

(2024) 10 KL CK 0051

High Court Of Kerala

Case No: Criminal Appeal Nos. 720 Of 2020, 358, 320 Of 2017

Gopi @ Gopu

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision: Oct. 9, 2024

Acts Referred:

- Code of Criminal Procedure, 1973 - Section 161, 386(b)(i)
- Indian Penal Code, 1860 - Section 34, 300, 302, 304, 304I, 323, 341
- Evidence Act, 1872 - Section 27, 106

Hon'ble Judges: P.B. Suresh Kumar, J; C. Pratheep Kumar, J

Bench: Division Bench

Advocate: K.M.Firoz, M.Shajna, E.C. Bineesh

Final Decision: Allowed

Judgement

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measuring 1 cm long within the 4th intercostal space and 7 cm outer to midline. The left chest cavity contained 700 ml of blood. The left dome diaphragm had tow,
cuts with marginal blood infiltration each measuring 1 cm long. The injury was directed inwards, downwards and to the right superficially cutting front surface of",
the heart. 5 x 1 x 2 cm through the pericardial sac and terminated by piercing the diaphragm and injuring the stomach. There was a cut .4 cm long on the front of,
stomach in between the lesser and greater curvature over the middle entering into the cavity of stomach. A contusion .5 x .5 cm was seen on the inner aspect of,
back wall of stomach near the greater curvature. The total minimum depth of the injury was 8.5 cm.,

2. A penetrating gaping wound 1 cm long with irregular ragged margins on the left side of back of trunk Transversely placed with slight obliquity having a right, lower end. The left end of the injury was 14 cm below the posterior fold of axilla. A small nick (0.1 x 0.1 cm) was seen on the middle of upper margin. Abrasion 1.2, x 0.2 cm with surrounding skin contusion was seen 1 cm behind the injury. The injury pierced the chest wall and entered the chest cavity through the seventh, intercostal space, through a defect 1 x 1 cm just below the angle of rib and pierced the back aspect of lower lobe of left lung producing a haematoma 5 x 5 cm and", extended through the lower lobe of left lung piercing the diaphragmatic surface of the lung and the diaphragm cut measured 1 cm. The total minimum depth of the, injury was 9 cm and the wound was directed inwards and downwards.,

3. Abrasion 1 x 1 cm on the right side of neck 3 cm above the root of neck and 11 cm outer to midline (13 cm below ear lobule),

4. Skin contusion 1 x 0.5 cm on the right side of front of neck 4 cm above the root of neck and 5 cm outer to midline.,

5. Skin contusion 2.5 x 2 cm on the left side of neck overlying the left side of thyroid cartilage 2.5 cm outer to midline and 10 cm above the inner end of clavicle.,

6. Contusion 7 x 3 x 2 cm on the right side of top of shoulder towards the front 4 cm outer to the root of neck.,

7. Contused abrasion 1.5 x 1 cm on the muco-cutaneous junction of upper lip at midline.,

8. Multiple abrasions over 1.5 x 1 cm over the mucocutaneous junction of lower lip at midline.,

9. Penetrating wound 0.8 cm long, gaping with irregular ragged edges and minimal marginal skin contusions. On the outer aspect of left thigh at its middle 27 cm", above knee. There were postmortem and erosions over an area 10 x 9 cm around the injury. The injury penetrated the thigh, through the underlying fat and", terminated by piercing the tensor fascia lata gaping wound measuring 1.1 cm. The injury was 1.5 cm deep and was directed inwards and slightly upwards. There, were two linear curved abrasions 13 x 0.1 cm, 3 x .1 cm on the outer aspect of left thigh at its middle third with the convexity of the larger abrasion towards the", front and the convexity of the smaller abrasion towards the back. The larger abrasion extended downwards from the lower end of the penetrating injury on the, outer aspect of the thigh as tailing.,

10. Multiple small healed superficial cuts ranging from 0.7 x 0.1 cm to 0.2 x 0.1 cm on the tip of right index finger and on the outer aspect of right middle finger, towards the tip. There was a healed abrasion 0.7 x 0.6 cm on the tip of right thumb.,
11. Contused abrasion 1.5 x 1 cm on the back of left hand over the knuckle of left middle finger.,
12. Abrasion 0.5 x 0.5 cm over the tip of right little toe.,
13. Linear abrasion 3 x 0.1 cm oblique with front upper end on the outer aspect of left thigh 6 cm above the knee.,
14. Transverse linear abrasion 4 x 0.1 cm on the outer aspect of left leg 5 cm below the knee.,

