

Suni Vs. State of Kerala

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Court : Kerala

Decided On : Jan-15-2006

Reported in : 2006(3)KLT618

Judge : J.B. Koshy and; V. Ramkumar, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 143, 147, 148, 149 and 302; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 161, 232, 313, 313(1), 464, 464(1), 464(2), 465, 535 and 537; [Explosive Substances Act, 1908](#) - Sections 3 and 5

Appeal No. : Crl. A. Nos. 528, 778 and 1003 of 2003

Appellant : Suni

Respondent : State of Kerala

Advocate for Def. : Noorjie Noushad and Sujith Mathew Jose, Public Prosecutors

Advocate for Pet/Ap. : P.S. Sreedharan Pillai,; C.S. Sunil,; Shehana Karthiyake

Judgement :

V. Ramkumar, J.

1. Accused Nos. 1 to 6 and 8 in S.C. No. 435/2000 on the file of the Addl. Sessions Court, Thalassery for offences punishable under Sections 143,147,148

and 302 read with Section 149 I.P.C. challenge the conviction entered and the sentence passed against them by that court for the aforementioned offences.

2. The case of the prosecution can be summarised as follows:

On 1-11-1998 at about 9.30 a.m. the 8 accused persons owing allegiance to the B.J.P. out of their political enmity towards the persons belonging to the C.P.I. (M) and in furtherance of their common object of causing the death of Pavithran a C.P.I.(M) activist, formed themselves into an unlawful assembly in front of the veranda of shop No. 37 of Thrippangottur Panchayath at Poyiloor and armed with deadly weapons like chopper, sword-stick, hatchet etc. and committed rioting. They attacked Pavithran who was sitting in front of the aforesaid shop by inflicting a stab injury on his right leg with a hatchet. When Pavithran, after receiving injury, made an attempt to escape from there the accused persons chased him and cut him and stabbed him with the aforesaid lethal weapons in front of the hotel of one Kumaran. After sustaining the grievous injuries when Pavithran fell down, the accused persons took to their heels. Pavithran who was initially taken to the Government Hospital, Thalassery was referred to the Medical College Hospital, Kozhikode from where he succumbed to the injuries. The accused have there by committed offences punishable under Sections 143, 147, 148 and 302 read with Section 149 I.P.C.

3. On the accused pleading not guilty to the charge framed against them by the court below for the aforementioned offences, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 16 witnesses as P.Ws, 1 to 16 and got marked 19 documents as Exts. P-1 to P-19 and three material objects as M.Os. 1 to 3.

4. After the close of the prosecution evidence, accused were questioned under Section 313(1)(b) Cr PC. with regard to the incriminating circumstances appearing against them in the evidence for the prosecution. They denied those circumstances and maintained their innocence.

5. The learned trial Judge on finding that this was not a fit case for acquittal under Section 232 Cr PC. called upon the accused to enter on their defence and to

adduce any evidence which they might have in support thereof. Except getting marked Exts.D-1 to D-5 case diary contradictions of some of the prosecution witnesses, the accused did not adduce any defence evidence.

6. The learned Addl. Sessions Judge after trial, as per Judgment dated 25-2-2003 found all the accused guilty of the offences charged against them and after hearing them on the question of sentence by order dated 28-2-2003 sentenced accused Nos. 1 to 6 and 8 each to imprisonment for life and to pay fine of Rs. 20,000 and on default to pay the fine to undergo rigorous imprisonment for two years under Section 302 read with Section 149 I.P.C., to undergo rigorous imprisonment for six months under Section 143 I.P.C. and to undergo rigorous imprisonment for three years under Section 148 I.P.C. No separate sentence was awarded for the conviction under Section 147 I.P.C. The substantive sentence of imprisonment was directed to run concurrently. It is the said Judgment which is assailed in these appeals by accused Nos, 1 to 6 and 8. Since the 7th accused died during the pendency of the trial the charge against him had abated.

7. We heard Adv. Sri P.S.Sreedharan Pillai, the learned Counsel appearing for accused Nos. 1 to 6 who are the appellants in Crl. Appeal Nos. 528/03 and 1003/03 and Adv. Smt. Shehana Karthikeyan, the learned Counsel who defended the appellant (8th accused) in Crl. Appeal 778/2003 on State Brief. We also heard Adv. Sri Sujith Mathew Jose, the learned Public Prosecutor who defended the State.

