Hospital, Thiruvalla. Information about the incident was given by PW-1 to PW-12, on the basis of which Crime No. 485 of 1989 of Thiruvalla police station was registered. PW-13 conducted the initial investigation. He held the inquest and as per Ext. P8 seized MOs 2 to 5 from the deadbody. PW-14 conducted the postmortem and in his certificate, Ext. P9, he opined that the deceased died as a result of the penetrating injury to his lungs. PW-17 took over the investigation, visited the scene of crime that was identified by PW1 and as per Ext. P7 mahazar seized MO 6. He questioned the witnesses and recorded their statements. Accused 2 to 6 were arrested on 30-10-89 and the first accused on 1-12-1989. As per his statement marked as Ext.P5(A), he seized MO 1 from an unoccupied place from the vicinity of the scene of crime under Ext. P5 that PW-7 had attested. The material objects were sent for chemical examination and were found stained with human blood by the Chemical Examiner vide his report Ext. P12. PW-17 laid the charge sheet.

2. Upon the accused pleading not guilty to the charge, the prosecution examined PWs 1 to 17, marked Exts. P1 to P12 and MOs 1 to 6.

3. When questioned under Section 313 Cr. P. C. A2 to 6 denied that they were in any manner involved in the incident and maintained their innocence. The first accused, the appellant herein, stated that he was attacked by PWs 1 to 3,6 and deceased Samuel at 8.30 p.m. on 11-10-1989 while he was returning home after work, that he somehow managed to escape, shut himself up in his house and on the next day early morning he went to the Thiruvalla police station, where he was detained. He urged that he was falsely implicated in the case. No witness was examined in defence.

4. The trial Court went into the evidence and other materials elaborately and held that the prosecution had proved its case against the appellant, who was accordingly found guilty under Sections 307 and 302 I.P.C. convicted and sentenced to undergo R. I. for seven years on the first Court and to imprisonment

for life on the second. The sentences were directed to run concurrently. No case was held to have been made out against the other accused and they were acquitted by the impugned Judgment dt. 4-8-1992, which is under challenge in this appeal.

5. Several contentions have been raised in the memorandum of Appeal to which reference will be made in the course of the judgment.

6. We heard counsel for the appellant and the Public Prosecutor.

7. There is no doubt on the evidence that the deceased had a homicidal death in the incident that occurred on 11-10-1989 at 9.15 p.m. as alleged. According to PW-14 the deceased died on account of injury No. 1, viz.

'Gaping incised wound with sharp edges 5 cm x 2 cm obliquely placed on the right side of chest upper and inner end of the wound 3 cms. right of midline and 7 cms. below the collarbone. Portion of the lung was protruding through the external wound.'

His evidence in that behalf was not disputed.

8. The witnesses to the occurrence are PWs-1 to 3 and 6. PW-5 is the doctor at the Government Hospital. Pathanamthitta, who proved Ext. P-3 wound certificate relating to PW-2 and Ext. P-4 certificate relating to the deceased. PW-7 was a witness to Ext. P-5 mahazar, under which MO-1 was seized. PW-8. Village Officer, proved Ext. P-6 sketch relating to the place of incident. PW-9 attested Ext. P-7 scene mahazar. PW-10 had forwarded the thondi Articles to the Chemical Examiner. PW-11. Police Constable, entrusted the deadbody to PW-14 doctor. PW-12 recorded Ext. P-1 from PW-1 on 12-10-1989 at 5 a.m. PW-13, Sub Inspector, held the inquest and proved Ext. P8 report. PW-15 proved the discharge certificate relating to PW-2. PW-16 had taken the deceased to the hospital in his autorikshaw and PW17 investigated the case.

9. We were taken through the evidence in detail. The appellant and those who were tried along with him on the one hand and the deceased and eye witnesses on the other belonged to different political parties and at the relevant time their

relationship was far from smooth or cordial. Following an incident that happened some time in August. 1989 relating to the tearing of a wall poster, that was pasted on the western wall of Mylakunnal George by some workers who belonged to the faction of the accused, by PW-2 there was a quarrel at 8 p.m. on 10-10-1989 in the course of which PW-2 was stated to have been slapped by the appellant, who had also threatened to teach him a lesson. On 11-10-1989 at 8.30 p.m. PWs-1, 3 and 6 met near the shop of George in Nellimala and while discussing certain political issues, the deceased and PW-2 also joined them. After some time PW-2 sought to go home and suddenly the accused, who emerged at the place surrounded him and blocked his way. The second accused was alleged to have called out to finish him and immediately the first accused took out a dagger and aimed it at him. when the deceased who was closeby rushed in pleading not to harm him. As he tried to take him away from the people who had encircled him. the appellant plunged his dagger on the right side of his chest and he fell down. PW-2. who tried to escape, was chased by the appellant and was stabbed causing injuries. PWs-1, 3 and 5 and those who were there raised an alarm whereupon the appellant escaped with his friends. The injured were removed to the hospital from the place where they had fallen by PWs 1 and 3 in two autorikshaws.