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13. According to PW9, the opinion as to the cause of death is that the deceased died of punctured penetrating stab injury sustained to the chest", involving the lung and heart. He also deposed that injury Nos.1, 2 and 9 are possible using MO5 file.",

14. PW12 is the wife of the deceased. Though she deposed that, in the evening on 21.3.2009 accused persons 1, 4 and 5 came to her residence and", took the deceased along with them, no such statement was given by her when her statement was recorded under Section 161 Cr.P.C. PW14 was the", SHO, Thirur, who had recorded the FI statement and registered Ext.P10 FIR.",

15. PW18 was examined to prove recovery of MO5 and 6 from the residence of the 1st accused. He would swear that on 24.3.2009 at about 4.30, p.m. he saw the police party along with the 1st accused going to the residence of the 1st accused. When he went there, he saw the police recovering", MO5 file, MO6 shirt and a lungi from there. He also admitted his signature in Ext.P14 mahazar prepared by the police in that respect.",

16. PW22 was the Circle Inspector, Thirur who had conducted major part of the investigation of this case. He would swear that on 22.3.2009 he had", prepared the inquest report and recovered the articles present at the scene, including cards and used candles. He also arrested the accused persons 1", to 5. According to him, on the basis of the information given by the 1st accused, he went along with the 1st accused to his residence, from where he", had handed over MO5 file containing blood, MO6 shirt and a dhothi worn by the 1st accused at the time of commission of the offence. Ext.P14(a) and",

P14(b) are the relevant portions of the information given by the 1st accused to him, which lead to the above recovery. Ext.P14 is the mahazar", prepared by him in that respect.,

17. He also deposed that on the basis of the information given by the 2nd accused, a mobile phone, a shirt and a dhoti were recovered from the",

residence of the 2nd accused as per Ext.P11 mahazar. Ext.P11(a) is the relevant portion of the information given by the 2nd accused in that respect.,

Similarly the disclosures made by the other accused were also recorded and the dress worn by them at the time of the alleged incident were also,

recovered by him, as per separate seizure mahazars.",

18. PW23 is the successor of PW22. During the examination of PW23, Ext.P39 FSL report and Ext.P40 chemical report in respect of the examination",

of some of the thondi articles were marked.,

19. It was argued by the learned counsel for the accused persons 2 and 5 that there is absolutely no evidence to prove that they had shared the,

common intention along with the 1st accused in order to commit murder of the deceased. According to them, the incident occurred all of a sudden",

during the progress of the game, when the deceased resorted to foul play. Further, it was argued that, there was no weapon in the possession of",

accused persons 2 and 5 and that there is no evidence to prove that they were aware of the presence of MO5 in the possession of the 1st accused. It,

was also argued that, the untoward incident occurred all of a sudden, during the course of the game, and hence there was no chance for the accused",

persons 2 and 5 to share any common intention with the 1st accused to murder the deceased.,

20. At the same time, the learned counsel for the 1st accused would argue that the prosecution has not succeeded in proving the charge against the",

1st accused also. It was argued that recovery of MO5 from the 1st accused does not show that the same was used by the 1st accused for the,

commission of the offence. He would further argue that, even if it is found that the 1st accused is responsible for the death of the deceased, it was",

because of the grave and sudden provocation caused by the deceased. It was argued that the deceased not only resorted to foul play, but when the",

same was found out and questioned, he also attacked the 1st accused. Therefore, according to him, it is a clear case of grave and sudden provocation",

on the part of the deceased and as such, the same will come within the Exception 1 to Section 300 of IPC.",

