

Thomas Vs. State of Kerala

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Court : Kerala

Decided On : Mar-22-1991

Reported in : 1992CriLJ581

Judge : K.T. Thomas and; P.K. Shamsuddin, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 299, 300, 302, 304, 323, 341 and 382; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Criminal Appeal No. 10 of 1988

Appellant : Thomas

Respondent : State of Kerala

Advocate for Def. : Aysha Youseff, Public Prosecutor

Advocate for Pet/Ap. : P. Vijaya Bhanu, Adv.

Judgement :

P.K. Shamsuddin, J.

1. Appellant challenges the conviction and sentence of imprisonment for life entered against him by the Sessions Court. Trichur for offence punishable under Section 302, I.P.C.

2. The act attributed to the appellant is that he fisted Rappai (now deceased) with hand and caused the death of Rappai due to subdural haematoma.

3. The appellant and Rappai were neighbours. However, on account of some boundary disputes, they were on inimical terms and many cases, both criminal and civil, were pending between them, and in one case the appellant was fined Rs. 500/-. On 17-2-1985 around 5 p.m. Rappai was going from north to south along Panokaran Road in Kanimangalam and when he reached in front of the house of one Viswambharan, the appellant, who was coming in the opposite direction fisted Rappai twice or three times above the right eye. Rappai sat down with pain and the accused ran away from the scene. PW 1 who was coming behind Rappai and PW 2 who was behind the appellant saw the occurrence. PW 2 went to the house of Rappai and informed his son PW 3 of the incident. PW 3 came to the place of occurrence and took Rappai to the District Hospital, Trichur. On getting information about the incident, PW 6 another son of Rappai who was working at the Salem Branch of South Indian Bank, came to the hospital and Rappai told PW 6 as to how the incident took place. On information from the District Hospital, PW 8, the Head Constable, Nedupuzha Police Station went to the hospital and recorded Ext. P-4 First Information Statement furnished by Rappai and prepared First Information Report and registered Crime No. 20/85 against the appellant for offences under Sections 341 and 382, I.P.C. Rappai underwent some treatment at the District Hospital, but finding that his condition became worse, he was taken to the Medical College Hospital, Calicut on 20-2-1985. Rappai was subjected to an emergency operation there. However Rappai died on 21-2-1985 at about 9 a.m. Therefore PW 15, the Circle Inspector of Police sent a report altering the offence from Section 323 to Section 302, I.P.C.

4. The accused gave a statement Ext. X-1 while he was in the District Hospital, where he was admitted at his request. He stated that there was an altercation between him and the deceased, which was followed by a scuffle and that he was injured in the incident. In his statement under Section 313, Cr. P. C. he denied his involvement in the crime.

5. That Rappai died as a result of the injuries sustained in the occurrence on 17-2-1985 does not admit of any doubt. Ext. P-8 is the post-mortem certificate issued by PW 13, Professor of Forensic Medicine, Medical College Hospital, Calicut. PW 13 noticed that the deceased had (1) incised sutured wound 19 cm. curved with concavity downwards, situated on the left side of the head one end 1.5 cm. above middle of left eyebrow and the other end 4 cm. in front of left ear and (2) incised wound 1 x 0.5 cm. vertical on the left side of head 3 cm. above top of the left ear with corrugated rubber drain in situ besides some contusions around the left eye and eyelid and also some abrasions on the back of left shoulder. Ext. P-8 reveals the following internal injuries. (1) Scalp tissue contusion over an area of 7 x 4 cm. on the left frontal region, (2) Oval bony defect 5 x 3 cm on the left temporal bone, (3) Thick subdural haematoma (Brown in colour) on the left temporal and frontal lobes of brain and (4) Brain laceration 10 x 5 x 1.5 cms. involving the left temporal and frontal lobes. Ext. P-8 shows that deceased died due to the head injuries sustained by him.

6. Prosecution examined PWs. 1 and 2 to prove the occurrence. Both of them spoke to the prosecution version that the accused fisted on the head and other parts of the body of the deceased twice or three times in front of the house of Viswasbharan. PW 2 further stated that he went to the house of the deceased and informed PW 3 about the occurrence and that PW 3 went to the place of occurrence and took the deceased into the District Hospital, Trichur. We do not find any reason to disbelieve the evidence of PWs. 1 and 2. No motive has been alleged against them to falsely implicate the appellant in a serious crime. PWs. 1 and 2 have given a consistent version about the occurrence and we are satisfied that they are speaking the truth.

7. Based on the evidence of PWs. 1 and 2, the Court below came to the conclusion that an offence under Section 302, I.P.C. has been made out against the appellant. Learned counsel for appellant challenged this finding and contended that even if the entire evidence of the prosecution is believed, only an offence under Section 323, I.P.C. is made out.

