

Rasi Vs. State of Kerala

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Court : Kerala

Decided On : Mar-10-2004

Reported in : 2004(3)KLT282

Judge : K.A. Abdul Gafoor and; J.M. James, JJ.

Acts : Indian Penal Code (IPC) - Sections 143, 147, 148, 149, 302, 304, 341 and 506; Indian Arms Act, 1959 - Sections 27(2) and 27(3); Code of Criminal Procedure (CrPC) - Sections 161

Appeal No. : Crl. App. Nos. 1187 and 1199 of 2002 and 76 and 854 of 2003

Appellant : Rasi

Respondent : State of Kerala

Advocate for Def. : Sujith Mathew Jose, Public Prosecutor

Advocate for Pet/Ap. : P. Vijaya Bhanu,; R.M. Rafiq,; P.M. Kunju Moideenkutty

Judgement :

K.A. Abdul Gafoor, J.

1. Appellants in these appeals, accused 1 to 7, in S. C. No. 301/2001, on the file of the Sessions Court, Kozhikode, have been charged for the offences punishable under Sections 143, 147, 148, 341, 506(ii) and 302 IPC read with Section 149

I.P.C., and also for the offences punishable under Section 27 (2) and (3) of Indian Arms Act, 1959. Accused 1 to 5 were convicted for all the offences charged against them under I.P.C., and were sentenced to undergo rigorous imprisonment for three years respectively under Section 148 and Section 506(ii), and for life imprisonment under Section 302 I.P.C., with a fine of Rs. 25,000 in default of which to undergo rigorous imprisonment for two years. They also have been sentenced to undergo simple imprisonment for one month under Section 341 I.P.C. Accused 6 and 7 were convicted for all the offences charged under I.P.C., except 302 I.P.C., and sentenced on same terms as above. Accused 2 to 7 were also convicted under Section 27 (2) and (3) of the Arms Act, and were sentenced to undergo rigorous imprisonment for three years. This conviction is under challenge in these appeals. Crl.A.No. 76/2003 is by accused 1 to 3. Crl.A. No. 1187/2002 is by accused 4 and 6. Crl.A.No. 854/2003 is by the 5th accused and Crl.A. No. 1199/2002 is by the 7th accused. The contentions urged by the Counsel appearing in these appeals are almost same, mainly assailing the identity of the person as spoken to by P.Ws. 1, 4 and 9. They also assail the recovery effected in bulk from the residence of the third accused.

2. Alleged incident happened as follows. During night on 4th March 1998, Alex Jacob, PW.4 Biju and CW.3 Ratheesh, met in a bar hotel called 'Hotel Maharani'. After taking liquor, they came to Mavoor Road to take food from a bunk shop near the footpath. There they saw the second accused quarrelling with PW.12, an alleged night flower, Suharabi. Alex Jacob intervened in their quarrel, and asked the second accused to leave PW.12 alone. This resulted in push and pull between the second accused and Alex Jacob, as a result of which, the second accused fell down. Accused 1, 3, 4 and 5 were also present at that time. First accused threatened the said Alex Jacob, and all of them, A1 to A5, went towards westwards. Few minutes later, accused persons came to the scene of occurrence, first accused carrying M.O.1 dagger, and others carrying swords, identified as M.O.2 series. There were wordly altercations between the two groups. It was at that time, PW.1 came in a motor bike. He identified Alex Jacob as his classmate, and therefore, tried to intervene in the quarrel. It was at that time, 5th accused threatened PW. 1 by wielding the sword in his hand. When PW.1 withdrew, the first accused stabbed on the chest, below the collar bone with M.O.1 dagger, of

the Alex Jacob. On getting the stab injury, the said Alex Jacob ran towards the east and the accused persons when towards west. PW.1 and others hospitalised the injured Alex Jacob. When brought to the hospital, the Doctor certified Alex Jacob dead. Immediately, PW1 launched Ext.P-1 F.I. Statement at about 3.00 a.m., on 5th March 1998 to PW 8, the Head Constable of Kasaba Police Station, Kozhikode. He registered Ext.P-1(a) F.I.R. PW.15, the Circle Inspector of Police, undertook the investigation. Thereafter, the investigation was completed by PW.17, who was the successor in office of PW.16. PW.17 laid the charges.

