(1991) 02 KL CK 0042

High Court Of Kerala

Case No: C.A. No. 409 of 1990

K.P. Rajan alias Antony		APPELLANT
	Vs	
State of Kerala		RESPONDENT

Date of Decision: Feb. 13, 1991

Acts Referred:

- Constitution of India, 1950 - Article 136
- Criminal Procedure Code, 1973 (CrPC) - Section 172(2)
- Penal Code, 1860 (IPC) - Section 299, 300, 302, 304, 304(2)

Citation: (1991) CriLJ 1859 : (1991) 2 ILR (Ker) 528

Hon'ble Judges: S. Padmanabhan, J

Bench: Single Bench

Advocate: C.J. Joy, for the Appellant; Chincy Gopakumar, Public Prosecutor, for the Respondent

Final Decision: Dismissed

Judgement

S. Padmanabhan, J.

Appellant, sole accused in Sessions Case No. 78 of 1989, was sentenced by the Additional Sessions Judge, Thodupuzha to rigorous imprisonment for seven years on conviction for an offence punishable under the second part of Section 304 of the Penal Code, though he was tried for offences punishable under Sections 341 and 302.

2. Deceased Jose and P.W. 13 were partners of a provision store, to which the appellant owned Rs. 1,999.00 by way of price of goods purchased on credit. Quarrel consequent on the demand for the amount is the motive alleged by the prosecution.

3. At about 6.00 p.m. on 24-3-1989, deceased, as requested by the appellant at about 3.00 p.m. on that day at his residence, came near the bridge at Kuttampuzha,

where the appellant was standing. Deceased demanded the amount due. A quarrel ensued. Appellant caught-hold of the deceased and stabbed him on his neck with MO 1, which was taken out from his loins. On his way to the hospital, Jose died. This is the prosecution case.

4. Plea of the appellant is one of private defence. He would say that on the morning of the date of incident, deceased played host and entertained him in a toddy shop, but finally asked him to pay the bill for Rs. 48/-. He promised to pay the next day as he had no money then. In the evening, when they met, deceased quarrelled with him on this score and attempted to stab him. A scuffle ensued. Deceased sustained the injury in that scuffle.

5. Defence version is not supported by any evidence, circumstance or probability. Not even the hostile witnesses supported such a version. There is nothing to show that the deceased was armed with any weapon or that there was any attack or apprehension of attack from him. Further, the facts alleged by the appellant, even if taken as correct, cannot operate as a motive for the deceased to attack him because he did not give any reason for provocation.

6. P.Ws. 1 to 11, 13 and 23 are the witnesses examined by the prosecution to prove the incident and motive. Among them, P.Ws. 1 to 5 and 23 were examined as eye witnesses to the occurrence. Out of these witnesses, P.Ws. 1, 2, 6, 11 and 13 alone supported the prosecution. All others turned hostile. Regarding the actual occurrence, we have only the evidence of P.Ws. 1 and 2.

7. Fact that Jose sustained an injury at the hands of the appellant at the time and place alleged by the prosecution and succumbed to the injury is clear from the ocular and medical evidence as well as from the evidence of the police officers. P.Ws. 9 and 11 took him to the hospital and P. W. 10 examined and declared him dead at 7.00 p.m., on the date of incident itself, P.W. 21 conducted autopsy and Ext. P17 is the post-mortem certificate. There was an elliptical stab wound 3 x 1 c.m. on the left side of neck, 4 c.m. below and slightly behind pinna of the left ear. It was an obliquely placed wound directed downwards and inwards completely cutting across the carotid artery. Cervical vertibral column was also partly cut at C4-5 level. Medical evidence is that the injury could be caused by stabbing with MO 1 and it is sufficient, in the ordinary course of nature, to cause death. Opinion as to cause of death is shock and haemorrhage due to this injury. There was a second injury cutting left pinna of the ear partly. Ocular and medical evidence show that this injury could be caused while with-drawing the weapon after inflicting the first injury.

8. On the evidence, Additional Sessions Judge found, in paragraph 19 of his judgment, that it is clear that it was the appellant who inflicted the fatal injury. But, in para 27 of the judgment, Additional Sessions Judge found that motive alleged is not proved. That seems to be one of the reasons which persuaded to him to come to the conclusion, in para 24, that there is nothing on record to show that the accused

had intention to cause death. Motive is not an integral part of the crime. It is only an aid in the assessment of criminality. When there is acceptable direct evidence regarding the incident itself, proof of motive is irrelevant.