21. On the other hand, Sri.E.C.Bineesh, the learned Public Prosecutor would argue that the circumstantial evidence adduced by the prosecution is",

sufficient to prove all the charges against the accused persons 1, 2 and 5. He has mainly relied upon the fact that, though the deceased was last seen",

along with the accused, they have not offered any explanation as to how the deceased sustained the fatal injuries on his body and as such adverse",

inference is to be drawn against them, in view of section 106 of the Evidence Act. Therefore, according to him, there are no grounds to interfere with",

the impugned judgment of conviction and sentence passed by the trial court, as against any of the accused. Mainly in the light of those circumstances",

he prayed for dismissing all the appeals.,

22. From the evidence of PW2 and PW20 it is revealed that in the evening on 21.3.2009 at about 7 p.m., all the accused persons 1 to 5 along with the",

deceased went to the toddy shop at Thirunavaya, consumed toddy and thereafter they went to the place of occurrence and started playing cards at",

about 7.30 p.m. During the course of the play, PW2 reached the place of occurrence and watched the game for some time and then he went away.",

Even at that time, there was quarrel between the accused and deceased with respect to the cards and money. At about 8.45 p.m. when PW20 closed",

the toddy shop, he heard a scream from the place of occurrence. But he did not go to the place of occurrence then, to ascertain the cause of scream.",

It is true that PW20 had not gone to the place of occurrence, and hence during the cross-examination he could not affirm whether anybody else also",

came for playing cards along with the deceased. However, there is no such disability in the evidence of PW2. PW2 has not only seen all of them at",

the toddy shop, thereafter, as requested by the 1st accused, he went to the shop, purchased two candles and went to the place of occurrence for",

handing over the candles to the 1st accused. At that time, he had the occasion to see that the accused were playing cards along with the deceased.",

From the evidence of PW2, it is also revealed that there was a quarrel between the accused persons and the deceased during the course of the card",

play with regard to the manner in which the conduct of card play was going on. Then, at about 8.45 p.m. PW20 heard a scream from there and on the",

next morning, the dead body of the deceased was found with injuries on his chest, back of chest and thigh.",

23. Though the prosecution alleged that accused 4 and 5 wrongfully restrained the deceased and accused 2 and 3 voluntarily caused hurt to him, there",

is no evidence, direct or circumstantial, to prove those charges, except their presence at the place of occurrence, at around the alleged time of",

occurrence.,

24. As against the 1st accused, the allegation is that he had inflicted stab injuries on the chest, back of chest and thigh of the deceased, using MO5",

file. With respect to the above overt act of the 1st accused also there is no direct evidence. However, on the basis of the information furnished by him",

to PW22, there is recovery of MO5, under Section 27 of the Evidence Act. From the evidence of PW22, the investigating officer and PW18, an",

attestor to Exhibit P14 mahazar, the recovery of MO5 weapon as well as MO6 shirt from the residence of the 1st accused is proved. From Exhibit",

P39 FSL report, it can also be seen that human blood was detected in MO5 and MO6.",

25. As we have already noted above, PW9, the Doctor, who had conducted the postmortem examination on the body of the deceased deposed that",

the fatal injuries present on the body of the deceased could be caused using MO5. Since MO5 contained human blood and it was recovered on the,

basis of Ext.P14(a) information furnished by the 1st accused, he has a duty to explain how MO5 contained human blood and how it came to be in his",

possession. However, there is absolutely no explanation from the side of the accused in that respect. Similarly, MO6 shirt worn by the 1st accused",

also contained human blood. In that respect also the 1st accused owed an explanation, which is also conspicuously absent in this case.",

26. Though the dress worn by the accused persons 2 and 5 were also recovered, they were not sent for forensic examination. It is true that, MO29",

mobile phone allegedly belonged to the deceased was recovered on the basis of Exhibit P11(a) information furnished by the 2nd accused. MO29 also, contained human blood. However, nobody identified MO29 mobile phone as that of the deceased. When PW12, the wife of the deceased was", examined, MO29 mobile phone was not shown to her. Therefore, in this case, there is no evidence to show that MO29 mobile phone recovered on the", basis of the information furnished by the 2nd accused belongs to the deceased. There is no other evidence as against accused 2 and 5, except that", they were also found at the place of occurrence, at around the alleged time of occurrence. Even if it is assumed that MO29 mobile phone belonged to", the deceased, containing human blood was recovered on the basis of the information furnished by the 2nd accused, it will, at the most, only confirm his", presence at the time of commission of the offence, which stands proved even otherwise."