3. The prosecution examined 18 witnesses, and marked 25 documents. M.Os. 1 to 12 were also identified. PWs. 1, 4 and 9 are the ocular witnesses. The identity of the persons were not revealed by either the first informant or the witnesses questioned by the police. This required test identification parade. This was conducted by Judicial First Class Magistrate-II, Kozhikode, upon orders from the Chief Judicial Magistrate. After appreciating the evidence on record, the Court below found the accused guilty as aforesaid, and passed sentences as mentioned above.

4. It is contented by the appellants, namely, accused 4 and 6 in CrI.A.No. 1187/2002 that they had never been present in the scene of occurrence. They have been implicated in the crime because of mistaken identity. Immediately after the occurrence, the photographs of all the accused including them had been published in the vernacular newspapers giving their names. This enabled PWs.1, 4 and 9, to chalk mark the accused later. Therefore, they shall be exonerated, as they have been implicated based on mistaken identity.

5. Almost same contention is urged by all the other accused as well. It is also contented that the test identification parade was conducted after 18 days of arrest. The witnesses were summoned to the police station to question them, when the accused were present in the police station. It is further contented that, while accused 1 and 3 had been taken for the purpose of recovery, the other accused had been kept in the police station enabling the witnesses to identify them, as involved in this case. Moreover, on two occasions, after their arrest, they have been produced in the open Court. This also enabled the witnesses to identify them

as the accused in this case. The accused persons have also complained to PW.6 about the test identification parade, and the opportunity being given to the witnesses to find them in advance, so that they could be identified in the parade. It is also submitted that the features of the persons other than the suspects included for the test identification parade had not been described by the Magistrate, either in his deposition or in his report, Ext.P5. Without associating persons having similar features as that of the accused persons, the test identification parade cannot have any relevance.

6. It is further submitted that there was no occasion of any offence punishable under Sections 341 or 506(ii) being committed. Therefore, even going by the prosecution case, there was direct overt act by the first accused only, leaving alone the exhortation by PW.3 against PW.1. In such circumstances, there cannot be any unlawful assembly being formed with a common object to commit any offence, it is submitted. So, there arise no question of sharing of any common object by anyone along with the first accused to commit the murder of the said Alex Jacob.

7. It is further submitted on behalf of the first accused that there was no occasion for the first accused stabbing the said Alex Jacob, as Alex Jacob was accompanied by PW.4 Biju and C.W.3 Ratheesh. PW.1 also had come for their rescue. In such a situation, it was improbable for the first accused to commit an offense in the public road. Moreover, it is submitted that even going by the prosecution case, it was the deceased who intervened and threatened second accused, when second accused was talking with PW.12. The second accused was pushed down by the deceased. Therefore, the deceased was the assailant. Admittedly by the prosecution, there was altercation. If at all there was homicide, it had arisen out of the altercation, and cannot, on any count, be brought within the fold of Section 302 IPC. There was no intention to commit the murder also. Therefore, the conviction by the court below cannot be supported and sustained.

8. As we see from Ext.P1F.I. Statement, PW.I, at the time of occurrence identified only accused 1 to 5. In such circumstances, there was absolutely no reason to subject first accused and 5th accused to test identification parade at the instance

of PW.1 at least. Whether, PW.1 knew any of these accused earlier is also doubtful from his deposition. Though he says that he knew the first accused even from the date earlier than the occurrence, he did not know what his avocation was. He could not even locate, even on the date of examination, the residence of the first accused exactly. He also did not know where the 5th accused was residing. According to him, he knew the name of the third accused on the date of test identification parade. He had categorically stated before the Court below that. He further states that he knew the names of the accused from the newspapers, as their names have been mentioned along with their photographs. He also had stated that it was after the publication of photographs in the newspapers that the identification parade has been conducted. Even though he has stated in his statement under Section 161 Cr.P.C. to the police that he knew 3rd accused also, he was not certain, when he deposed before the Court below. Thus, it cannot be taken from his deposition, that he had identified any one other than accused 1, 3 or 5. Because even according to him, he had stated in his F.I. Statement that he could recognise them by seeing later. But he recognised so in the identification parade, after identifying them from the photographs and the names published in the newspapers. Therefore, identification by PW. 1 of any of the accused other than accused 1, 3 and 5, cannot be accepted.

