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Date : 24/08/2025

Suresh Vs State of Kerala

Court: High Court Of Kerala

Date of Decision: Sept. 6, 2005

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 222, 232, 313, 313(1), 357
Explosive Substances Act, 1908 â€" Section 3, 5
General Clauses Act, 1897 â€" Section 26
Penal Code, 1860 (IPC) â€" Section 143, 147, 148, 149, 302

Citation: (2006) 1 KLT 78

Hon'ble Judges: V. Ramkumar, J; K. Padmanabhan Nair, J

Bench: Division Bench

Advocate: P. Vijaya Bhanu and Tony Mathew, for the Appellant; Sujith Mathew Jose, Public Prosecutor, for the Respondent

Judgement

V. Ramkumar, J.
Accused Nos. 1 to 9 in Sessions Case No. 143/98 on the file of the Addl. Sessions Judge (Adhoc I), Thalassery are the

appellants in this appeal. They challenge the conviction entered and sentence passed against them by the aforesaid Court for offences punishable

under Sections 143, 147, 148 and 302 I.P.C. read with Sections 3 and 5 of the Explosive Substances Act.

2. The case of the prosecution can be summarised as follows:

On 10-3-1995 at about 9 p.m. the accused who are C.P.M. loyalists, out of their enmity towards Chembattarathinmel Kelu, P.W.1 (Krishnan),

P.W.3 (Raveendran) and C.W.3 (Gopi) who are workers and sympathisers of B.J.P., formed themselves into members of an unlawful assembly,

the common object of which was to commit rioting armed with deadly weapons, to cause hurt to the aforesaid persons using country bombs and to

commit the murder of the said persons who were sitting on the steps leading to Koovendavalappil house at K.C. Mukku in Puthur amsom,

Kootteri desom belonging to P.W.1 and in prosecution of the aforesaid common object of the said assembly, the accused threw bombs at the

aforementioned persons. Kelu referred to above sustained fatal injuries on account of the explosion of the bomb and he succumbed to the same in

the same night and P.W.3 sustained injuries. The accused have thereby committed offences punishable under Sections 143, 147, 148, 324, 307

and 302 read with Section 149 I.P.C. and Sections 3 and 5 of the Explosive Substances Act, 1908.

3. On the accused pleading not guilty to the charge framed against them by the Court below for offences punishable under Sections 143 I.P.C.

Section 5 of Explosive Substances Act read with Section 149 I.P.C. Section 302 read with Section 149 I.P.C. and Section 3 of the Explosive

Substances Act read with Section 149 I.P.C., the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether

examined 15 witnesses as P.Ws 1 to 15 and got marked 14 documents as Exts.Pl to P14 and 7 material objects as M.Os 1 to 7.

4. After the close of the prosecution evidence, the accused were questioned u/s 313(1)(b) Cr.P.C. with regard to the incriminating circumstances

appearing against them in the evidence for the prosecution. They denied those circumstances and maintained their innocence. The first accused

stated as follows:

He is innocent. There is absolutely no connection with the occurrence and himself. On the relevant dates he was an inpatient in the Medical College

Hospital, Kozhikode. The case was foisted out of political enmity.

5. The 2nd accused stated that he is a C.P.M. Worker and he was falsely implicated out of political enmity.

6. The 3rd accused stated that they are B.J.P. workers and the opposite party belong to the C.P.M. and the case was taken out of political

enmity.

7. The 4th accused stated that he has not committed any offence.

8. The 5th accused stated that during the time of occurrence he was in his own medical store and that he has not committed any offence.

9. The 6th accused stated that he is innocent and he was falsely implicated due to political enmity.

10. The 7th accused also toed the line of the 6th accused.

11. The 8th accused stated that at the time of the alleged occurrence he was at his own residence and the younger brother of deceased Kelu was

in his house and he was falsely implicated out of political enmity.

12. The 9th accused stated that he is innocent and he was made an accused out of political enmity.

13. After the examination of the accused u/s 313 Cr.P.C., the learned Addl. Sessions Judge without hearing the prosecution and the defence u/s

232 Cr.P.C., called upon the accused to enter on their defence. They examined three witnesses as D.Ws 1 to 3 and got marked as Exts. D1 to

D3.