10. In Ext. PI that PW-1 had given without delay, he had set out the background of the incident and other relevant details. He had implicated the accused, who were known to him already. and stated that both the deceased and PW-2 were stabbed by the appellant with his dagger. Indeed he was very near the place of incident where there was sufficient light from the shop of Podippara Baby, to which reference had been made in Ext. P7 scene mahazar. Indeed he could have seen everything that happened so near him and his friends and that probably they did not interfere because they were outnumbered and one among them was armed with a dagger. He remained loyal to his version Ext. PI at the trial. His evidence has the ring of truth. In our view, his veracity is not open to doubt.

11. PW-2 is the paternal uncle of the appellant and as his evidence showed, besides political differences between them, there were family disputes too that had soured their relationship, which he had tried to conceal. As stated already, the appellant had slapped him the previous night following a quarrel and he paid him

back in the same coin. There is no doubt that each was biding his time to settle scores and precisely it was in that context that the incident in this case had happened on that fateful night. PW2 has corroborated the case of PW-I in all respects and stated that he was surrounded by the appellant and his friends and upon the call of the second accused, when the appellant tried to stab him. the deceased rushed to his rescue and while trying to take him away, the appellant stabbed him and he fell down. He took to his heels, but was chased by the appellant, who slabbed him from behind and he fell down. He identified MO I. with which he was stabbed, before the Investigating Officer as also at the time of trial. According to him he fell unconscious and regained consciousness following a surgery done in the hospital the next day. The medical evidence tendered by PWs- 5 and 15 was also in accordance with his version. He had an incised wound 2.5 x 1 cm. back of right side of chest 6 cm. below scapula. Depth not noted.' There are indeed no reasons to disbelieve his version despite the infirmities that were brought out and his hostility towards the appellant.

12. PWs. 3 and 6 had also given a consistent version of the incident and their testimony agreed in all material respects with that given by PWs. 1 and 2. It seems unnecessary to us to consider their evidence in detail.

13. That the appellant had slabbed PW. 2 and the deceased with a dagger had been established by acceptable evidence. There was motive to do so too. as alleged, which could not be doubted. Indeed he had targeted PW. 2 for what he had done and said, which was serious in that it was a scandal involving his mother. It was while the appellant tried to stab him allegedly at the call of the second accused, that the deceased rushed to his rescue and came to be slabbed just once, no doubt, on a vital part of the body. That was indeed not by design or upon premeditation, but happened just in the thick of events. We should discount that he had the mens rea to kill to attract the offence of murder. He had that in regard to PW. 2. who. no doubt, survived the attempt made on him.

14. In our view, in regard to the death of Samuel as a result of the injury the appellant inflicted, he is guilty of culpable homicide not amounting to murder punishable under the first part of Section 304 I.P.C. We accordingly find him guilty,

convict and sentence him to undergo R. I. for 8 years. We also sustain his conviction under Section 307 I.P.C. Indeed we are not persuaded to agree that there is a case for reducing/modifying the sentence awarded. We should observe that a sentence of imprisonment for the offence under Section 307 I. P. C. is mandatory. No doubt, in an appropriate case and having regard to the relevant evidence and circumstances it may be open to the Court to invoke Section 357 Cr. P. C. too not in derogation of or in substitution of the mandatory jail sentence, the quantum whereof can be decided in the sound discretion of the Court upon relevant materials. A sentence of fine alone will just not be legal. We are constrained to make his observation since our attention was drawn to a decision of this Court in *Joshi v. State of Kerala* (1995 (2) KLT 443). where *Hari Krishnan and Slate of Haryana v. Sukhbir Singh* : 1989 CriLJ116 seems to have been misapplied.

15. The sentences awarded shall run concurrently.

The appeal is disposed of as above.

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