

Rafeek and Others Vs. State of Kerala, Represented by the Public Prosecutor

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Court : Kerala

Decided On : Jan-12-2012

Judge : R. Basant & P.Q. Barkath Ali

Appeal No. : C.R.A. No. 1236 of 2009 ()

Appellant : Rafeek and Others

Respondent : State of Kerala, Represented by the Public Prosecutor

Advocate for Pet/Ap. : Shri. P.S.Sreedharan Pillai

Judgement :

R. Basant, J.

1. Did the learned Sessions Judge err in accepting and acting upon the oral evidence of PWs 4, 10 and 11?

(ii) Is the finding of the learned Sessions Judge that accused 1 to 8 were members of an unlawful assembly prosecuting a common object correct?

(iii) Are the appellants/accused 2 to 8 or anyone of them entitled to the benefit of doubt?

These questions are raised before us by Shri P.S.Sreedharan Pillai, learned counsel for the appellants in these appeals. Accused 2, 3 and 7 have preferred a separate appeal.

2. This case has already had a chequered career. The alleged incident took place on 19.03.2000 at about 7 p.m. The incident allegedly took place at the road intersection between the National Highway and the beach road leading westwards from the National Highway at Perumpadappu hospital junction in Trichur District. Altogether there were 15 accused persons. The prosecution alleged that all the accused persons on account of political animosity had entered into a criminal conspiracy to do away with Kareem, the deceased in this case. In prosecution of the criminal conspiracy hatched by all the accused, A1 to A8, formed themselves into an unlawful assembly and were allegedly waiting at the scene of the crime for deceased Kareem.

Deceased Kareem came to the scene of the crime at about 7 p.m in a motorcycle. PW10 was riding that motorcycle and deceased Kareem was the pillion rider. According to the prosecution, Kareem and PW10 on the motorcycle came from the beach road from west towards east to proceed northwards along the National Highway. They were allegedly stopped by A1 and A8. A1 attacked deceased Kareem with MO.3 sword(val)/chopper (koduval). A2 to A7 allegedly rushed towards deceased Kareem. A6 allegedly inflicted injuries on Kareem by beating him repeatedly with MO.4 iron rod. A5 allegedly cut deceased Kareem with MO.1 sword on his back. A4 allegedly inflicted 3 injuries on deceased Kareem by stabbing him with MO.2 sword stick. A8 allegedly caught hold of PW10 making it impossible for PW10 to proceed to Kareem and save him. All the 8 accused together after the incident allegedly went away from the scene of the crime. Investigation commenced with Ext.P4 F.I statement lodged by PW4. Investigation was completed and final report was filed by PW14, the Investigating Officer.

3. The learned Magistrate, before whom the final report was filed, after observing all legal formalities, committed the case to the Court of Session. All the 15 accused appeared before the Sessions Court which took cognizance of the offences alleged. All the accused denied the charges framed against them by the learned Sessions Judge. Thereupon the prosecution was directed to adduce evidence in support of its case.

4. The prosecution examined PWs 1 to 14 and proved Exts.P1 to P32. MOs.1 to 7 were also marked by the prosecution.
5. The accused in the course of cross examination of prosecution witnesses and later when examined under Section 313 Cr.P.C denied all circumstances which appeared in evidence and which were put to them. They did not at the first instance adduce any defence evidence.
6. The learned Sessions Judge by judgment dated 25.11.2004 found A9 to A15 not guilty of the charges leveled against them and acquitted them. A1 to A8 were found guilty, convicted and sentenced by the learned Sessions Judge by the said judgment.
7. A1 to A8 preferred appeals. Two sets of appeals were presented. One by A2 to A4 and A6 and the other by A1, A5, A7 and A8. By common judgment dated 26.03.2007, the Division Bench set aside the conviction and remanded the matter to the Sessions Court with directions to dispose of the matter afresh. Proceedings were directed to be continued afresh from the stage of Section 313 Cr.P.C. It is thus that the matter went before the learned Sessions judge again.
8. The learned Sessions Judge took up the matter for disposal afresh in the light of the judgment of this Court dated 26.03.2007. Proceedings against A1 to A8 continued. At that juncture it is submitted that A1 started absconding. Thereafter he was not available for trial. The case against him was hence split up. Proceedings continued against A2 to A7, the appellants before us. They were questioned afresh under Section 313 Cr.P.C. They examined a defence witness as DW1. Even before remand, Exts.D1 to D20 were marked by the defence.
9. The learned Sessions judge by the impugned revised judgment again came to the conclusion that the prosecution has successfully established the charges against the appellants. The learned Sessions Judge came to the conclusion that the evidence of PWs 4, 10 and 11 - eye witnesses, can safely be accepted and acted upon. The learned Sessions Judge came to the conclusion that charges against the appellants have been proved in part, ie. the offences under Sections 143, 147, 341 and 302 r/w 149 I.P.C were held to be proved against all the

