

PETITIONER:
A.M. KUNHIKOYA @ KOYA

Vs.

RESPONDENT:
STATE OF KERALA

DATE OF JUDGMENT 26/03/1993

BENCH:
SINGH N.P. (J)
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SINGH N.P. (J)
ANAND, A.S. (J)

CITATION:
1993 SCR (2) 692 1993 SCC Supl. (3) 641
JT 1993 (3) 573 1993 SCALE (2) 275

ACT:
Indian Penal Code--Sections 148, 149, 302, 304 Part II and 323--Appellant--Taking into account evidence of PWs and circumstances of case--Held appellant had knowledge that injury was likely to cause death--No intention to cause death of victim.

HEADNOTE:
The appellant along with others was tried for offences under Section 302 read with Sections 148, 149 and 323 of the Indian Penal Code.

The case of the prosecution was that on 16.9.80 Mammed Kutty at 6.00 a.m. in the morning pelted stones at the house of the deceased. At about 12.00 noon while Mammed Kutty and his brother Abdulla Kutty were passing in front of the house of the deceased, a protest was made by the deceased in respect of the morning incident which was denied.

At about 2.00 p.m. when the deceased was sitting with his wife (PW 4) and others on the verandah of his house, 5 persons including the appellant came to his courtyard and challenged him to come out, if he wanted to beat Mammed Kutty and Abdulla. The deceased stepped out into his courtyard and asked the accused persons not to create a scene, when the appellant and the other accused gave some blows to the deceased on his hand. Thereafter the deceased raised his hand to give a blow to the appellant, when the appellant took out a dagger from his waist and gave an injury on the upper part of the chest of the deceased near the left shoulder and above the armpit. The deceased ran towards the house of PW1 and fell on the verandah. Therefore, the accused persons escaped. The victim was removed to the Medical Hospital where he was examined by PW 9, but soon thereafter expired.

The F.I.R. was lodged at 7.15 p.m. and after investigation the chargesheet was submitted against the five accused persons. At the trial the prosecution examined 4 eye witnesses, PW1 to PW4, and PW8 the doctor who held the post mortem examination.

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The trial court on consideration of the materials on record came to the conclusion that the charges leveled against the accused persons had not been established beyond all

reasonable doubt, and on that finding acquitted all the accused including the appellant. Great importance was attached to the injury found on the person of Abdulla and adverse inference was drawn against the prosecution case.

On appeal by the State, the High Court convicted the appellant under Section 302 and sentenced him to undergo rigorous imprisonment for life. Another accused (Alavi) was convicted under Section 323 of the Penal Code and sentenced to payment of fine of Rs. 250. The acquittal of the remaining 3 accused persons by the Trial Court was affirmed. The High Court held that mere non disclosure of the superficial injuries on the person of Abdulla even if those injuries had been caused in the same occurrence, do not in any manner affect the persecution case.

In the appeal to this court it was contended on behalf of the appellants that the statements made in the First Information Report, the evidence of the eye witnesses in connection with the morning incident of pelting of stones, show that it was a concoction and that none had pelted any stone on the house of the deceased, and that if this part of the prosecution case is disbelieved then it has a bearing on the main occurrence itself. It was further submitted, that the prosecution had suppressed the real manner of occurrence in as much as Abdulla was first assaulted by the prosecution party on the same day at about 130 p.m. and that he was hospitalised after receiving the injuries, reliance being placed on the evidence of DW1 who had stated that he had examined the injuries on the person of Abdulla on 16.9.80 at 430 p.m.

Allowing the appeal in part, this Court,

HELD:1. It is well settled that if the evidence of the eye witnesses is held to be reliable and inspires confidence then the accused cannot be acquitted solely on the ground that some superficial injuries found on the person of the accused concerned, had not been explained by the prosecution. [696 H]

In the instant case, so far as the four eye witness are concerned they have been named in the FIR. The FIR was lodged at 7.15 p.m., the same evening, within two hours of the death of the victim. The FIR mentions the

694 details of the occurrence, and the version disclosed therein had been supported by the eye witness before the Court. No reason has been shown as to why the evidence of these P.Ws should not be accepted. [697 C]

