(1960) 03 KL CK 0036

High Court Of Kerala

Case No: Criminal Appeal No''s. 193 to 196 of 1959

Kittan		APPELLANT
	Vs	
State of Kerala		RESPONDENT

Date of Decision: March 17, 1960

Acts Referred:

- Penal Code, 1860 (IPC) - Section 302, 326, 34

Citation: (1960) KLJ 592

Hon'ble Judges: K. Sankaran, C.J; T.C. Raghavan, J

Bench: Division Bench

Advocate: K. Sreedharankutty Menon S.B, for the Appellant;

Final Decision: Allowed

Judgement

Raghavan, J.

These four Criminal Appeals arise out of Sessions Case No. 21 of 1959 on the file of the Sessions Court of Quilon. Accused 1 and 2 in the case were charged u/s 326, I. P. C. and Section 302 read with Section 34, I. P. C. They have been convicted u/s 326, I. P. C. and sentenced to rigorous imprisonment for 5 years each. Appeal Nos. 193 and 194 of 1959 are by accused 1 and 2 respectively against the above conviction and sentence. Accused 3 and 4 were charged u/s 302 read with Section 34, I. P. C. They have been found guilty and convicted u/s 302, I. P. C. and sentenced to rigorous imprisonment for life. Appeal Nos. 195 and 196 of 1959 are by the 3rd and 4th accused respectively against the above conviction and sentence passed by the lower court. The case that the prosecution sought to prove in the lower court is briefly as follows :--

Accused 1 and 2 are the sons of the 3rd accused, and the 4th accused is his son-in-law. Accused 1 to 3 were living in Kuthirakulathu Puraidom as tenants. The Puraidom belonged to P.W. 6 and had an extent of 10 acres and 10 cents. The accused have been living there for the past about 15 years. P.W. 4 is another tenant

of P.W. 6 and he is also living in the same compound a few yards away from the house of the accused. About 3/4th of an acre was in the possession of the accused under P.W. 6 and a small extent of a few cents was sublet to them by P.W. 4. About 21/2 months prior to the occurrence, the deceased Raghava Kurup, had been deputed by the land-lord, P.W. 6 to supervise the cultivation of the compound. He was also having a portion of the compound under his direct cultivation. He had planted some yam in the portion of the compound in his possession which lay about 150 ft. away from the house of the accused. On 8th January 1959, at about 5 p.m., the deceased in the company of his brother''s son, P.W. 2, was going to the channel nearby to take bath. When they came near the house of the accused, the deceased entered the Puraidom to inspect his yam cultivation. He found that yam, from 5 of the beds, was missing. He suspected that the accused might have been responsible for the same and so he went to the house of the accused. Then the wives of accused 1 and 3 alone were there. The deceased questioned them as to whether the yam had been removed by them. They pleaded ignorance, on which the deceased got into the house of the accused, where he found a few pieces of yam. He took them to the house of P.W. 4 and kept them there. On his return from P.W. 4''s house he saw the 3rd accused standing in the courtyard of his house. The deceased rushed up to him and questioned him about the missing yam, when 3rd accused said that he did not know anything about it. Then the deceased took the 3rd accused forcibly by his loin cloth to the yam beds and showed him the beds from where the yam was removed. The 3rd accused said that though he did not remove the yam he would replant it, if so desired, by the deceased. The deceased wanted the 3rd accused to do that then and there and so the 3rd accused brought the yam from the house of P.W. 4 and cut it and replanted the pieces in the same beds. Thereafter the deceased and P.W. 2 went to the channel and had their bath and at about 6 p.m. they returned. On their way back also the deceased inspected the yam beds. At this time all the 4 accused were present in their house. The 1st accused who was standing in the courtyard called the deceased to his side on the pretext that he wanted to say something to hi(sic) When the deceased approached him, the other 3 accused appeared in (sic) courtyard. The deceased got suspicious that they might attack him an(sic) he turned back and walked in the direction of his house. Immediately (sic) accused threw a country bomb at him which hit the deceased on his bac(sic) turning back the second accused also threw a bomb which hit the (sic) on his left eye. Both the bombs exploded and the deceased fell to the(sic) Immediately accused 3 and 4 ran towards him and the 3rd accused to(sic) M. O. 1 and hit him on his head once. The stone slipped from his ha(sic) on the ground. The 4th accused picked up the same stone and hit (sic) four or five times on his head. The deceased became motionless a (sic) spot. P.W. 2, who was witnessing the incident, raised a hue and cry when the accused ran away from the scene. When the incident was taking place, P.W. 3, who is aged only 7 years, was playing on a rock a few yards away. He also witnessed the occurrence. P.W. 4, who is the father of P.W. 3, was then engaged watering the crops a few yards away. When he heard the explosion of