accused, ie. A2 to A8. It was further held that as against A4 to A6, the charge under Section 148 I.P.C has also been proved. Accordingly, the learned Sessions judge proceeded to pass the impugned judgment imposing sentences on all the appellants under Section 143 I.P.C and 302 r/w 149 I.P.C. On A4 to A6 sentence was imposed under Section 148 I.P.C also. No separate sentences were imposed under Section 147 and 341 I.P.C.

10. Before us, the learned counsel for the appellants Sri P.S.Sreedharan Pillai and the learned Public Prosecutor have advanced detailed arguments. The learned counsel for the appellants submits that the learned Sessions Judge had erred grossly in placing reliance on the oral evidence of PWs 4, 10 and 11. At any rate, the court below has erred in concluding that all the accused were members of an unlawful assembly and were acting in prosecution of any common object. The appellants are, at any rate, entitled to the benefit of doubt. They deserve to be acquitted, contends the learned counsel.

11. The learned Prosecutor on the contrary contends that the oral evidence of PWs 4, 10 and 11 is eminently reasonable and acceptable. Their evidence clearly establishes that all the accused (A1 to A8) were members of an unlawful assembly of persons who acted in prosecution of their common object to attack and do away with the deceased. There is absolutely no justification in the claim for benefit of doubt by any of the appellants, contends the learned Prosecutor.

12. We have considered all the relevant inputs. An appellate judgment is and ought to be read in continuation of the judgment of the trial court. In that view of the matter, we deem it unnecessary to renarrate the oral and documentary evidence relied on by the contestants. Suffice it to say that the learned counsel have taken us through the oral evidence of PWs 1 to 14 and the contents of Exts.P1 to P32 and D1 to D20 in detail. We have also been taken in detail through the charges framed by the court against the appellants as also the statements given by the accused in the course of their 313 examination.

13. There is not a semblance of doubt possible on the question that the deceased had suffered injuries at about the place of occurrence identified by the prosecution and had succumbed to such injuries. The oral evidence of PW1 and Ext.P1

postmortem certificate show in detail the nature of injuries suffered by the deceased. Evidence is clear that the deceased suffered injuries at the spot of occurrence and succumbed to those injuries. The nature of injuries further reveal that plurality of persons must have mounted an attack on the deceased with plurality of weapons. On that aspect of the matter, there is no room for any semblance of doubt.

14. We now come to the charge against the appellants about causing injuries on the deceased. We have the evidence of PWs 4, 10 and 11 on this aspect. PW10 was the rider of the motorcycle in which the deceased was travelling as pillion rider at the relevant time. On this aspect of the matter, we find no serious dispute. In fact suggestions have been thrown at PW10 that he along with the deceased was guilty of indiscreet conduct. All that we intend to take note now is that the presence of PW10 at the scene of crime along with the deceased is not seriously disputed. We find it absolutely safe to come to the conclusion that PW10 was present along with the deceased at the scene of the crime. He must have witnessed the occurrence undoubtedly.