14. The Court below, after trial, as per judgment dated 9-1-2003 found all the accused guilty under Sections 143, 147, 148 and 302 read with

Section 149 I.P.C. and Sections 3 and 5 of the Explosive Substances Act. For the conviction u/s 302 I.P.C. the first accused was sentenced to

undergo imprisonment for life and also to pay a fine of Rs. 25,000/- and on default to pay the fine, to undergo simple imprisonment for one year.

For the conviction u/s 302 read with Section 149 I.P.C. accused Nos. 2 to 9 were each sentenced to undergo rigorous imprisonment for 10 years

and also to pay a fine of Rs. 10,000/- and on default to pay the fine, to undergo simple imprisonment for one year. For the conviction under

Sections 3 and 5 of the Explosive Substances Act the accused were each sentenced to rigorous imprisonment for five years each and to pay a fine

of Rs. 5,000/- each, and on default to pay the fine, to undergo simple imprisonment for six months each. For the conviction u/s 148 I.P.C., the

accused were each sentenced to undergo simple imprisonment for six months. No separate sentence was imposed for the conviction under

Sections 143 and 147. The fine amount as and when realised was directed to be paid to the legal heirs of the deceased by way of compensation

u/s 357 Cr.P.C. The accused were also held entitled to set off u/s 428 Cr.P.C. It is the said judgment which is assailed in this appeal.

15. While admitting this appeal, noticing the illegality in the sentence imposed on accused Nos. 2 to 9 for the conviction u/s 302 I.P.C., this Court

suo motu initiated proceedings for enhancement of sentence and gave notice of the same to Advocate Sri. P. Vijaya Bhanu who took notice on

behalf of the appellants.

16. We heard Advocate Sri. P. Vijaya Bhanu, the learned Counsel appearing for the appellants/accused and Adv. Sri. Sujith Mathew Jose, the

learned Public Prosecutor appearing for the State.

17. P.Ws 1 to 3 are the occurrence witnesses. P.W.4 is an attester to the inquest report prepared by P.W.14. P.W.5 is the driver of the

autorickshaw in which the injured were initially taken to Panoor Government Hospital. P.W.6 is an attester to Ext.P3 scene mahazar. P.W.7 is the

Village Officer, Puthur, who proved Ext.P4 scene plan. P.W.8 is the Head Constable of Panoor Police Station who registered Ext.P5 F.I.R.

P.W.9 is the Sub Inspector of Panoor Police Station who arrested accused Nos. 7 and 9 on 14-3-1999 while on patrol duty. P.W.10 is the

Assistant Sub Inspector of Police who attested Ext.P6 mahazar for the articles taken by P.W.13 (the Scientific Assistant, Forensic Science

Laboratory, Thiruvananthapuram) from the scene of crime. He also arrested accused Nos. 2 and 4 on 25-3-1999. P.W.11 is the Civil Surgeon of

the Government Hospital, Thalassery, who proved the wound certificate of deceased Kelu and P.W.3. Eventhough these wound certificates

should have been marked as Exts.P7 and P8, they were wrongly marked as Exts. P6 and P7 in the deposition. (The appendix of the trial Court

judgment, however, shows these wound certificates as Exts.P7 and P8). P.W.12 was the Civil Surgeon of Government. Hospital, Thalassery who

conducted autopsy over the dead body of Kelu and prepared Ext.P9 postmortem certificate on 11-3-1995. P.W.13 is the Scientific Assistant, in

the Forensic Science Laboratory, Thiruvananthapuram. He proved Ext.P10 report showing the collection of properties from the scene of crime.

He also proved another report showing the result of forensic examination on those properties conducted by another Scientific Assistant in the

Forensic Science Laboratory. Although P.W.13 proved the contents of the said report the same was not marked. P.W.14 is the Circle Inspector

of Panoor who conducted the major part of the investigation. P.W.15 who succeeded P.W.14 proved Ext.P13 report and Ext.P14 sanction for

prosecution under the Explosive Substances Act and laid the charge.

18. Eventhough the learned Counsel for the appellants as well as the learned Public Prosecutor made elaborate submissions before us in support of

their respective cases, we are of the view that in the light of the glaring illegalities and palpable infirmities that will be adverted to hereinafter and

which have come to our notice, the matter has to go back to the trial court for fresh disposal according to law.