2.The prosecution has admitted that the accused persons were not carrying any weapon in their hands and during the protest made, a sudden quarrel and fight took place between the prosecution party and the accused persons. This part of the version had been admitted at the trial by the eye-witnesses in their evidence, who also stated that first the appellant and the other co-accused gave blows on the hand of the deceased and that the knife blow was given by the appellant when the deceased was trying to give a counter blow to the appellant. [697 F]

In view of the admitted position that a sudden right and quarrel preceded the giving of the knife blow by the appellant to the victim which in all probability was given not while the victim and the appellant were standing face to face but during struggle between them, causing tailing of the injury, it shall not be just and proper to hold that the appellant had an intention to cause the death of the victim, but only knowledge that injury which he was causing was likely to cause death. In such a circumstance it is not possible to uphold the conviction of appellant under Section

302 of the Indian Penal Code. It is therefore set aside, and the appellant convicted under Section 304 Part 11 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 7 years. [697 H, 698 A-C]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 818 of 1985.

From the Judgment and Order dated 4.7.1985 of the Kerala High Court in Criminal Appeal No. 251 of 1982.

P.S. Poti and Ms. Malini Poduval for the Appellant.

M.T. George for the Respondent.

The Judgment of the Court was delivered by

N.P. SINGH, J. The appellant along with others was put on trial for offenses under sections 302 read with 149, 148, 323 of the Penal Code on the charge of committing the murder of Moideen Kutty (hereinafter referred to as the deceased). The Trial Court on consideration of the
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materials on record came to the conclusion that the charges leveled against the accused persons have not been established, beyond all reasonable doubt and on that finding acquitted the appellant as well others. On appeal being filed on behalf of the State of Kerala the High Court convicted the appellant under section 302 of the Penal Code and sentenced him to undergo rigorous imprisonment for life. So far another accused Alavi who had been acquitted by the Trial Court was also convicted by the High Court under section 323 of the Penal Code and sentenced to pay a fine of Rs. 250 and in default thereof to suffer simple imprisonment for a term of one month. The acquittal of other accused persons was affirmed by the High Court by dismissal of the appeal against them.

The case of the prosecution is that on 16.9.1980 Mammed Kutty at 6.00 A.M. in the morning pelted stones at the house of the deceased. At about 12.00 in the noon while Mammed Kutty and his brother Abdulla Kutty were passing in front of the house of the deceased, a protest was made by the deceased in respect of the morning incident. They denied that any stone had been pelted by them. It is the further case of the prosecution that at about 2 P.M. while the deceased was sitting with his wife (PW4) and others on the varandah of his house, five persons including the appellant came to his courtyard and challenged him to come out, if he wanted to beat aforesaid Mammed Kutty and Abdulla. The deceased stepped out into his courtyard and asked the accused persons not to create a scene. At this the appellant and the other accused (since acquitted) gave some blows to the deceased on his hand. Thereafter the deceased raised his hand to give a blow to the appellant. At this very moment, the appellant took out a dagger from his waist and gave an injury on the upper part of the chest of the deceased near the left shoulder and above the armpit. The deceased ran towards the house of PW1 and fell on the varandah. Thereafter the accused persons escaped. The victim was removed to the Medical Hospital Calicut, where he was examined by PW9. But soon thereafter he expired. The First Information Report was lodged at 7.15 P.M. After investigation the charge sheet was submitted against five accused persons.

At the trial prosecution examined four eye witnesses PW1 to PW4. The doctor who held the post mortem examination was examined as PW8. He found only one incised penetrating

wound vertically placed on the front of left shoulder above the left armpit 'tailing 6 cm. in length running towards from the lower sharp end." According to his opinion, "The an
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died because the artery was cut..... This injury became dangerous only because it cut the artery..... In the cross examination PW8 stated that it was impossible to cause an injury like one which was found on the person of the victim by the assailant standing in front of the victim. He also stated that the tailing of the injury show that either the knife was dragged after stabbing or that the injury was caused during the course of the struggle. According to him, if the accused had given a direct blow, as is normally done, there would not have been the tailing of the injury.