15. PW4 claims to have witnessed the occurrence. He was present by the side of the road leading to the National Highway (beach road) when the incident took place. The defence has questioned the assertion of PW4 that he had witnessed the occurrence. The incident took place at about 7 p.m on 19.03.2000. We have Ext.P4 F.I statement lodged by PW4 before PW13 at 8.45 p.m on 19.03.2000, ie. within a period of one hour and 45 minutes from the time of occurrence. The oral evidence of PW10 thus gets convincing assurance from the version of PW4 which in turn gets support from the contents of the contemporaneous Ext.P4 F.I statement. It is apposite to note that Ext.P4 F.I statement and Ext.P13 F.I.R registered on the basis of Ext.P4 had reached the learned Magistrate at 2.45 p.m on 20.03.2000. To this extent, Ext.P4 can afford convincing assurance to the court for the version of PW4. In Ext.P4 it is further stated clearly that PW10 was riding the motorcycle in which the deceased was travelling. Thus the evidence of PWs 4 and 10 get interse support from each other. Assurance is available for their versions from the prompt and contemporaneous Ext.P4 F.I statement.

16. PW11 claims to be a witness to the occurrence. Nothing has been brought out in evidence which can/must generate any doubt, suspicion, reservation or distrust against the version of PW11. There is a ring of truth around the testimony of PW11. His evidence is not shown to be interested or in material conflict with his statement given to the Investigating Officer in the course of investigation. There are no broad probabilities or intrinsic materials generating doubt or suspicion against his testimony. We do, in these circumstances, come to the conclusion that the oral evidence of PWs 4, 10 and 11 deserves a fair, reasonable and natural appreciation without any undeserved doubt, suspicion or distrust.

17. Coming to the specific details about the incident, from the evidence of PWs 4, 10 and 11 it appears to us to be evident that deceased and PW10 were travelling in the motorcycle which PW10 was riding. They reached the scene of the crime. It will be apposite straightaway to deal with the contention of the learned counsel for the appellants that the scene of the crime is not located correctly. One must carefully go through Ext.P5 scene mahazar as also Ext.P2 scene plan prepared by PW2 on the basis of Ext.P5. At the scene of the crime, there is a road intersection. The National Highway proceeds in the north -south direction and the beach road from the west joins the National Highway. It appears that in Ext.P5, the precise spot of occurrence is located on the National Highway lying north-south. The spot of occurrence is located on the tarred portion of the National Highway at a distance of 50 c.m east of the western kerb of the National Highway. That spot is located at a distance of 2.7 metres northwards from the road intersection. The learned counsel for the appellants relying on the oral evidence of PWs 4, 10 and 11 laboriously builds up an argument that according to the prosecution, the incident had taken place on the beach road and not on the National Highway. From this it is argued that the scene of the occurrence is not correctly located.

18. Considering the seriousness with which this argument is pursued by the learned counsel for the appellants, we have considered this contention in detail. According to the evidence of PWs 4, 10 and 11, while deceased and PW10 were proceeding on the motorcycle on the beach road, they were attempted to be stopped by A1 and A8. The motorcycle was stopped and at that point the deceased Kareem was attacked by the miscreants when he got out from the motor

cycle. The identification of the scene of occurrence with the help of blood marks in the scene mahazar Ext.P5 shows the same to be on the tarred portion on the National Highway 50 c.m east of the western kerb of the National Highway. This does not, according to us, bring into existence any vital incongruity with the case of the prosecution. That they were stopped/attempted to be stopped on the beach road is no assurance that the incident had also taken place on the beach road itself. More over we do not find any hidden motive or agenda for the prosecution to shift the scene of the crime from the beach road joining the National Highway on the west to the spot of occurrence marked in Ext.P5. We are, in these circumstances, of the opinion that this contention laboriously advanced by the learned counsel for the appellants cannot deliver any advantage to the appellants. The insignificant difference between the beach road and the spot of the incident marked on the National Highway does not generate any doubt, dissatisfaction or suspicion against the version of PWs 4, 10 and 11.