9. The other ocular witness is PW.4. Admittedly by him, in the Court below, he could not identify any of the accused by name, but only by sight. It is true that Magistrate, PW.6, had stated that PW.4 identified accused 1, 2 and 5 by name, obviously because he did have the occasion to see the photographs published in the daily newspapers. Even going by the deposition of PW.4, he had identified in the test identification parade, accused 1, 2 and 5 and none else. Even this identification is based on his acquaintance with their figures because of the publication of photographs. Moreover, he had also deposed before the Court below that before he entered into the identification hall, C.W.3 had communicated about the figure of 5th accused to him. It is keeping in mind such discussion, that he had identified the 5th accused.

10. PW.9, though was summoned to take part in the identification parade, did not go there. Even according to him, he had no previous acquaintance with any of the

accused. He identified such persons in Court. A person who did not have any type of acquaintance with the assailants at the time of occurrence, cannot validly identify them, for the first time in Court, unless they had been shown to him. Therefore, his identification in the Court also does not have any evidentiary value. Thus, in this case, there was no proper identification of any of the accused other than accused 1, 2, 3 and 5. Accused 1, 3 and 5 had been identified by PW.1, even without test identification parade. Second accused had been identified by PW.4 in the test identification parade.

11. Ext.P5 report submitted by PW.6 Magistrate is to the following effect. 'Witness 2, Biju, told me that he has no previous acquaintance with any of the accused, and he could identify only some of the suspects by their name, but he could identify by sight'. Obviously because their photographs with names have been published in the newspapers. Therefore, from the facts of this case, we can accept the identification of accused 1, 3 and 5 by PW.1 alone.

12. It is submitted by the Counsel for the accused/appellants that test identification parade has no evidentiary value, as the photographs of the accused persons have been published in the newspapers sufficiently earlier than the conduct of test identification parade. In this regard, a decision of the Supreme Court reported in *Vijayan v. State of Kerala*, 1999 SCC CrL. 378, had been relied on.

13. Countering this contention, it is submitted by the learned Public Prosecutor that mere publication of the photographs in the newspapers cannot in any manner, vitiate the test identification parade. It will vitiate only if the photographs have been specifically shown to the witnesses before the test identification parade. In this regard, this decision reported in *Sajeevan v. State of Kerala*, 1993 (1) KLT 712, is relied on.

14. In the decision of the Supreme Court relied on by the appellant, it has been held by the Supreme Court as follows:

'8..... We are unable to agree with this conclusion particularly when it is apparent from the prosecution material that much before the holding of the test identification parade, the photograph of the accused Vijayan had been published

in the newspaper and because of a certain sensation in the locality, it had a lot of publicity and there was sufficient opportunity for the witnesses being shown the accused person. In this view of the matter, in our considered opinion, the High Court erroneously interfered with the conclusion of the learned Sessions Judge in this regard and came to hold that the identification of Vijayan by PW.4 could be relied upon. We have examined the evidence of the said PW.4 in great detail and we are unable to subscribe to the view the High Court has taken on the evidence of the aforesaid witness'.

15. The facts of the said case are similar to the one on the hand. But the facts of the Sajeevan's case relied on by the Public Prosecutor is yet different. There, no test identification parade has been conducted at all. That was a case where photographs had been shown to the witnesses. Even then, in para 11, a Division Bench of this Court, considered the publication of photographs of the accused persons in the newspapers, and held that it cannot be taken to have vitiated the identification parade, merely because of such publication. Even then, the Division Bench was cautious 'to observe that,

'11..... Of course, it is open to the Court to decide whether a witness's evidence regarding identification was really influenced by such publication'.

16. In this case, PW.4 did not have acquaintance with any of the accused as stated by him in his deposition. Therefore, if at all he had identified them by sight, as stated in Ext. P5 report of PW.6 Magistrate, necessarily, it shall be based on the photographs that he had admittedly seen from the newspapers. Necessarily, this is a case where the identity of the accused has been disputed, and the PW.4 could identify the accused only on the strength of his seeing photographs. Equally so, is in respect of other accused except accused 1, 2 and 5 identified by PW.1.

17. It is also not known, why CW.3 Ratheesh who had accompanied the deceased and PW.4 to take food from the bunk shop in the footpath of Mavoor road, who also had been associated with the test identification parade was not examined in this case. There is yet another factor. The dispute cropped up from PW12 Suharabi, an alleged night flower, who was seen talking with the second accused. Admittedly, the deceased had intervened in the talk, there was an altercation and

the second accused fell down as a result of that. Admittedly by the prosecution, Accused 1, 3, 4 and 5 were present in the scene at that time. In such circumstances, it would have been attempted by the prosecution whether PW.12 could identify any of the accused. Unfortunately, such attempt has never been made. Therefore, this is a case where there was no clear identification.

