

SOMON

v.

STATE OF KERALA

(Criminal Appeal No. 1693 of 2008)

OCTOBER 24, 2008

[C.K. THAKKER AND D.K. JAIN, JJ.]

Penal Code, 1860 – ss. 302 and 304 (Part I) – Six armed accused formed unlawful assembly with common object to kill deceased – Riot committed and injuries caused to deceased resulting in his death – Previous enmity between parties – Conviction of accused no. 1 u/s 302 r/w s. 34 and others u/s. 147 and s. 148 respectively – High Court upheld conviction of accused no. 1 u/s. 302 but acquittal of others extending them benefit of doubt – On appeal, held: None of the injuries were inflicted on the vital part of the body, though its combined effect was sufficient in ordinary course of nature to cause death – There is no infirmity as to finding of guilt of accused no. 1 by courts below, thus, accused no. 1 not entitled to benefit of doubt – On facts, case of accused covered u/s. 304 (Part I) – Thus, conviction altered to one u/s. 304 (Part I) and sentence reduced to the sentence already undergone.

According to the prosecution case, accused persons were on inimical terms with B. Accused no. 1–6 armed with deadly weapons formed themselves into an unlawful assembly and committed riot with the common object to kill B. They caused injuries to B and PW–2. B died later. Prosecution examined the witnesses. On basis of the evidence of injured witnesses, hostile witnesses and independent witness, trial court held that B was killed in the incident which took place and accused nos. 1, 2, 4 and 6 shared common intention to commit murder of B. Trial court convicted and sentenced accused nos. 1, 2, 4 and 6 under s. 302 r/w s. 34 IPC. It also convicted accused

A nos. 1–4 under s. 147 and accused nos. 5–6 under s. 148 IPC. High Court acquitted accused nos. 2–6 of all the charges. However, it upheld the conviction of accused no. 1 under s. 302. Hence the present appeal.

B Partly allowing the appeal, the Court

HELD: 1.1. While exercising power under Article 136 of the Constitution, this Court does not re-appreciate the evidence as a regular Court of Appeal. A finding has been recorded by the trial court and confirmed by the High Court on evidence as to the guilt of the appellant. There is no infirmity in the said finding. This Court was justified by issuing notice as to the 'nature of offence'. Therefore, the submission that the appellant is entitled to benefit of doubt and be set at liberty by extending benefit which had been granted to other accused is rejected. [Paras 13 and 14] [128-F-H; 129-A]

1.2. As far as the 'nature of offence' is concerned, the submission of the counsel for the appellant is well-founded. PW 8—Deputy Police Surgeon stated that combined effect of injury Nos. 1, 3, 4 and 5 was sufficient in the ordinary course of nature to cause death. Looking to the injuries sustained by the deceased which were not on head, face or vital part of the body, but on arms, legs etc. coupled with the fact that in all, there were six accused and though all of them were convicted by the trial court, the High Court extended benefit of doubt to accused Nos. 2–6, the counsel is right in submitting that on the facts and in the circumstances of the case, it cannot be said that the appellant had committed an offence punishable under section 302 IPC. Even the trial court did not convict the appellant substantively for an offence punishable under section 302 IPC. He was convicted with other accused for an offence punishable under section 302 read with section 34, IPC. On the facts of the case and injuries sustained by the deceased, the

case is covered by section 304 Part I IPC. In view of the above facts, the ends of justice would be met if the conviction of the appellant is converted from an offence punishable under Section 302, IPC to an offence punishable under Section 304 Part I, IPC. [Paras 15, 17, 18 and 23] [129-A-B; 130-B-E; 131-F]

Kapur Singh v. State of Pepsu, AIR (1956) SC 654, referred to.

2. From the record it appears that initially the appellant had remained in jail for more than a month. After his conviction, again he was taken to custody on January 16, 2003 and is in jail all throughout. Thus, the appellant is in jail since more than five years. On the facts and in the circumstances of the case, that interest of justice would be met if the sentence of the appellant is reduced to the sentence already undergone. [Para 24 and 25] [131-G-H; 132-A]

Case Law Reference :

AIR (1956) SC 654 referred to Para 19

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1693 of 2008.

From the final Judgment and Order dated 19.1.2004 of the High Court of Kerala at Ernakulam in Criminal Appeal No. 131/2002-B.

C.N. Sree Kumar, Kanchan Shukla, P.R. Nayak and Dushyant Parashar for the Appellant.

P.V. Dinesh for the Respondent.

The Judgment of the Court was delivered by

C.K. THAKKER, J. 1. Leave granted.

2. The present appeal is filed against the judgment and

A order of conviction recorded by the First Additional Sessions Judge, Pathanamthitta on January 09, 2002 in Sessions Case No. 48 of 1996 and confirmed by the High Court of Kerala on January 19, 2004 in Criminal Appeal No. 131 of 2002.