19. Ext.P5 F.I.R. in this case was registered by P.W.8 for offences punishable under Sections 143, 147, 148, 324 and 307 I.P.C. and Sections 3

and 4 of the Explosive Substances Act, 1908. This was at a time when Kelu was admitted in the Government Hospital, Thalassery and was

struggling for his life. Consequent on the death of Kelu soon after his admission in the said hospital, P.W. 14. claims to have sent a report on the

same day to the Magistrate concerned to delete Section 307 I.P.C. and to substitute the same with Section 302 I.P.C. During the course of

investigation, finding that P.W.3 was assaulted, P.W.15 sent Ext.P13 report to the Magistrate to add Section 307 I.P.C. as well. After the

conclusion of investigation the final report (charge-sheet) filed before the Magistrate was for offences punishable under Sections 143, 147, 148,

324, 307 and 302 read with Section 149 I.P.C. and Sections 3 and 5 of the Explosive Substances Act, 1908. On 11-2-1998 the committal court,

however, took cognizance only of offences punishable under Sections 143, 147, 148, 302, 324 and 307 I.P.C. and Section 3 of the Explosive

Substances Act. The committal Court did not take cognizance of the offence punishable under Sections 149 IPC and Section 5 of the Explosive

Substances Act.

20. After committal when the case came before the Sessions Court, cognizance was taken for offences punishable under Sections 143, 147, 148,

324 and 302 read with Section 149 I.P.C. and Sections 3 and 5 of the Explosive Substances Act, 1908. On 29-9-1998 the learned Sessions

Judge made over the case to the Addl. Sessions Judge for disposal. On 23-10-2001 the Additional Sessions Court framed charge against the

accused for offences punishable under Sections 143 & 302 I.P.C. and Sections 3 and 5 of the Explosive Substances Act read with Section 149

I.P.C. But as per the impugned judgment the accused have been convicted not only under Sections 143, 302 and Sections 3 and 5 of the

Explosive Substances Act read with Section 149 I.P.C. but also under Sections 147 and 148 I.P.C. The act of framing charge is not an empty

formality. It is the basic record which gives notice to the accused on what accusation he is going to be tried by the court so that he could shape his

defence accordingly. When there is no charge and no charge has been read over and explained to the accused as well, legally the accused has no

notice on what accusation he is being tried. In such cases, there is no trial at all in the eye of law and the so-called trial, if any, is vitiated. No

prejudice need be proved in such cases nor is it a case of irregularity which could be cured either u/s 464 or u/s 465 Cr.P.C. (See Ramachandran

v. State of Kerala - 1987 (1) KLT 421. Offences such as rioting punishable u/s 147 and rioting armed with deadly weapons punishable u/s 148

are certainly not minor or cognate offences vis-a-vis Section 143 I.P.C. or Section 302 read with Section 149 I.P.C. and, therefore, Section 222

Cr.P.C. also cannot be pressed into service to justify the conviction recorded under those offences.

21. It has already been seen that the trial Judge did not post the case for hearing u/s 232 Cr.P.C. which is also not an empty formality. After

examining the accused u/s 313 Cr.P.C., the trial Judge straightaway called upon the accused to enter on their defence. That was certainly not the

stage at which the accused were to be asked whether they had any defence evidence to be adduced. Non-compliance of Section 232 Cr.P.C. is

also an infirmity that goes to the root of the matter with regard to the procedure followed by the trial judge. See Radhanandan v. State of Kerala

1990 (1) KLT 516 and Sivamani v. State of Kerala 1992 (2) KLT 227.

22. The award of rigorous imprisonment for 10 years and fine for the conviction u/s 302 I.P.C. was the height of illegality displayed by the learned

Sessions Judge. It shows that besides non-application of mind the learned Sessions Judge has been blissfully, if not unpardonably, ignorant about

the punishment prescribed for the offence of murder.

23. After the examination of P.W.10 was completed, the trial Judge had marked exhibits upto Ext.P6. So when P.W.11, the doctor was examined

next, the document that was to be marked next was Ext.P7. Instead, the two wound certificates were marked as Exts.P6 and P7 instead of as

Exts. P7 and P8. But while preparing the appendix to the judgment, these two certificates were shown as Exts.P7 and P8. This indicates the

cavalier manner in which the trial of a murder case was being conducted.