19. According to the prosecution, the deceased and PW10 who were coming on their motorcycle along the beach road were attempted to be stopped by A1 and A8. We have the evidence of PWs 4, 10 and 11 unanimously on this aspect. Insignificant contradictions with their previous statement before the Investigating Officer notwithstanding, we find the oral evidence of PWs 4, 10 and 11 on this aspect to be eminently reasonable and acceptable. The contradictions are only on the aspect whether they were stopped using words or gestures. After the deceased and PW10 were stopped, it is the evidence of PWs 4, 10 and 11 that A1 pulled out MO.3 concealed on his person and inflicted injuries on the deceased twice with MO.3. A8 allegedly caught hold of PW10 making it impossible for him to reach the deceased and help him. Much is attempted to be made out of the innocuous incongruity between the statement of PW4 in Ext.P4 that A1 had attacked the deceased with a sword (val) as distinguished from his present statement on oath that it was with a chopper (koduval) that A1 attacked the deceased. The evidence of PW4 clearly shows that when the sword has a curved end, he chooses to call it a koduval (chopper). According to us nothing turns upon this insignificant incongruity between the sword (val) and chopper (koduval) between the statements of PW4 in court and in Ext.P4. He has identified MO.3 to be that weapon.

20. It is the further case of PWs 4, 10 and 11 that when the deceased and PW10 were stopped and A1 and A8 indulged in the culpable overt acts against the deceased and PW10, all the 6 other accused came to the deceased and stood near him. A5 with MO.1 inflicted injury on the deceased. A4 with MO.2 inflicted multiple injuries on the deceased and A6 with MO.4 iron rod beat the deceased on a couple of times. This is the consistent evidence of PWs 4, 10 and 11. PWs 4, 10 and 11 further assert that A8, who along with A1 had stopped PW10 and the deceased, had also caught hold of PW10 making it impossible for him to reach the deceased and save him. We have been taken through the cross examination of PWs 4, 10 and 11. The core of their testimony relating to the overt acts of A1, A4, A5, A6 and A8 is found by us to be eminently reasonable and acceptable. We find no reason to find fault with the court below for having accepted the core of the testimony of PWs 4, 10 and 11. Their evidence is eminently reasonable and natural. Their statements before court are not in conflict with their earlier statements. Interse they corroborate each other. Their evidence is further supported by the contents of Ext.P4 F.I statement lodged promptly and contemporaneously. Their evidence is supported further by the medical evidence about the injuries found on the person of the deceased. The prosecution seeks to further support the oral evidence of PWs 4, 10 and 11 by the evidence tendered by PW14 about the recovery of MO.3, MO.1, MO.4 and MO.2 on the basis of the information furnished by A1, A5, A6 and A4 under Exts.P9, P10, P11 and P12 respectively. The medical evidence suggests that the injuries on the deceased could have been inflicted with these weapons. The evidence of chemical examination further shows that the 2 of these 4 weapons had blood stains on them also. About the recovery, we have the oral evidence of PW14, the Investigating Officer, as also PW12, the attester. The attester has turned hostile completely. However, he admits his signatures in Exts.P9 to P12. The contents of the contemporaneous Exts.P9 to P12, eminently support the oral evidence of PW14 Investigating Officer about the recovery of those weapons notwithstanding the hostility of PW12. We do not, in these circumstances, find any reason not to accept and act upon the oral evidence of PWs 4, 10 and 11. We are unable to find any reason to fault the reasoning of the court below that the oral evidence of PWs 4, 10 and 11 can safely be accepted. The broad circumstances and the intrinsic

materials discussed above suggest to us eminently that the core of the testimony of PWs 4, 10 and 11 can safely be accepted.

21. In addition to the incriminating evidence tendered against A1, A4 to A6 and A8 - about specific overt acts committed by them, PWs 4, 10 and 11 have also spoken about the role played by accused 2, 3 and 7. The learned counsel for the appellants first of all contends that even if the entire evidence were accepted, it would be totally improper to lightly assume that accused 2, 3 and 7 were members of an unlawful assembly along with A1, A4 to A6 and A8 or that they had shared any common object with the others.

22. We now have to look at the theory of the prosecution that all the 8 accused were members of an unlawful assembly. What is the common thread that binds all of them to persuade the court to assume that they were all prompted by any common object of unlawful assembly? It is said that deceased Kareem was a Muslim League man, whereas all the accused are said to belong to the Congress party. Except vague assertions, we are unable to agree that there is any such acceptable evidence which can safely lead the court to the conclusion that all the accused were members of an unlawful assembly prompted by their political ideology to cause any harm to the deceased. No such compelling materials have been placed before us to show that A1 to A8 are such active members of the Congress Party or that as Congress men, they have any unity of motive against the deceased. At any rate, satisfactory evidence of the existence of any common motive of A1 to A8 against the deceased has not been adduced.