B 3. To appreciate the points raised by the appellant herein, few relevant facts may be stated.

C 4. It was the case of the prosecution that six accused in Sessions Case No. 48 of 1996, in prosecution of their common object to cause death of Balan on account of previous enmity formed themselves into an unlawful assembly on May 25, 1995 at about 1.30 p.m. near the Forest out post in Maniyar Nalumakku and committed an offence of rioting. They were armed with deadly weapons like sword, stick, chopper, crackers, etc. and caused injuries to Balan and also to PW 2 D Uthaman. Balan was taken to Medical College Hospital, Kottayam on the same day at about 5.30 p.m. where he was declared dead. All the accused were, therefore, charged for commission of offences punishable under Sections 143, 148, 323 and 302 read with Section 149, Indian Penal Code, 1860 E (IPC). They were also charged under Sections 3 and 5 of the Explosive Substances Act, 1908. The Judicial Magistrate, Ranni committed the case under Section 209 of the Code of Criminal Procedure, 1973 since the case was exclusively triable by a Court of Session.

F 5. In support of the case, prosecution examined 18 witnesses. Certain witnesses who had seen the incident and were examined by the prosecution did not support the prosecution case and were treated 'hostile'. On the basis of other evidence including the evidence of injured witnesses as G also referring to the evidence of ('hostile') witnesses coupled with the evidence of PW 3 Rahmathulla Rawther, Forest Guard, who was an independent witness, the trial Court recorded a finding that the incident in question did take place in which Balan was killed. The trial Court, after appreciating the H evidence on record held that it was proved that accused Nos.

1, 2, 4 and 6 shared common intention to commit murder of deceased Balan and hence they were liable to be convicted for an offence punishable under Section 302 read with Section 34, IPC. It also held that accused Nos. 1–4 were liable to be convicted under Section 147, IPC. Similarly, accused Nos. 5 and 6 were liable to be convicted under Section 148, IPC. Accordingly, punishments were imposed on them.

6. Being aggrieved by the order of conviction and sentence, all the accused approached the High Court. The High Court again considered the evidence on record and held that conviction and sentence recorded by the trial Court against accused Nos. 2–6 could not be said to be legal and in accordance with law. They were, therefore, ordered to be acquitted of all the charges. So far as accused No. 1 (appellant herein) is concerned, it held that conviction recorded by the trial Court against him for an offence punishable under Section 302, IPC was well-founded and was accordingly confirmed.

7. It is against the said order of conviction recorded by the High Court that the appellant has approached this Court.

8. On December 10, 2007, this Court issued notice limited to the nature of offence. The Registry was directed to place the matter for final hearing and accordingly, the matter has been placed before us.

9. We have heard the learned counsel for the parties.

10. The learned counsel for the appellant contended that the order of conviction and sentence recorded against the appellant was contrary to law and against the evidence on record. He submitted that when the High Court acquitted accused Nos. 2–6 disbelieving the evidence of prosecution witnesses, no conviction could have been recorded against the appellant herein on the basis of the same evidence and benefit of doubt ought to have been given to appellant also by acquitting him. Alternatively, it was submitted that when

- A accused Nos. 2–6 were acquitted of all the charges, no conviction of appellant could have been recorded substantively for an offence punishable under Section 302, IPC. Hence, in any case, conviction of the appellant for an offence punishable under Section 302, IPC deserves to be set aside. The counsel
B submitted that no injury had been caused to the deceased on head, face or vital part of the body and considering the said important aspect, Section 300, IPC could not have been invoked by the Courts. At the most, it was a case of homicidal death not amounting to murder punishable under Part I or Part
C II of Section 304, IPC. It was, therefore, submitted that in any case the appeal deserves to be allowed to that extent.

11. Learned counsel for the State, on the other hand, supported the order of conviction and sentence.

- D 12. Having heard the learned counsel for the parties and having gone through the relevant record, in our opinion, the appeal deserves to be partly allowed.

- E 13. So far as the order of conviction is concerned, apart from the fact that at the time of issuance of notice on Special Leave Petition, this Court had expressly observed that it was limited to 'the nature of offence', even on the basis of evidence and material on record, we are satisfied that both the Courts were right in holding that accused No. 1 (appellant herein) had caused injuries to deceased Balan. There is no infirmity in the
F said finding.

- G 14. While exercising power under Article 136 of the Constitution, this Court does not re-appreciate the evidence as a regular Court of Appeal. A finding has been recorded by the trial Court and confirmed by the High Court on evidence as to the guilt of the appellant, and we are of the view that the Court was justified by issuing notice in December, 2007 as to the 'nature of offence'. We, therefore, reject the contention of the learned counsel for the appellant that the appellant is entitled
H to benefit of doubt and be set at liberty by extending benefit

which had been granted to other accused.