the country bombs, he ran to the scene and saw the deceased lying on the ground and accused 3 and 4 hitting him with the stone. P.W. 2 informed his father P.W. 1 about the incident and P.W. 1 proceeded to the Pathanamthitta Police Station and gave the first information report, Ext. P. 1, at about 1-O'' Clock in the same night. P.W. 9, the Sub Inspector of Police was present in the station and he recorded the statement. Immediately the Circle Inspector of Police was informed and he came and took investigation himself. He conducted the inquest, searched the house of the accused and recovered a country bomb from there. Accused 1, 2 and 4 were arrested on 13-1-1959 by P.W. 12 and the 3rd accused was arrested by P.W. 9 on 16-1-1959.

2. In the committal court, the 1st accused stated that the deceased belaboured the 3rd accused and later on belaboured him also and under such circumstances he threw a bomb at him. The other 3 accused denied the occurrence. However, in the committal court, the first incident where the deceased questioned him regarding the removal of the yam and the subsequent replanting of the yam was admitted by the 3rd accused. In the Sessions Court the accused had given a slightly different version. The 1st accused stated that the deceased belaboured his father and then he ran to the scene. He was also beaten by the deceased. Then the 2nd accused, to save the life of the 1st accused, threw a hand bomb which hit the deceased on his left eye. Thereupon the deceased released his hold of 1st accused, and at that time the 1st accused himself took a bomb from the verandah of the house and threw it at the deceased. The 2nd accused also gave a statement almost in similar terms. The 3rd accused in his statement before the Sessions Court admitted the first incident about the questioning by the deceased and the replanting of the yam. But he denied the main incident. The 4th accused pleaded alibi in the Sessions Court.

3. That Raghava Kurup sustained serious head injuries and died of those injuries on the spot does not admit of any doubt. The postmortem certificate Ext. P. 6 mentions the following injuries:

(1) Contused lacerated wound 4" x 11/2" x 3/4" situated on the back 1/2" left of the (sic)rtibral column at the level of 12th dorsal first and 2nd lumbar vertebrae. The surrounding skin the wound was scorched and the hairs were singed.

(2) Contusion 2" x 11/2" situated on the upper part of left cheek, upper eye-lid and (sic)r eye-lid. The skin over the contusion was scorched and the hairs singed.

(3) Lacerated wound 21/2" x 1/2" bone deep on the right side of head 11/2" above the right

(4) Lacerated wound 1" x 1/2" bone deep on the right side of head 1/2" above right ear.

(5) Contusion 10" x 2" situated on the head extending from the upper part of the the left ear.

(sic)Small abrasions seen on both the knees.

(sic)rding to the evidence of the doctor, P.W. 7, there was fissured fracture "in length underneath injury No. 5 extending from the middle of the lower end of the right parietal bone to the lower end of middle of left parietal bone and there were extra dural and sub-dural haemorrhages with clots under the fracture and death was due to coma as a result of injuries to the brain and meninges and syncope due to shock and haemorrhage as a result of the injuries sustained. According to him injury No. 5 was sufficient in the ordinary course of nature to cause death and death would have been instantaneous.

4. The main question in the case is as to who caused the injuries to the deceased. On this question the eye-witnesses are P.Ws. 2, 3 and 4. P.W. 2, who is the nephew of the deceased, was present with the deceased throughout. He speaks to the first occurrence as well as the second occurrence which took place on their way back after their bath in the channel. He deposes that on their way back the 1st accused called the deceased to his side and on the appearance of the other accused on the courtyard, the deceased turned back, when the 1st accused threw a country bomb on his back. He says further that the deceased looked back, when the 2nd accused also threw a bomb on his face and the deceased fell down on the ground on his face. He goes on to depose that the third accused took M.O. 1 and hit the deceased once on his head, when the stone slipped and fell on the ground, which was picked up by the 4th accused, who also hit the deceased on his head four or five times. No serious discrepancy has been shown to us in the evidence of this witness. The only criticism that is levelled against this witness by the learned counsel of the accused is that he is a near relation of the deceased. But on that ground alone the witness could not be discredited. Coming to P. W. 3, he is a child witness aged only 7 years. We find that the learned Sessions Judge had had a preliminary examination of this witness and had put a few questions to assess the mental capacity and the competency of the witness. These questions and answers have been rightly recorded by the learned Sessions Judge for the benefit of the appellate court and they are now before us. Considering the questions and answers, we are also satisfied that the witness has the capacity to understand and give cogent answers. This witness was playing on a rock nearby. When he heard the sound of explosion of the country bomb, he turned in the direction from which the sound came and he saw the whole incident that took place there. This witness has been cross-examined at length but no serious discrepancy has been brought out in the cross-examination. The evidence of this witness is fully corroborated by the evidence of P.W. 2. The other eye-witness is P.W. 4, the father of P.W. 3. At the time of the occurrence he was watering his crops and when he heard the sound of the explosion of the bombs, he ran up to the scene and when he reached the rock on which his son was playing, he could see the incident. He witnessed the latter portion of the incident where accused 3 and 4 hit the deceased on the head. The witness deposes that the 3rd accused hit the deceased once and then the stone slipped from his hand and fell on