The learned counsel appearing for the appellant placed the statement made in the First Information Report, the evidence of the eye witnesses, in connection with the morning incident of pelting of stones, to show that it was a concoction and none had pelted any stone on the house of the deceased. According to the learned counsel, if this part of the prosecution case is disbelieved then it shall have a bearing on the main occurrence itself. It was also pointed out that the prosecution has suppressed real manner of occurrence in as much as one Abdulla on the side of the accused persons was first assaulted by the prosecution party on the same day at about 1.30 P.M. and he was hospitalised after having received the injuries. That incident was an integral part of the occurrence which has not been disclosed by the prosecution. In this connection our attention was drawn to the evidence of DW1 who has stated that he had examined the injuries on the person of one Abdulla on 16.9.1980 at 4.30 P.M. and found three injuries on his person, (i) A contusion on the left shoulder 4 x 2 cm, (ii) abrasion below the right collar bone 3 x 5 cm. and (iii) injury on the outer side of the left ankle 4 x 3 cm. He has also stated that the said Abdulla had alleged that he had been assaulted with a wooden stick at 1.30 P.M. the same day.

The Trial Court while acquitting the accused persons has attached great importance to the injury found on the person of aforesaid Abdulla and has drawn adverse inference against the prosecution case. The High Court has rightly pointed out that merely non-disclosure of the aforesaid superficial injuries on the person of Abdulla even if those injuries had been caused in the same occurrence, shall not in any manner affect the prosecution case: It is well-settled that if the evidence of the eye witnesses are held to be reliable and inspire confidence then the accused cannot be acquitted solely on the ground that some superficial injuries found on the person of the accused concerned, had not been explained by the prosecution.

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According to us, if the evidence of four eye witnesses including the evidence of the son and the wife of the deceased are accepted as reliable and trust worthy then the prosecution case cannot be rejected merely on the ground that the incident of pelting of the stones on behalf of the accused in the early morning had not been proved or established or that some minor injuries on the person of Abdulla caused in the same occurrence had not been disclosed and explained by the prosecution.

So far the four eye witnesses are concerned they have been named in the First Information Report. The First Information Report was lodged at 7.15 P.M. the same evening, within two hours of the death of the victim. In the First

Information Report the details of the occurrence was mentioned. The version disclosed in the First Information Report has been supported by the eye witnesses before the Court. The learned counsel appearing for the appellant could not point out any reason why their evidence against the appellant should not be accepted. It may be pointed out that in the First Information Report itself PW1, the informant, stated that this appellant came to the house of the deceased and challenged him as to who was there to beat Abdulla and Muhammed Kutty. He further stated that having heard this the deceased moved towards them and asked them to go back. At that very moment this appellant and the other co-accused Alavi gave him blows on his hand. Thereafter the deceased tried to give counter blow to the appellant. Then the appellant took out a knife from his waist and gave a blow from the said knife, to the deceased at his left collar bone. The prosecution very fairly admitted that accused persons were not carrying any weapon in their hands and during the protest made, a sudden quarrel and fight took place between the prosecution party and the accused persons. Even at trial evidence the eye witnesses have admitted this part of the version and have stated that first the appellant and the other co-accused gave blows on the hand of the deceased. The knife blow was given by the appellant when the deceased was trying to give a counter blow to the appellant.

There is no dispute that the appellant suddenly took out the knife during the course of the quarrel and fight from his waist. From the evidence of doctor PW8 referred to above it appears that injury aforesaid could not have been caused by the assailant standing in front of the victim. It could have been caused only during the struggle. In view of the admitted position that a sudden fight and quarrel preceded the giving of the knife

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blow by the appellant to the victim which in all probabilities was given not while the victim and the appellant were standing face to face but during a struggle between them, causing tailing of the injury, it shall not be just and proper to hold that appellant had an intention to cause the death of the victim. Taking the evidence of the witnesses along with circumstances of the case, according to us, the appellant had the knowledge that injury which he was causing was likely to cause death but he had no intention to cause the death of the victim. In such a circumstances it is not possible to uphold the conviction of the appellant under section 302 of the Penal Code. Accordingly, the conviction and sentence passed against the appellant under section 302 of the Penal Code are set-aside. The appellant is convicted under section 304 part 11 of the Penal Code and sentenced to undergo rigorous imprisonment for seven years. The appeal is allowed in part to the extent indicated above. The bail bond is cancelled.

N.V.K.

Appeal partly allowed.

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