8. Assailing the conviction and sentence passed against the appellants, the learned Counsel for the appellants made the following submissions before us: None of the occurrence witnesses including P.W.I had actually seen the incident in which deceased Pavithran had sustained fatal injuries. The names of the accused were not initially mentioned in the First Information Statement or in the statements under Section 161 Cr PC. at the earliest point of time. This will show that the appellants were subsequently implicated after due deliberations and consultation. The scene of occurrence, according to the prosecution, is from the shop by name 'Red Rose' of one P.V.Kumaran and extending up to the hotel belonging to another Kumaran. But there was not even a trail of blood at the scene of

occurrence. This will go to show that the prosecution has purposely suppressed the true facts and the genesis of the occurrence. Vide *Meharaj Singh v. State of U.P.* 1994 SCC CrI. 1390. The version given by P. Ws. 1 to 3 from the witness box is totally different from that of the prosecution version. Even though the accused were initially charged for offences punishable under Sections 3 & 5 of the [Explosive Substances Act, 1908](#) also, when the final report was filed those offences were deleted. None of the persons who have witnessed the occurrence has been questioned or cited by the prosecution. The two Kumarans who own the shop 'Red Rose' and the hotel have been kept out of the witness box. According to the prosecution, the deceased was attacked when he was talking with his colleagues. But none of the colleagues has been examined by the prosecution. Even though one Kunhiraman, the owner of a tea shop in the vicinity of the scene of occurrence was questioned by the police and cited as C.W. 12, he was given up by the prosecution without any rhyme or reason. The testimonies of P.Ws. 1 to 3 are full of contradictions and embellishments. P. W. 1 at one point would depose that the incident occurred in the bus stand but would thereafter come out with a case that the deceased was attacked when he was sitting in the veranda of the shop by name 'Red Rose' while chatting with his friends. In the case of P.W. 2, his statement before the police was that the deceased was attacked after he fell on the ground. But when examined before court, he stated that the deceased was attacked before he fell down. As per the court charge the accused were called upon to answer the accusation that they caused the death of C.W.I. But the evidence which has been adduced by the prosecution is to the effect that they caused the death of one Pavithran and not C.W. 1. By calling upon the accused persons to defend a case which is totally different from the charge which alone they were called upon to answer, the appellants have suffered extreme prejudice. The act of framing charge is not an empty formality. Charge is the basic record which gives notice to the accused of the accusation he is going to be tried by the court so that he could establish his defence accordingly. No further prejudice need be proved in case a charge is defective as in the present case Vide *Suresh v. State of Kerala* 2006 (1) KLT 78.

(Editors' Note : Paras. 9 to 15 omitted being appreciation of evidence)

16. Ext.P-1 is the first information statement given by P, W. 1 on 1-11-1998 at 11 a.m. to the Head Constable (P.W. 12) of Kolavalloor Police Station. The evidence in the case shows that after the occurrence on 1-11-1998, there was a serious law and order situation prevailing in that area. In spite of that, the first information statement was promptly lodged by P.W. 1 at 11 a.m. on the same day. It is pertinent to note that P.W. 1 was the Headmaster of the M.L.P. School, Parapoyil, and there is no reason why he should give a false version of the occurrence. Ext. P-I F.I. Statement had reached the Magistrate concerned at 8.30 a.m. on the next day indicating that there has been no attempt to give an improved version of the occurrence. In Ext. P-I which is the earliest statement regarding the occurrence, the assailants identified by P.W. 1 and specifically named are the following:

1. Tharassiyil Suni
2. Tharassiyil Pradeepan
3. Echilat Chalil Manu
4. Kuniyil Rajan
5. Vinu

But the persons who are arrayed as accused in the charge-sheet and in the court below were the following:

1. Tharassiyil Suni
2. Tharassiyil Rajeevan
3. Echilat Chalil Aneesh
4. Echilat Chalil Manu @ Manoharan
5. K.Shylendran
6. A.C.Pavithran
7. Aswini Kumar