18. Any how, out of the seven, presence of four accused, had been thus doubted. Necessarily, charges under Sections 143, 147, 148 and 149 I.P.C. will vanish. Consequently, the sentence imposed under Section 148 as well.

19. There arises no question of any wrongful restraint as well, because PWs.1 and 4 could withdraw, when there was threat. Had there been any wrongful restraint, there arises no question of any occasion for them to withdraw. Therefore, the conviction and sentence under Section 341 I.P.C. cannot be sustained.

20. When there was no unlawful assembly, there arose no situation of any conviction under Section 506(ii) IPC as well.

21. Then, what remains is only conviction under Section 302 I.P.C. and under Section 27 (2) and (3) of Arms Act, in respect of Accused 1, 2 and 5, as the identity of the other accused is not proved as mentioned above.

22. When PW.1 came to the scene of occurrence, he had noticed a quarrel between the accused party and the deceased, his former classmate. He intervened. It was at that time, there were threat from the hands of the 5th accused, who did possess one among the swords in M.O.2 series. He withdrew. Then, the first accused inflicted fatal injury on Alex Jacob, the deceased. That is the only overt act, so far as the deceased is concerned, from the hands of any of the accused. In such circumstances, when the 5th accused was only confronting PW. 1, it cannot be taken that he did share any common intention with the first accused to commit the murder of Alex Jacob. There is no overt act, even of any exhortation attributed to the second accused. Therefore, he also cannot be said to have shared any common intention with the first accused in committing the murder of Alex Jacob. Therefore, both of them also have to be exonerated out of the conviction under Section 302 I.P.C. read with Section 34 I.P.C.

23. As regards the conviction of the first accused, we have to re-appreciate the evidence on record. PW. 1 had given ocular evidence that the first accused had stabbed the deceased Alex Jacob. The medical opinion by PW.14, and the opinion expressed in post-mortem certificate, Ext.P11, are that the said injury was fatal so far as the deceased was concerned. M.O.1 is a deadly weapon, a dagger. He had taken it after withdrawing from the scene of occurrence. He had threatened Alex Jacob before he withdrew. Therefore, his intention to commit the offence on Alex Jacob is manifest. PW.4 also has seen the first accused inflicting injury on the deceased. The deceased sustained only one injury, and that was out of M.O.1 and that injury was fatal as spoken to by PW.14, as mentioned above. Necessarily, this was a case of clear murder committed by the first accused.

24. His case that there was an altercation earlier cannot be of any avail to him to shift the crime from Section 302 I.P.C. to any other section including Section 304 I.P.C., because earlier altercation was between the deceased and the second accused, and not between the deceased and the first accused. Therefore, there arises no question of any passion being arisen in the first accused to react. The alleged occurrence was not at the time when the deceased threatened the second accused or the first accused, who had fallen down as a result of the push by the deceased. Therefore, there arises no question of exercising any private defence, as threat had ceased to exist, when all of them had withdrawn from the scene of occurrence after the first phase of the incident. So, this is a clear case of murder committed by the first accused. Necessarily, his conviction under Section 302 I.P.C. has to be sustained.

25. Regarding recovery of M.O.2 series weapons, there is a lot of confusion. It has been stated to be recovered from a beach, on disclosure by the third accused. But their identity and their presence on the scene of occurrence have not been proved. Necessarily, the conviction under Section 27 (2) and (3) of the Arms Act, also cannot be sustained.

Accordingly, we allow Crl.A. Nos. 854/2003, 1187 of 2002 and 1199 of 2002 in full, and Crl.A.No. 76/2003 in part, and order as follows:

(1) The conviction of all the accused in S.C.No. 301/2001 on the file of the additional Sessions Judge, Kozhikode, except that of the first accused, is set aside.

(2) Accused Nos. 2 to 7 shall be set at liberty forthwith, if they are not wanted in connection with any other case.

(3) The conviction of the first accused under Section 302 I.P.C. is sustained, and consequently, his sentence also is confirmed.

Communicate a copy of the Judgment to the superintendent of Central Prison, Kannur.

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