23. It is well settled that even without specific overt acts on the part of members of an unlawful assembly they can be vicariously held guilty of criminal acts committed by other members of the unlawful assembly if it is proved that they are members of the unlawful assembly and the other members of the unlawful assembly had acted in prosecution of the common object of all the members of the unlawful assembly. It would therefore be an idle exercise generally in all cases to look for specific overt acts of the members of the unlawful assembly to make them culpably liable for the overt acts of other members of the unlawful assembly. But it is crucial that the court must be satisfied that all the indictes were members of the unlawful

assembly and they were prompted/triggered by a common object. In that context, it may not be unjustifiable for a court to look for specific overt acts to draw inspiration for the allegation that such persons/indictes were members of the unlawful assembly sharing a common object. We make it clear that it is unnecessary in every case to invariably look for specific individual overt acts by the members of the unlawful assembly to attract the play of vicarious liability under Section 149 I.P.C if membership in the unlawful assembly and the common object of the unlawful assembly are proved. But for a court to draw assurance in fact circumstances like the instant one that the indictes facing the charge were actually members of an unlawful assembly and had shared the common object, it will only be reasonable to look for overt act to confirm such membership of the unlawful assembly and sharing of common object. To exclude mere onlookers, from a group of persons some of whom are members of the unlawful assembly, Courts can safely resort to that exercise, reminding them always that it is the law that a member of the unlawful assembly can be vicariously held liable even in the absence of any specific individual overt act if the Court is convinced of his membership in the unlawful assembly and the culpable conduct of other members of the unlawful assembly in prosecution of the common object of the unlawful assembly. So far as A1, A4, A5, A6 and A8 are concerned, we note that they had stopped the deceased and PW10. They had indulged in specific overt acts. Accused 1, 4, 5 and 6 were armed with dangerous weapons also. Accused No.8, though he is not shown to have armed himself with any weapons, his complicity is evident from his conduct of stopping the deceased and PW10 and later holding PW10 making it impossible/difficult for PW10 to go for the rescue of the deceased. A1, A4, A5 and A6 can without any difficulty be held to be members of the unlawful assembly sharing the common object. A8 in view of the two specific overt acts alleged against him, which have been proved satisfactorily by the evidence of PWs 4, 10 and 11 can also be safely held to be a member of the unlawful assembly sharing the common object. The mere fact that PW10 in reply to a question stated that he cannot assert with certainty whether the intention of A8 was to save him from getting attacked, is no reason for the court to squander the evidence of overt acts by A8 - of his having stopped the deceased and PW10 and of his having restrained PW10 while the attack on the deceased was going on by the other

indictes. In the facts proved even if it be assumed that the intention of A8 in stopping PW10 was prompted by the desire of saving PW10, that only suggests that the ire of the unlawful assembly was directed specifically against the deceased only. That possibility - which does not appear to be convincing to us, even if accepted, cannot help A8 to claim absolution.

24. But so far as accused 2, 3 and 7 are concerned, the search of this Court for assurance for the fact that they were members of the unlawful assembly and that they had shared the common object remains unproductive. There is no satisfactory evidence to show that all the accused had come to the scene of the crime together or that they had left the scene of the crime together. Specific evidence on that aspect is significantly lacking. The evidence shows that when deceased and PW10 were stopped, all the other 6 accused had rushed to the place where the deceased and PW10 were restrained. The learned counsel for the appellants argues that even an innocent on looker with curiosity could have been attracted to the deceased and PW10. The mere fact that in a scene of crime like the instant one - a bazar road junction, A2, A3 and A7 who were unarmed and who did not indulge in any overt act even admittedly converged at the point where the deceased was being attacked, is no reason for a prudent mind to jump to the conclusion that they were members of the unlawful assembly along with the other indictes or that they had shared the common object of the members of the unlawful assembly. Accused 1, 4, 5, 6 and 8, we have already held, can safely be held to be members of the unlawful assembly. But on the question whether A2, A3 and A7 were members of the unlawful assembly and shared the common object with the other indictes, we feel it safer and more prudent to concede to them the benefit of doubt. We repeat that no common notice is proved. A2, A3 and A7 even allegedly did not carry any weapon. They even allegedly had not indulged in any specific overt act at the scene of the crime. We therefore hold that A2, A3 and A7 are entitled to the benefit of doubt and consequently are entitled to be acquitted.