9. Conclusion of the Additional Sessions Judge that motive is not proved itself is not factually correct. Main fact which weighed with the Additional Sessions Judge in this respect is the evidence of P.W. 12, mother of the deceased, regarding the conduct of the appellant in going to her residence at 3.00 p.m. on the date of incident and behaving friendly with the deceased. But, though she did not say that the deceased demanded the amount at that time, her evidence shows that the appellant reminded of the debt due to the deceased and invited him to the scene. It was in response to this request that the deceased went. What was shown by the appellant may be a feigned friendship and the invitation might have been to get an opportunity to wreak vengeance because he thought that a fantastic claim was made against him by creating false accounts. That is what the evidence of P.W. 23 indicates. Anyhow, I fail to understand from what evidence the Additional Sessions Judge found, in para 26, that the defence version is true. In para 27 of the judgment, Additional Sessions Judge said that there is no evidence to show that the deceased asked for the price of goods or the accused got angry. That is only because the Additional Sessions Judge overlooked the relevant item of evidence.

10. Fact that there was talk between the appellant and deceased at the time of incident was mentioned in Ext. P1 and spoken to by many of the witnesses, including P. Ws. 1,2,3, 5, 6 and 23. Only thing is that P.Ws. 1, 2, 3, 5 and 6 were not able to hear and understand what exactly was the subject of conversation. There is also the possibility that the hostile witnesses purposely refused to divulge the truth. Fact that the appellant owned amounts to the deceased and P.W. 13 is clear from the evidence of P.Ws. 12 and 13 and Exts. P9 and 10 accounts proved by P.W. 13. Evidence of P.Ws. 1 and 6 shows that during the conversation, deceased requested the appellant to go home saying that they could talk over the matter later. There is also the evidence of P.W. 23, the hostile witness, that the talk was over the question of money and he heard the appellant saying that the account is a falsified one. Fact that Mundakkal Provision Store was formerly run on partnership between the deceased and P.W. 13 is clear from the evidence including those of P.Ws. 13 and 23. P.W. 13 also said that the deceased used to collect loans and give his share. There is also the evidence of P.W. 11 regarding the dying declaration made by the deceased to him immediately after the incident that he was stabbed by the appellant when he demanded the amount. This dying declaration is probabilised by the evidence of the above witnesses, particularly P.W. 23. Fact that, as seen from the evidence of P.W. 12, at 3.00 p.m. appellant went to the house of the deceased and behaved in a friendly manner is of no consequence. That could be a feigned frienship as well for the purpose of inviting the deceased to the scene. It is clear from the above items of evidence, particularly from the deposition of P.W. 23, that the talk was over the money and it was the motive for the attack. It is trite law that the evidence of a

hostile witness need not be wholely discarded and the Court could accept whatever is acceptable from that evidence. P.W. 23 was all out to help the appellant and it cannot be thought he gave a false version to implicate the appellant. Unfortunately, Additional Sessions Judge overlooked these items of evidence when he said that there is no evidence in support of the motive alleged. I adverted to these aspects only because they have some relevance in considering the opinion of the Additional Sessions Judge that the prosecution is guilty of suppression of evidence and the genesis and origin of the occurrence were not truly placed before Court.

11. I doubt whether there was due application of mind by the Additional Sessions Judge to the prosecution and defence case, impact of the evidence and circumstances or law applicable. After having come to the conclusion that the fatal injury, which resulted in the death of Jose, was inflicted by the appellant, only ground on which the offence was reduced to one punishable under the second part of Section 304 is that there is no evidence to Show as to how the occurrence originated and there is suppression of the genesis and origin of the occurrence. He sought support from the decision in State of Karnataka Vs. Siddappa Bansanagouda Patil and another, alone in that connection. That decision did not lay down that whenever there is suppression of genesis and origin of occurrence by prosecution, accused has to be convicted only under the second part of Section 304. A reading of paragraphs 11 and 13 of that judgment would show the circumstances under which the High Court entered conviction u/s 304(2) and the Supreme Court refused to interfere under Article 136 of the Constitution. That is because the High Court took into account the peculiar facts and exceptional and special circumstances coupled with the nature of the injuries. If the prosecution is guilty of suppression of the origin and genesis of the occurrence, normally its case has to be rejected and the benefit given to the accused. That is not the basis for deciding whether the offence is murder or only culpable homicide not amounting to murder.