27. Even as per the prosecution case, accused persons 1 to 5 along with the deceased went to the toddy shop, consumed toddy and thereafter they", proceeded to the place of occurrence for playing cards. Till then, there was no enmity between them and there was no intention to commit the alleged", offences. As per the charge, only when the deceased resorted to foul play by removing some of the cards the accused persons questioned the above", conduct of the deceased. At that time, it is the deceased, who had inflicted the first blow on the body of the 1st accused by kicking him. It was", thereafter, the accused persons 4 and 5 allegedly, wrongfully restrained the deceased and the accused persons 2 and 3 beat him. At that time, the 1st", accused, all of a sudden, stabbed the deceased using MO5 file. Since the deceased resorted to foul play during the course of the game and the same", was detected by the accused persons, they were perfectly justified in questioning the above conduct of the deceased."

28. Now the crucial question is, whether accused persons 2 and 5 shared the common intention to cause the death of the deceased, along with the 1st", accused ? Unless and until the prosecution succeeds in proving that they have also shared the common intention with the 1st accused in order to, murder the deceased, they could not be convicted for the offence of murder by invoking Section 34 of IPC. The law is well settled that common",

intention can be formed at any time, even during the course of the commission of the offence. However, it is to be proved by the prosecution by",

adducing evidence. Since common intention and sharing of the same are something present in the mind of the accused, we cannot expect any direct",

evidence in that respect and hence the same has to be presumed from the other evidence including the conduct of the accused.,

29. As argued by the learned counsel for the accused persons 2 and 5, in this case, there is no reliable evidence to show that the accused persons 2",

and 5 shared the common intention along with the 1st accused in order to commit murder of the deceased. MO5 is a small triangular file of 14 cm long,

and there is no evidence to prove that accused 2 and 5 were even aware that it was there in the possession of the 1st accused. There is also no,

evidence to prove any overt acts from the side of accused 2 and 5, except that they were present at the spot. Their presence at the spot is quite",

natural as they were also participating in the game. It is true that they have not offered any explanation as to how the deceased sustained the injuries.,

As long as the prosecution could not bring out any incriminating circumstances against an accused, his mere silence alone is not enough to arrive at",

any conclusions against him. In the above circumstances, the conviction of accused persons 2 and 5 under Section 302 of IPC by invoking section 34",

IPC is liable to be interfered with.,

30. At the time of arguments, the learned counsel for the 1st accused argued that, in this case, there was no evidence to show that it was the 1st",

accused, who had inflicted vital injuries on the body of the accused using MO5. It is true that there is no direct evidence in that respect. However, it is",

to be noted that MO5 weapon containing human blood was recovered from the residence of the 1st accused on the basis of the information furnished,

by him. The 1st accused has not offered any explanation in that respect. In the absence of any such explanation, the only presumption that can be",

arrived at is that, the said weapon was used by the 1st accused himself, for inflicting the injuries noted by PW9 on the body of the deceased.",

31. The 1st accused inflicted three injuries on the body of the deceased, one each on the chest, back of the chest, and thigh. Though the injury on the",

thigh is not treated as on the vital part, the injuries on the chest and back of the chest are on vital parts. Those injuries had a depth of 8.5 cm and 9 cm", respectively and both entered the chest cavity and one of them even cut the front surface of the heart. It is true that PW9 had not specifically stated, that injury Nos.1 and 2 are sufficient in the ordinary course of nature to cause death. Even then, based on the nature and gravity of the injuries, the", weapon used, the place where the injury was inflicted, the extent of force used and number of blows inflicted etc., the court can ascertain whether the", injuries intended to be inflicted are sufficient in the ordinary course of nature to cause death.,

32. It was argued that MO5 being a small file without any handle, the injuries noticed on the body could not be inflicted using the same. It was further", contended that, even if one injury is inflicted using MO5, it will not be possible to withdraw the same to inflict the subsequent injuries. Therefore, the", contention was that MO5 was not the actual weapon used for commission of the offence. On the other hand, the learned Public Prosecutor would", argue that though MO5 has no handle, it has a long pointed edge and as such there is no difficulty in using it as a weapon of offence.",