24. Failure to award any punishment for the conviction under Sections 143 and 147 is another illegality committed by the learned Sessions Judge.

Law does not envisage a person being convicted for an offence without any sentence being imposed on him. The rule is that a sentence should

follow a conviction. (See Jayaram Vithoba and Another Vs. The State of Bombay, , Varghese v. State 1986 KLT 1285 and Thampi Sebastian v.

State of Kerala 1988 (1) KLT 247). As early as on 25-5-1965 this High Court had issued Circular No. 7/1965 for the same of strict compliance

by the subordinate criminal courts. The said Circular reads as follows:

Instances have come to notice where criminal courts have failed to award separate sentences in cases in which the accused have been convicted of

more than one offence. All Sessions Judges and Magistrates are informed that except where a separate sentence is forbidden by Article 20(2) of

the Constitution or Section 71 of the Indian Penal Code or Section 26 of the General Clauses Act or any other law, they should award a sentence

for every offence in respect of which they record a conviction.

There has been palpable violation in this case of the said Circular as well.

25. Yet another irregularity committed by the Court below is the description of the imprisonment directed to be undergone by the accused for the

non-payment of the fine imposed u/s 302 I.P.C. It is well settled that a sentence of imprisonment for life means rigorous imprisonment for life.

(Vide Sat Pal alias Sadhu Vs. State of Haryana and Another, and Naib Singh Vs. State of Punjab and Others, . Thus in a case where substantive

sentence of imprisonment which the court can impose for an offence is only rigorous imprisonment, then, as enjoined by Section 66 of the Indian

Penal Code, the imprisonment for non-payment of the fine imposed for the said offence, can only be rigorous imprisonment and not simple

imprisonment.

26. The set off given without any condition in the case of the sentence of life imprisonment is also against the settled legal position. The question of

setting off the period of detention undergone by an accused as an under-trial prisoner against the sentence for life imprisonment, can arise only if an

order is passed by the appropriate Government either u/s 432 Cr.P.C. or u/s 55 I.P.C. read with Section 433(b) Cr.P.C. (See Bhagirath Vs.

Delhi Administration, and Madhavan v. State of Kerala 1992 (1) KLT 544).

27. The conviction of all the accused for the offence punishable u/s 148 of the Indian Penal Code without a finding that those who were so

convicted were armed with deadly weapons is also unsustainable. Persons not armed with deadly weapons cannot be convicted u/s 148 I.P.C.

with the aid of Section 149 I.P.C. for the mere reason that they were members of an unlawful assembly. (See Vijayan v. State of Kerala 1959

KLT 704 (last para), Picharu Bhati and Others Vs. State of Orissa, , In re P. Abdul Sattar and Ors. - AIR 1961 Mys 57, In re Muthusami

Goundan and Ors. - AIR 1942 Mad. 420 and Kabul Singh and Ors. v. State of Punjab 1995 SCC 1035.

28. The F.S.L. report the contents of which was proved by P.W.13 but was omitted to be marked will also have to be marked in evidence.

29. In the light of the above illegalities and infirmities committed by the Court below, the conviction entered and the sentence passed against the

appellants cannot be sustained. But at the same time, the appellants are not entitled to an acquittal on that sole ground. For rectifying the

procedural and other infractions committed by the court below, the matter will have to go back.

30. In the result, the judgment under appeal is set aside and the matter is remitted to the court below for disposal according to law. We, however,

do not consider that a re-trial or de-novo trial is warranted in this case. It shall be open to the court below to alter the charge, if necessary, and in

that case, provide an opportunity to the accused to recall any witnesses which they might pray for.

31. Parties shall appear before the trial Court without any further notice on 7-10-2005.

The first accused shall be released from prison on his executing a bond to the satisfaction of the trial court, ensuring his continued appearance

before that Court. With regard to the remaining accused, the bond executed by them will be in force until they appear before the trial Court on 7-

10-2005 and execute a fresh bond to the satisfaction of that Court.

Remit the entire records to the court below immediately.