12. When death is caused by doing an act, question whether it is murder or only culpable homicide not amounting to murder must depend upon the nature and extent of mens rea in the form of intention, knowledge or reasonable belief. When death is caused by an act done with the intention of causing death, it is murder under the first part of Section 299 and the first part of Section 300. If death is caused by an act done only with the intention of causing such bodily injury, as is likely to cause death coming under the second part of Section 299, it will normally be only culpable homicide not amounting to murder, unless it comes under the second part of Section 300, in which, on account of the peculiar condition of the victim, the offender knew that it is likely to pause death. Except in cases coming under the Second part of Section 300, it will be murder only if the injury inflicted was an intentional one and not accidental and it is sufficient, in the ordinary course of nature, to cause death attracting the third part of Section 300. If the act was done without any intention at all, but only with the knowledge of the likelihood of death coming under the third part of Section 299, it will only be culpable homicide not

amounting to murder unless the person committing 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 and the act was done without any excuse for incurring the risk. Acts by which death is caused attracting the second or third part of Section 299 and not attracting any one of the four parts of Section 300 alone could be culpable homicide not amounting to murder. If any one of the four parts of Section 300 is attracted, gravity of the offence could be reduced to culpable homicide not amounting to murder punishable under either part of Section 304 only if any one of the exceptions to Section 300 is involved. Even then, second part of Section 304 could come in only if the act was done with the knowlege that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death. If the act was done with the intention of causing death or of causing such bodily injury as is likely to cause death, it could come only under the first part of Section 304, even if it is only culpable homicide not amounting to murder. These distinctions were not appreciated by the Additional Sessions Judge.

13. As the evidence shows, case in hand is one evidently coming u/s 300 attracting either the first or third part. Catching hold of the deceased by one hand, appellant took out the weapon and inflicted the intentional fatal injury on the neck. That is what the evidence indicates. If intention to cause death was not there, at least the intention to cause the particular injury on the neck is there. It is not an inadvertent or accidental injury and what was intended was not some other injury. That injury was found sufficient, in the ordinary course of nature, to cause death and the victim died shortly. Third part of Section 300 at least is attracted. If so, question is only whether arty one or more of the exceptions will be involved. In the nature of the defence and evidence, only two exceptions that could be considered are 2 and 4 attracting exceeding private defence or sudden fight upon sudden quarrel. Additional Sessions Judge has not considered any of these aspects.

14. P.W. 24 (investigating officer) did not find any sign of scuffle on the spot. Hostile witnesses, who saw the deceased and appellant talking just before the incident, are P.Ws. 3, 5 and 23. None of them said that there was any scuffle or that the deceased attacked the appellant or that the deceased was armed. They only saw them talking in an ''unfriendly tone. Evidence of P.W. 23 shows that the wordy quarrel was concerning the amount and at that time, deceased was standing leaning towards a wall. Only witness who mentioned about a push and pull is P.W. 7, who is a hostile witness and the information claimed by him is only hearsay. P.Ws. 1 and 2 heard the wordy quarrel and saw the incident in which the appellant caught and stabbed the deceased. From the place, where they were standing, they were not able to decipher what the talk was. But the conversation is clear from the evidence of P.W. 23, which is probabilised by the evidence already discussed. After the stab, P.Ws. 1, 2 and 6 saw the appellant running with the blood-stained weapon to his house. Even P.W. 23 saw him going though he refused to admit possession of weapon. P.Ws. 1 and 6

heard appellant challenging the members of the family of the deceased to come and also threatening them with consequences. In the light of these acceptable items of evidence, I fail to understand the correctness of the conclusion of the Additional Sessions Judge that the prosecution is guilty of suppression of the genesis and origin of the occurrence. Maximum that could be said is that the prosecution failed in giving sufficient evidence regarding the nature of the wordy quarrel. When the relevant witnesses turned hostile and loyal witnesses were not able to decipher the conversation, it cannot be said that there was suppression, especially when there is the evidence of P.W. 23. Only other person who could give an authoritative version of what transpired is the appellant and his version is improbabilised and belied even by the evidence of the hostile witnesses. Prosecution could be held guilty of suppression only when a material item of evidence necessary to unfold the true facts is withheld with ulterior motive.