33. In the light of the above rival contentions, we have summoned MO5 and personally examined the same. MO5 is a triangular file having a length of", 14 cm, without any handle. However, it has a long pointed edge. Therefore, there is no difficulty in using its pointed edge as a weapon of offence, by", using the triangular end as handle. Presence of human blood on MO5 and the evidence of PW9 that injuries 1,2 and 9 could be caused using MO5 also", substantiates the above conclusion. Therefore, we do not find any merits in the contention that MO5 was not the weapon used for the commission of", the offence.,

34. Since MO5 is comparatively a small weapon, in order to penetrate the chest cavity of the deceased from both ends, the blows must have been", inflicted using maximum force. Considering the nature of injuries, the place where the injuries were inflicted, the depth of the injuries and the fact that", injuries have caused damage to the heart and lung of the deceased, it can be concluded that the injuries, especially injury Nos. 1 and 2 inflicted on the",

chest and back of the chest of the deceased are sufficient in the ordinary course of nature to cause death. Therefore, the above act of the 1st accused",

amounts to culpable homicide amounting to murder as defined under section 300 IPC.,

35. However, as we have already noted above, even as per the prosecution case, it was the deceased, who had provoked the accused, in more than",

one ways. Firstly, it was the deceased who resorted to foul play during the game. Secondly, when the foul play was found out and questioned, he had",

started assaulting the 1st accused by kicking him. In this case, it is to be noted that the accused as well as the deceased belong to the lower strata of",

the society. They have played cards not just for entertainment, but also by risking their money. Viewed from the above background, it can be safely",

concluded that the conduct of the deceased in resorting to malpractice in the play and when the malpractice was found out and questioned by the,

accused persons, his conduct in attacking the 1st accused would definitely have resulted in grave and sudden provocation to the 1st accused, sufficient",

enough to deprive of his self-control.,

36. In the above circumstance, it can be seen that the 1st accused has caused the death of the deceased while deprived of his self-control by grave",

and sudden provocation made by the deceased himself and as such, the act of the 1st accused comes under exception 1 of Section 300 IPC.",

Therefore, it can be seen that the above act of the 1st accused will not amount to murder, punishable under Section 302 IPC, but comes only under",

Part I of Section 304 IPC.,

37. The accused examined the Secretary of Thirunavaya grama panchayat as DW1 to prove that no license was issued for conducting toddy shop in,

building No.9/486 and produced Exts.D2 and D3 documents. However, during the cross-examination, he clarified that, on enquiry it was revealed that",

a toddy shop was conducted in the adjacent shed and also that during 2009 license from the Excise department was enough and also that any license,

from the Panchayat was not necessary. Therefore, the evidence of DW1 is of no use in this case.",

38. Though the prosecution has alleged that in furtherance of the common intention of all, accused persons 4 and 5 wrongfully restrained the deceased",

and the accused 2 and 3 voluntarily caused hurt to him, before the fatal injuries were inflicted by the 1st accused. However, it is to be held that in this",
case, there is absolutely no evidence to prove the offences under Sections 341 and 323 IPC and as such point No.2 is liable to be found against the",
prosecution.,

39. The punishment provided in Part I of Section 304 IPC is imprisonment for life or imprisonment of either description for a term which may extend,
to ten years and shall also be liable to fine. Considering the entire facts, we hold that rigorous imprisonment for a period of ten years will be a",
reasonable punishment for the 1st accused under Section 304 Part I of IPC. For the reasons discussed above, we hold that the conviction and",
sentence passed against the accused persons 2 and 5 is liable to be set aside and they are liable to be acquitted of all the charges. Points answered,
accordingly.,

40. In the result, Crl. Appeal No.720 of 2020 is allowed in part as follows:",
The conviction and sentence passed against the 1st accused under Section 302 IPC is set aside. Conviction of the 1st accused is converted to one,
under Part I of Section 304 IPC. The punishment is reduced to rigorous imprisonment for a period of ten years and to pay a fine of Rs.50,000/- and in",
default, to undergo rigorous imprisonment for a period of three months.",

41. In the result, Crl. Appeal Nos.358 of 2017 and 320 of 2017 are allowed. Conviction and sentence passed against accused persons 2 and 5 are set",
aside. They are acquitted under Section 386 (b)(i) of Cr.P.C. Release them forthwith, if their presence is not required in any other case.",