8. To constitute the offence under Section 302, I.P.C., the act should fall in one of the four clauses in Section 300, namely, (1) if the act is done with the intention of causing death or (2) with the intention of causing such bodily injury as the offender knows to be likely to cause death or (3) with the intention to cause bodily injury and the bodily injury intended is sufficient in the ordinary course of nature to cause death, or (4) if the person doing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death. We are unable to say that the act alleged would fall in any of the above clauses so as to bring the offence within the ambit of Section 300, I.P.C.

9. The next question to be considered is whether it would constitute culpable homicide not amounting to murder. All murders are culpable homicides, but all culpable homicides are not murders. Section 299 defines culpable homicides as follows :

Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to, cause death, commits the offence of culpable homicide.

In order to constitute an offence of culpable homicide, a person has to cause death by doing an act with the intention of causing death, or with the intention of causing such: bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death. Culpable homicide is the genus of which murder is the species. As pointed out by a Division Bench of the Allahabad High Court in *Behari v. State*, AIR 1953 All 203 : (1953 Cri LJ 565) what is left out of culpable homicide after the special characteristics of murder are taken away, is culpable homicide not amounting to murder and it is made punishable under Section 304, I.P.C. Subject to the five exceptions enumerated in Section 300, I.P.C., every act, which falls within one or more of the four clauses of that section is murder.

10. Section 304, I.P.C. will apply to the following classes of cases: (i) when the case falls under one or the other of the clauses of Section 300, but it is covered by one of the exceptions to that Section, (ii) when the injury caused is not of the

higher degree of likelihood which is covered by the expression 'sufficient in the ordinary course of nature to cause death' but is of a lower degree of likelihood which is generally spoken of as an injury 'likely to cause death' and the case does not fall under Clause (2) of Section 300, I.P.C., (iii) when the act is done with the knowledge that death is likely to ensue but without intention to cause death or an injury likely to cause death.

11. The word 'likely' means probably and it is distinguished from more 'possibly'. When chances of happening are even or greater than its not happening, we may say that the thing will 'probably happen'. In reaching the conclusion, the Court has to place itself in the situation of the accused and then judge whether the accused had the knowledge that by the act he was likely to cause death.

12. The act committed by the appellant in the instant case is that he fisted Rappai (now deceased) with hand which led to the death of Rappai due to subdural haematoma. Can we say that the appellant had necessary knowledge that his act was likely to cause death of Rappai? If such knowledge can be attributed to the appellant, the act committed by the appellant would certainly fall within the third limb of Section 299, I.P.C. and will constitute an offence of culpable homicide not amounting to murder punishable under Part II of Section 304, I.P.C.

13. In *Urmese v. State of Kerala*, 1959 Ker LT 1351 : (1960 Cri LJ 827) the deceased abused the accused's wife and on her reporting the matter to the accused, he dealt one blow with his hand to the deceased. It was held by this Court that the offence would fall only under Section 323 of the Indian Penal Code, even though death ensued. In *Rama-krishna Panicker v. State of Kerala*, AIR 1959 Kerala 372 : (1959 Cri LJ 1331) it was held by a Division Bench of this Court that where from the circumstances of the case, it is impossible to draw an inference that the accused would have intended to give the deceased anything more than a beating or thrashing to teach him a lesson for using foul language to him. Because of the diseased condition, the spleen of the deceased got ruptured in that case. This Court held that in the circumstances, the conviction of the accused under Section 304, I.P.C. cannot stand.

14. A similar situation as in this case, arose before a learned single Judge of the Bombay High Court in Dnyaneshwar Dag-doba Hivrekar v. State of Maharashtra, 1982 Cri LJ 1870. The accused and the deceased were neighbours and friends and after some quarrel, accused gave a blow on the head of the deceased with a stick, which resulted in the death of the deceased. It was argued that the accused had neither intention nor knowledge that his act would cause the death of the deceased. From the evidence, it was seen that the weapon used was a stick and the accused had neither intention nor knowledge that his act would result in the death of the deceased.

The Court held that offence would fall only under Section 323, I.P.C.

15. No doubt, in the instant case, the fisting resulted in subdural haematoma which led to the death of Rappai, but we are unable to say that the appellant can be attributed with the knowledge that by such act he was likely to cause death of Rappai. Nor are we in a position in the circumstances of this case, to hold that the accused intended to cause that particular injury which he caused. It is true that the appellant and the deceased were inimical. However, the evidence shows that the accused was unarmed, and he happened to see the deceased in a casual way and then some altercation ensued which led to the fisting by the appellant with hand. In the circumstances, his intention could only have been to give some thrashes to the deceased. It follows that the offence committed by him will fall only under Section 323, I.P.C.

We, therefore, set aside the conviction of the appellant under Section 302, I.P.C. and instead convict him for an offence punishable under Section 323, I.P.C. we also order that the appellant will undergo maximum sentence provided for the offence, namely rigorous imprisonment for one year. Learned counsel for the appellant has pointed out that the appellant has already undergone imprisonment for more than three years by now. In the circumstances, we direct that the jail authorities will release the appellant forthwith, if he is not required in connection with any other case.