the ground when the 4th accused took the same stone and hit the deceased four or five times on the head. He further deposes that when P.W. 2 raised a hue and cry, the accused ran away from the scene. This witness is sought to be discredited on the ground that he was interested in the Jenmi who was bent upon evicting the accused from the property. We are not satisfied that on this ground alone the witness should be disbelieved. In the aforesaid circumstances we are inclined to accept the version of the eye-witnesses, P.Ws. 2, 3 and 4 and on their evidence we come to the conclusion that the injuries on the deceased were caused by the four accused.

5. The next question is the apportionment of the liability for the several injuries among the several accused, or, in other words, the fixing of the liability of each of the accused and the ascertainment of the crime committed by him. This is often a vexed question in cases where crimes are committed by a combination of persons and where it is difficult to assign specific overt acts in the commission of the offence to particular accused persons. One of the provisions in the Indian Penal Code to meet such cases is Section 34 dealing with offences committed by a group of persons "in furtherance of the common intention of all". The wording of this section clearly indicates that the common intention should be anterior in time to the commission of the offence and there should be a prior meeting of the minds of the persons constituting the group, though the time between the formation of the common intention and the commission of the offence may be very short. It is always difficult to get direct evidence of common intention and consequently common intention has to be gathered from the circumstances of the case and it is always a question of fact. But care should be taken to apply this Section only to cases where there is clear evidence of common intention, even as different from same intention, for, an inference of common intention results in constructive liability for crimes making all persons in the group equally liable for the act of any one of them.

6. In the present case the accused have been charged u/s 302 read with Section 34, I. P. C. Accused 1 and 2 have been also charged u/s 326. The learned Sessions Judge finds that the attack by the accused was a planned and premeditated one. But he observes that he was not in a position to enter a definite finding whether the intention of accused 3 and 4 to cause death was shared by accused 1 and 2. In this view he convicts accused 1 and 2 u/s 326 and the 3rd and 4th accused u/s 302, I. P. C. Evidently he proceeds on the basis that accused 3 and 4 had the common intention to cause death, which was not shared by accused 1 and 2. We are not inclined to accept this view. If at all there were a planning and a common intention, such common intention would have been shared by all the accused and all of them should have been equally liable. The evidence in the case is not so clear to presume such a common intention as to make all the four accused equally liable. Therefore it is better to steer clear of Section 34 in the present case. Further, there is sufficient evidence in the case to fix the liability of the several accused on the basis of the overt acts committed by each of them. The evidence is clear that injury No. 1 was caused by the 1st accused and injury No. 2 on the left cheek was the result of the

bomb thrown by the 2nd accused. Hence we sustain the conviction of accused 1 and 2 u/s 326, I. P. C. and also the sentence, as it is not excessive. Coming to the case of the 3rd and the 4th accused also, we are of the opinion that there is sufficient evidence in the case to hold that it was the 4th accused who caused injury No. 5, which according to P.W. 7 was the fatal injury and that the 3rd accused should not be held liable for it. From the evidence of P.W. 2, it is clear that the 3rd accused hit only once with M. O. 1 and the 4th accused hit four or five times. P.W. 7 says in his cross-examination --

No. 5 cannot be caused by a single strike with M. O. 1. But by more than one hit it can be caused.

Therefore it is clear that the 3rd accused, who hit only once, could not have caused injury No. 5. He could have caused only one of the other two injuries on the head and hence his conviction u/s 302, I. P. C. cannot be upheld. The offence committed by him can only fall u/s 326, I. P. C, for, M. O. 1, which is a fairly big granite stone, is an "instrument which used as a weapon of offence is likely to cause death." Therefore, we alter the conviction of the 3rd accused to one u/s 326, I. P. C. and sentence him to rigorous imprisonment for seven years. The foregoing discussion makes it clear that the 4th accused was responsible for the mortal injury No. 5. In view of that, we hold that the conviction and sentence passed on him by the lower court are correct.

In the result we allow appeal No. 195 of 1959 in part as indicated above and dismiss the other appeals.