15. As far as the 'nature of offence' is concerned, in our opinion, the submission of the learned counsel for the appellant is well-founded. In this connection, our attention has been invited by the counsel to deposition of PW 8 Dr. V.S. Umesh, Deputy Police Surgeon attached to General Hospital, Pathanamthitta. He stated that post mortem was conducted by Dr. T.V. Velayudhan, Deputy Police Surgeon attached to Medical College Hospital, Kottayam who had died by the time the case came up for trial. He further stated that he knew the handwriting of Dr. Velayudhan who had prepared post mortem certificate (Ex. P-9) and identified his signature.

16. Ex.P-9 contains following injuries:

1. Incised gaping wound 7x4 cm over the back and outer aspect of right forearm 7.5 cm below the elbow with a maximum depth of 3.5 cm in the middle and tapering towards the ends. The wound cuts muscles, nerves, blood vessels and cut the radius completely.
2. Skin deep incised wound 5x5 cm over the front of right leg 19 cm below the knee.
3. Incised gaping wound 4x2 cm oblique over the front and outer aspect of left forearm 8.5 cm below the elbow with a maximum depth of 3.8 cm in the middle.
4. Incised gaping wound 10x3 cm nearly horizontal over the back of left leg 8 cm below the knee with a maximum depth of 6.2 cm in the middle and tapering towards the ends. The wound cut, muscles nerves, blood vessels and tibia completely.
5. Incised gaping wound 10x5.5 cm oblique over the outer aspect of left leg 10 cm below the knee with

A a maximum depth of 3.8 cm in the middle and tapering towards the ends.

6. Abrasion 4.3 x 0.3 cm vertical over the back of left side of chest 7 cm to the left of midline and 10.5 cm below the top line of shoulder.

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17. It was stated that combined effect of injury Nos. 1, 3, 4 and 5 was sufficient in the ordinary course of nature to cause death.

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18. Looking to the injuries sustained by the deceased which were not on head, face or vital part of the body, but on arms, legs etc. coupled with the fact that in all, there were six accused and though all of them were convicted by the trial Court, the High Court extended benefit of doubt to accused Nos.

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2-6, in our opinion, the counsel is right in submitting that on the facts and in the circumstances of the case, it cannot be said that the appellant herein had committed an offence punishable under Section 302, IPC. Even the trial Court did not convict the appellant substantively for an offence punishable under Section 302, IPC. He was convicted with other accused for an offence punishable under Section 302 read with Section 34, IPC. In our view, on the facts of the case and injuries sustained by the deceased, the case is covered by Section 304 Part I, IPC.

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19. We are fortified in our view by a decision of this Court in *Kapur Singh v. State of Pepsu*, AIR (1956) SC 654. In that case, the appellant was convicted for offence punishable under Section 302, IPC. According to the prosecution case, the appellant had caused death of the deceased while one Chand Singh held the victim. Eighteen injuries were inflicted on the deceased on the arms and legs with gandasa.

G

20. Converting conviction of the accused from Section 302 to Section 304 Part I, this Court observed;

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"It is significant that out of all the injuries which were thus inflicted none was inflicted on a vital part of the body.

The appellant absconded and his companion was in the meantime convicted of an offence under Section 302 and a sentence of transportation for life was imposed on him, which was confirmed by the High Court. The appellant was arrested thereafter and his trial resulted in his conviction under Section 302. The learned Sessions Judge awarded him a sentence of death subject to confirmation by the High Court. The High Court, in due course, confirmed the death sentence".

21. The Court further observed;

"The fact that no injury was inflicted on any vital part of the body of the deceased goes to show in the circumstances of this case that the intention of the appellant was not to kill the deceased outright. He inflicted the injuries not with the intention of murdering the deceased, but caused such bodily injuries as, he must have known, would likely cause death having regard to the number and nature of the injuries".

22. Thus, though eighteen injuries were caused and the deceased met with death, this Court held that since the injuries were caused on arms and legs, the case could be said to be covered by Part I of Section 304, IPC and accordingly, conviction of the appellant was converted into Section 304, Part I from Section 302, IPC.

23. In view of the above facts, in our opinion, ends of justice would be met if we convert conviction of the appellant herein from an offence punishable under Section 302, IPC to an offence punishable under Section 304 Part I, IPC.

24. So far as sentence is concerned, from the record it appears that initially the appellant had remained in jail for more than a month. After his conviction, again he was taken to custody on January 16, 2003 and is in jail all throughout. Thus the appellant is in jail since more than five years.

A 25. On the facts and in the circumstances of the case, we are of the view that interests of justice would be met if we reduce the sentence of the appellant to the sentence already undergone.

B 26. The appeal is accordingly allowed to the above extent and the appellant herein is ordered to be set at liberty if not required in any other case.

N.J.

Appeal partly allowed.