15. Additional Sessions Judge disbelieved P.W. 2 and refused to believe P.W. 1 fully, in my opinion, without any justifiable reason. P.W. 2 belongs to Thiruvananthapuram. He is a driver by profession. He was employed by one Antony, a relation of the deceased, having business at Thiruvananthapuram. His house is near the scene. On the date of incident, he came in a car driven by P.W. 2. That is clear from the evidence of P. Ws. 2, 6, 8 and 12. Evidence of all these witnesses show that there is no cartable road to the residence of Antony and hence he used to park the car in the residential compound of P.W. 8, who is also a hostile witness. Fact that at the time of incident P.W. 2 was there talking with him was admitted by P.W. 8, though he turned hostile. He also admitted that the car was parked in his compound. Against P.W. 2, there is no allegation of interest in the prosecution or animosity towards the appellant. He was disbelieved only because in cross-examination, he said that the appellant and the deceased are persons not known to him and his version that he was questioned by the investigating officer three or four days after the incident and he identified the appellant when he was taken to the scene for preparing a mahazar cannot be correct. Incident was on 24-3-1989 and appellant was arrested only on 3-4-1989. He was released on bail on 16-5-1989. According to the Additional Sessions Judge, as per the final report, P.W. 2 was questioned only on 30-5-1989. Sessions Judge, therefore, thought that witness could not have identified the appellant when he was taken to the scene for preparing mahazar.

16. It is true that P.W. 2 said in cross-examination that the appellant and deceased are strangers to him as he came to the locality only for the first time. But, in chief examination as well as re-examination, he emphatically identified the appellant as the culprit and said that before the police also, he identified him when he was brought to the scene. Evidence is that along with Antony, he was in the locality for a few days before going back to Thiruvananthapuram. He only made an approximate assessment of the date of his questioning by the police. There is no evidence to show the exact date on which he was questioned. Statement of the Additional

Sessions Judge that the final report shows that he was questioned only on 30-5-1989 is not correct. Final report ''will not show it. Investigating officer was not questioned on this aspect and he did not say when P.W. 2 was questioned. Additional Sessions Judge did not call for or peruse the police diary, which may be part of the case diary containing entries regarding day-to-day proceedings in investigation. Even if such case diary was perused, it cannot be used as evidence and it could be used only to aid in inquiry or trial, as provided in Section 172(2) of the Criminal P.C. Grounds of rejection of the evidence of this witness are, therefore, unsustainable.

17. Other grounds of attack against this witness are Ext. D1 series case diary contradictions. They are all very minor aspects and they are not contradictions at all. In the case diary statement, he mentioned the name of P.W. 8 but in box, he was not able to remember the name. That is quite natural. In the case diary statement, he said as if in the wordy quarrel both the appellant and the deceased talked, but in the box, he said that talk was mainly by the appellant. Other contradictions are regarding withdrawal of knife and blood-stains on the knife. I do not find any reason at all to disbelieve this independent witness on these grounds.

18. P.W. 1 is a daily labourer, who is also a climber. He used to do climbing for the deceased also. That is no reason to reject his version or find that he is interested. In Ext. P1, he said that he heard the appellant abusing the parents of the deceased, deceased requesting him to go saying that the matter could be talked later, and after the incident, appellant challenging the members of the family of the deceased. This version is, to a certain extent, supported by P.W. 6 and some of the hostile witnesses also. These versions were practically admitted by him in the box also, though, in chief examination, he said that the deceased did not say anything. When he was confronted with the wordy quarrel mentioned in Ext. P1, in cross-examination, he admitted that the appellant abused the parents of the deceased and the deceased pacified and asked him to go with an offer that the matter could be talked out later. I do not find any contradiction at all, as pointed out by the Additional Sessions Judge.