8. K.P.Reghu

Out of them A-7 died pending trial. But when examined before court, P.W. 1 came out with a version that Tharassiyil Pradeepan is also called Rajeevan and Kacheri Suni is also called Echilat Aneesh and that Kuniyil Rajan mentioned in Ext. P-1 is Shylendran. In other words, except the names of A-1 and A-4 all the other names mentioned in Ext. P-1 are that of persons who are not arrayed as accused before court and the attempt of P.Ws. 1 to 3 at the stage of evidence has been to show the names, of accused Nos. 2, 3, 5 before Court are the alias names of Pradeepan, Suni and Rajan mentioned in Ext. P-1. It is pertinent to note here that even Ext. P-10 report dated 10-11-1998 filed by P.W. 14 the 2nd investigating officer giving the full names and addresses of the accused persons, does not show any alias name for accused Nos. 2, 3 and 5. Likewise, the final report filed before court also does not show any alias names for accused Nos. 2, 3 and 5. Accused Nos. 2, 3 and 5 were also arrayed before the court below without any alias name. In the case of accused Nos. 6, 7 and 8 their names do not figure at all in Ext. P-1 F.I. Statement and 7th accused died pending trial. Under these circumstances, even though we are inclined to accept the prosecution case that Pavithran was attacked by about 8 persons who came in a jeep and after executing their mission they escaped in the jeep which was parked there, we are not able to accept the case of the prosecution that accused Nos. 2, 3, 5, 6, 7 and 8 were among those assailants.

17. The evidence adverted to above shows that accused Nos. 1 and 4 who were among the assailants were both armed with deadly weapons like chopper and hatchet, and they had inflicted cut injuries on the body of Pavithran who was unarmed and who was engaged in a conversation in the veranda of the shop called 'Red Rose'. 'Red Rose' is situated very close to the bus terminus (loosely described by the witnesses as bus stand) and that is why P.W. 1 deposed that the first part of the occurrence took place at the bus stand. Pavithran had altogether 19 injuries on his body of which 11 were incised injuries. There cannot be any doubt that any person sustaining such injuries would have definitely bled to death and it is no justification to contend that if timely medical aid had been rendered the life Pavithran could have been saved.

18. It is true that there is a mistake in the court charge which reads as follows:

That you along with other accused persons being motivated due to political enmity in furtherance of their common object, being members of an unlawful assembly, committing rioting armed with deadly weapon like kaimazhu at or about 9.30 a.m. on 1 -11 -1998 and voluntarily caused hurt to C.W. 1 with intent to murder him with kaimazhu and inflicted cut injuries all over the body while C.W. 1 was sitting in front of the verandha of ShopNo. 37 Thrippangottur Panchayat, Ward No. VII and due to the injuries sustained he breathed his last and thereby you committed the offence punishable under Sections 143, 147, 148 and 302 read with Section 149 I.P.C. And within the cognizance of court of Session; and I hereby direct that you be tried on the said charges.

The reference to C.W. 1 in the court charge is an obvious mistake and the person who was done to death is not C.W. 1 but Pavithran. It is nobody's case that C.W. 1 examined as P.W. 1 had breathed his last in the occurrence. At no point of trial had the accused raised a contention that the above inadvertent mistake in the court charge was a grave one causing prejudice to them or that they could not shape their defence properly. It was not even suggested to any of the prosecution witnesses that C.W. 1 (examined as P.W. 1) was the victim who was cut to death. At the stage of examination under Section 313 Cr PC. also none of the accused persons had a case that there was such a mistake in the court charge or that the above mistake in the court charge had caused prejudice to them. No arguments were adduced before the trial court also regarding mistake in the charge. Section 464 Cr PC. reads as follows:

464. Effect of omission to frame, or absence of, or error in, charge-

1. No finding, sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder or charge, unless, in the opinion of the court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

2. If the court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-

(a) in the case of an omission to frame a charge, order that a charge framed and that the trial be recommended from the point immediately after framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

Thus, even the absence of a charge is not a ground to interfere with the judgment unless it has occasioned failure of justice. When the cross-examination of all the prosecution witnesses indicates that the suggestions put to them was that it was Pavithran who was attacked and killed in the occurrence, it cannot be said that the accused had suffered any prejudice on account of the above mistake. No such objection was raised in the court below also. In *State of Andhra Pradesh v. Thakkidiram Reddy and Ors.* : 1998 CriLJ4035 , the Apex Court observed as follows:

10. Sub-section (1) of Section 464 of the Code of Criminal Procedure, 1973 ('Code' for short) expressly provides that no finding, sentence or order by a Court or competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact (emphasis supplied) been occasioned thereby. Sub-section(2) of the said section lays down the procedure that the Court of appeal, confirmation or revision has to follow in case it is of the opinion that a failure of justice has in fact been occasioned. The other section relevant for our purposes is Section 465 of the Code; and it lays down that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of

any error, omission or irregularity in the proceedings, unless in the opinion of that Court, a failure of justice has in fact been occasioned. It further provides, inter alia, that in determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