25. We may, before parting with the case, refer to certain other contentions raised by the learned counsel for the appellants. The learned counsel attempts to make much out of the preponing of the incident by 15 minutes by the prosecution. In Ext.P4 the time of occurrence was indicated to be 7 p.m, but in evidence it was

stated that the incident took place some time between 6.45 p.m and 7 p.m. Witnesses do not speak by the clock. When PW4 narrated the time of occurrence to be 7 p.m, he was definitely speaking approximately and not by the minute hand and the seconds hand of the clock. The argument that the time is preponed in order to make it appear that sufficient light must have been available at the time of occurrence cannot safely be accepted in the light of the statement of witnesses that there was sufficient light - both natural and from sources, at the scene of the crime to enable the witnesses to ocularly perceive the incident.

26. The learned counsel also argues that there is incongruity as to whether the armed accused had gone northwards or southwards after the occurrence. We do perceive an incongruity on this aspect. But inasmuch as we do not rely on such conduct of the accused to draw any conclusion/inferences on the existence of the unlawful assembly, we do not reckon this circumstance to be crucial.

27. A contention is raised that 2 of the accused had also suffered injuries. The sequence of events in this case clearly show that, at any rate, the accused could not have suffered the injuries at the hands of PW10 or the deceased at the scene of the occurrence. There is no such case at all. In these circumstances, the attempt made to contend that 2 of the accused had injuries and that such injuries have not been proved or explained cannot deliver any advantage to the appellants.

28. The learned counsel for the appellants contends that the prosecution has not been fair in selection of witnesses for examination in court. Only PWs 4, 10 and 11 have been examined. They are persons interested in the deceased. Other witnesses cited including DW1 have not been examined by the prosecution. Though the Prosecutor has the prerogative to choose the witnesses to be examined, the choice is not fair and reasonable in this case and that affects the prosecution case, contends the learned counsel for the appellants. We do not accept this contention. As noted earlier, PW4, the first informant, has been examined. PW10, who was admittedly present along with the deceased, has also been examined. The sample of one other witness has been examined as PW11. The evidence of DW1 declares eloquently why the prosecution did not want to

examine that witness as a witness for the prosecution. We do not find that the prosecution is guilty of any unfairness or unreasonableness in the choice of the witnesses to be examined in the court out of the witnesses who were available to be examined. The challenge on this ground cannot also succeed.

29. We entertain no doubts on what must have been the common object of the unlawful assembly. The nature of the attack, the nature of the weapons carried and the nature of injuries actually caused leave no doubt in our mind that the common object of the unlawful assembly must have been to do away with the deceased. We are not persuaded to entertain any doubt on that aspect.

30. No other contentions are raised. We are satisfied, in these circumstances, that Crl.Appeal No.1236 of 2009 filed by A2, A3 and A7 deserves to be allowed and Crl.Appeal No.1600 of 2009 filed by A4, A5, A6 and A8 deserves to be dismissed.

31. In the result:

- a) Crl.Appeal No.1600 of 2009 is dismissed. The verdict of guilty, conviction and sentence imposed on A4, A5, A6 and A8 are upheld;
- b) Crl.Appeal No.1236 of 2009 is allowed. A2, A3, and A7 are found entitled to the benefit of doubt. They are consequently found not guilty and acquitted of all the charges levelled against them.

32. Registry shall forthwith communicate this judgment to the court below and the prison authorities. If further detention of A2, A3 and A7 is not required in connection with any other cases, they shall forthwith be released from custody by the prison authorities. The court below shall take necessary steps to ensure that.

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