19. In Ext. P1, there was a slight mistake regarding the exact location, where the injury was inflicted. That was corrected by questioning him again. Additional Sessions Judge said that it is difficult to accept his explanation in the box that the mistake occurred in Ext. P1 in his perplexity at that time. In the box, he said that while requesting the appellant to go when he abused his parents, deceased patted the appellant. This fact is not there in Ext. P1. So also Ext. P1 first information statement was given by him only the next morning. These are the other reasons to view the evidence of P.W. 1 with suspicion regarding the origin and genesis of the incident except in the matter of infliction of the stab injury. Slight mistake regarding the location of the injury is not significant at all and the explanation is quite convincing also. First information statement is only an information to the police regarding commission of a cognizable offence and it need not be an encyclopaedia

of all the minute details. An omission regarding patting is not a serious circumstance at all. P.W. 1 is a disinterested witness. Incident was by about dusk. Police station is about 40 km. away. There was difficulty in getting conveyance. It is no wonder P.W. 1 went to the police station only the next morning. These facts were spoken to by him. I cannot, therefore, appreciate the grounds relied on by the Additional Sessions Judge when there is nothing to show that there was any embellishment.

20. From the evidence, it is seen that both P.Ws. 1 and 2 are impartial and truthful witnesses, whose presence cannot be doubted. Their evidence regarding origin and genesis of the incident gets ample corroboration from other sources. Evidence of P.W. 1 is that immediately after receiving the injury, deceased requested him to bring a jeep and he did so. So also, at the request of the deceased, he went and informed P.W. 12, mother of the deceased. P.Ws. 6 and 12 supported the version that P.W. 1 went to the house of P.W. 12 and informed her. P.W. 4, who is a hostile witness, saw P.W. 1 near the scene before the incident. After the incident, he saw P.W. 1 running saying that he is going to inform P.W. 12. P.W. 5, another hostile witness, also supported this version. From the evidence of P.Ws. 8 and 9, who are also hostile witnesses, it is seen that it was P.W. 1 who brought the jeep and that he went to inform P.W. 12. P.W. 23, another hostile witness, also saw P.W. 1 near the scene at the time of incident. He said that after sustaining the injury, P.W. 1 alone went near the deceased and the deceased requested P.W. 1 to bring a jeep.

21. In the background of these facts, I do not find any justification for branding these two persons as chance witnesses, or viewing their evidence with suspicion when it is admitted even by the hostile witnesses that Jose sustained the injury and died consequent on some conversation between them. Medical evidence also fully supports the evidence of these witnesses. Further, there is the evidence of the investigating officer that MO 1 knife was recovered under Ext. P14(a) mahazar from the place where it was hidden by the appellant on the information given by him though the attestor P.W. 16 turned hostile. P.W. 1 identified MO 1 as the weapon wielded by the appellant. It is clear from the evidence that the deceased was unarmed and he was standing leaning on a retaining wall while the appellant was standing in front of him and engaged in a wordy quarrel with him when the deceased asked for the money due. At that time, in spite of the friendly request of the deceased to go away, appellant challenged the claim and stabbed the deceased after catching him and taking the knife from the loins. No question of acting in exercise of the right of private defence or inflicting the injury in a sudden quarrel involving Exceptions 2 and 4 arises and what is involved is an unprovoked attack, for which there was no justification. Unfortunately, Additional Sessions Judge has not assigned any acceptable reason for reducing the gravity of the offence. Demand for the money and the wordy altercation cannot give rise to Exception 4 when the evidence is that the deceased pacified the appellant and asked him to go.

22. It is true that the appellant had an injury. There is no case that this injury was sustained in the incident. Appellant is a labourer engaged in works connected with bamboo. Prosecution is that he sustained injury accidentally a few days -before the incident. In this connection, we have got the evidence of two doctors, examined as P.Ws. 18 and 19. Evidence of P.W. 18 is that on 21-3-1989 (incident was on 24-3-1989), appellant went to him with the injury caused by bamboo and he took out the bamboo piece and dressed the wound. Evidence of P.W. 19 is that thereafter appellant came to him with a dressed wound and it was almost healed then. There is nothing to show that the injury was sustained in the course of the incident or that there was any such probability. Even though prosecution had no duty to explain this injury, it was satisfactorily explained.

23. It is unfortunate that in such a situation, appellant was acquitted of murder and convicted only under the second part of Section 304. I was inclined to take up the matter in suo motu revision to place it before a Division Bench. But, in view of the fact that the sentence awarded is rigorous imprisonment for seven years, though the conviction is only under the second part of Section 304 (which is not at all justified), and further because the State has not chosen to file an appeal for reasons not known, I refrained from doing so.