11. this Court in Willie (William) Slaney v. State of Madhya Pradesh : 1956 CriLJ291 , elaborately discussed the applicability of Sections 535 and 537 of the Code of Criminal Procedure, 1898, which correspond respectively to Sections 464 and 465 of the Code, and held that in judging a question of prejudice, as of guilt, courts must act with broad vision and look to the substance and not to technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself. Viewed in the context of the above observations of this Court we are unable to hold that the accused persons were in any way prejudiced due to the errors and omissions in the charges pointed out by Mr. Arunachalam. Apart from the fact that his point was not agitated in either of the Courts, below, from the fact that the material prosecution witnesses (who narrated the entire incident) were cross-examined at length from all possible angles and the suggestions that were put forward to the eye-witnesses we are fully satisfied that the accused persons were not in any way prejudiced in their defence. While on this point we may also mention that in their examination under Section 313 of the Code, the accused persons were specifically told of their having committed offences (besides others) under Sections 148 and 302/149, I.P.C. For all these reasons we reject the threshold contention of Mr. Arunachalam.

In Kammari Brahmaiah and Ors. v. Public Prosecutor, High Court of A.P. : 1999 CriLJ1134 , it is stated as follows:

Non-framing of charge would not vitiate the conviction if no prejudice is caused thereby to the accused. The trial should be fair to the accused, fair to the State and

fair to the vast mass of the people for whose protection penal laws are made and administered. Criminal Procedure Code is a procedural law and is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. In the instant case, accused were tried on the prosecution version that all of them went at 3.30 p.m. In the field of the deceased, they picked up the quarrel with him, inflicted injuries to the deceased as narrated by the prosecution witnesses, accused Nos. 3 to 6 participated as stated above: the statements were recorded under Section 313 of the Cr PC. and the questions were asked to the effect that they jointly came at 3.30p.m. and caused injuries to the deceased as stated by the prosecution witnesses and the role assigned to accused Nos. 3 to 6 was also specifically mentioned. Hence it is apparent that no prejudice is caused to the accused who were charged for the offence under Section 302, by not framing the charge for the offence punishable under Section 302 read with 149. Thus the conviction of the accused Nos. 3 to 6 for the offence punishable under Section 325 read with 149 cannot be said to be anyway illegal which requires to be set aside.

In Para 22 of *Bhoor Singh and Anr. v. State of Punjab* 1974 SCC CrL 664, it is stated as follows:

Nanak Chand's case (*supra*) relied on by the appellants was explained by this Court in *Willie William Slaney v. The State of Madhya Pradesh*. It was pointed out that the term 'illegality' used in Nanak Chand's case must be read with reference to the facts of that case where the Court found prejudice. The Code does not use the word 'illegality', nor defines 'irregularity' and illegality can only mean an incurable illegality, incurable because of prejudice leading to a failure of justice. It was stressed (per S. R. Das, Acting C. J. and Bose, J.) that the object of the charge is to give the accused notice of the matter he is charged with and does not touch jurisdiction. If therefore, the necessary information is conveyed to him in other ways and there is no prejudice, the trial is not invalidated by the mere fact that the charge was not formally reduced to writing. The essential part of this part of the law is not any technical formula of words but the reality, whether the matter was explained to the accused and whether he understood what he was being tried for.

19. After giving our anxious consideration to the entire facts and circumstances of the case we are of the view that the prosecution has succeeded in establishing the guilt of the accused Nos. 1 and 4 beyond reasonable doubt. But in the case of accused Nos. 2, 3, 5, 6 and 8 we have no hesitation to hold that the prosecution has not been able to establish their involvement in the occurrence to the required degree of proof. Accordingly accused Nos. 2, 3, 5, 6 and 8 are entitled to acquittal.

In the result Crl.A. Nos. 528 and 778/03 are allowed in toto and Crl.A.No. 1003/03 is partly allowed. The conviction entered and the sentence passed against accused Nos. 1 and 4 are confirmed. The conviction entered and sentence passed against accused Nos. 2, 3, 5, 6 and 8 are set aside and they are acquitted of the offences punishable under Sections 143, 147, 148 and 302 read with Section 149 of the Indian Penal Code and are set at liberty. Accused Nos. 2,3,5,6 and 8 shall be released from prison forthwith unless their continued detention is required for any other case.

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