SUPREME COURT OF INDIA

Kuriakose

Vs.

State of Kerala

(G.N. Ray and K. Jayachandra Reddy JJ.)

01.02.1994

JUDGMENT:

G.N. RAY, J.-

This appeal is directed against the judgment dated March 25, 1983 passed by the Division Bench of Kerala High Court disposing of Criminal Appeal No. 37 of 1981 and Criminal Revision Petition No. 32 of 1981. Both the said appeals and the revision case arose out of the judgment dated September 16, 1980 passed by the learned Additional Sessions Judge, Kottayam in Sessions Case No. 37 of 1980. By the said judgment, the learned Additional Sessions Judge acquitted both the accused appellants from a charge under Sections 447, 307, 302 and 34 IPC. The State of Kerala preferred the said Criminal Appeal No. 37 of 1981 against the judgment of acquittal and the complainant also moved a revision petition against the said judgment being Criminal Revision No. 32 of 1981. The High Court allowed the said criminal appeal and convicted both the accused appellants under Section 302 IPC and convicted each of them to suffer rigorous imprisonment for life. In view of the said decision rendered in the appeal, the criminal revision case was disposed of without passing any order. The short facts of the prosecution case are inter alia that 26th January was St. Sebastian's day which was celebrated with jubilation in the locality. PW 1 Poulose, belonged to Vayala near Koodalloor but later on shifted to Trichur after selling his land and winding up his affairs in Vayala. He also came to the said locality on January 26, 1980. The deceased, Varkey had put up an enclosure on the road with an icon of St. Sebastian. The said Varkey and the other deceased Chacko together with PW 1 had been to the church in the evening. Varkey asked the accused 1, Kuriakose, to pay contribution for the said enclosure put up by Varkey at about 8.00 p.m. on January 26, 1980. He refused to pay such contribution and made some remarks on which there was an altercation between Varkey and the said accused 1. It is alleged that accused 1 assaulted Varkey on which PW 2, son of Varkey, gave one blow to accused 1. Chacko had given two kicks to the said accused. Accused 1 thereafter left the place threatening the deceased and the others.

2. The locality in which the deceased and the accused had been staying was an area intensely cultivated. The deceased Varkey and the other deceased Chacko who was his brother had lands where cultivation of tapioca and other crops used to be carried out. Beyond the fields of Varkey and Chacko to the north, accused 1 also had agricultural field having banana cultivation. The features and location of the property were exhibited in a plan Ext. A-6. The next morning, namely on January 27, 1980 Varkey and Chacko had been to the field in connection with their cultivation

activities. It is the prosecution case that while they were in the field accused 1 accompanied by his son, accused 2, namely Jose Kappen went towards the field of Varkey and Chacko and they came along the property of Varkey and Chacko. Varkey protested to such moving on the property of Varkey and told the accused that there was no way along the said land. The first accused thereafter persisted in walking along that way and challenged Varkey and Chacko. Both the accused who kept knives covered in their sheaths drew them out and accused 1 stabbed Varkey 3 to 4 times. Varkey died on the spot. Accused 2 inflicted stab wounds on Chacko and he also succumbed to those injuries on the spot. PW 2, Sunny George, was then in the northern yard of the house in the company of PW 1, Poulose and Pappu. Having noticed the said murderous assault on Varkey and Chacko, PW 2 rushed towards the spot but he stumbled on a small bund and fell down. PW 3, Devaria who had been returning home after attending the service in the church heard the noise of the quarrel in the field and rushed to the spot. PW 1 and nephew of Varkey also rushed to the spot. When those persons reached the place, Varkey and Chacko were found dead. The first accused pulled PW 2 who had fallen after stumbling by his leg and the accused 2 stabbed PW 2. A hue and cry was raised by PW 1 and PW 3, Varkey's wife and Pappu the nephew of Varkey. Both the accused persons then fled away from the place. PW 2 was taken to the Medical College Hospital in a jeep by PW 3. PW 5, Dr E.E. Raja, examined PW 2 in the hospital and issued the wound certificate Ext. P-2. The said PW 2 was discharged on February 6, 1980 from the hospital and the said doctor also issued the Discharge Certificate Ext. P-3 to PW 2. The Police Officer PW 9 of Marangattupally Police Station rushed to hospital on coming to know that PW 2 had been taken to the hospital and he reached the hospital at about 9.00 a.m. and recorded the statement given by PW 2 (Ext. P-1). He also prepared a note after noticing the wound on the body of PW 2. Such note is Ext. P-1 (A) and he took into custody lungi MO 4 worn by PW 2. Thereafter, he returned to the police station and registered Crime No. 4/80 and prepared the first information report Ext. P-8. The investigation was later on taken over by the Circle Inspector PW 10, and inquest on the dead bodies was prepared being Ext. P-9 and P-10. Sheath of the knife was found in the field which was seized being MO 1. The dead bodies were sent to the Medical College Hospital for postmortem examination. PW 6 conducted the postmortem examination on Varkey and Chacko and issued the postmortem certificates being Exts. P-4 and P-5.

3.The accused surrendered before the Circle Inspector and they were interrogated by the Circle Inspector. Pursuant to the statement made by accused 1 Ext. P-11 (a) knife (MO 2) and sheath (MO 12) were recovered from the rubber machine shed of the said accused. Similarly, knife (MO 3) was recovered pursuant to the confession Ext. P- 11 (b) made by accused 2.

4. Ten witnesses were examined by the prosecution and documents P-1 to P-11 (b) were also exhibited. It appears that one of the prosecution witnesses, namely Jose Kappen, PW 4, was declared hostile. In the statement made under Section 313, Criminal Procedure Code, accused 1 completely denied the incident which happened on January 26, 1980 and made a statement to the effect that when on January 27, he was proceeding along the bund towards his own land he was obstructed, kicked, fisted and beaten up by the deceased along with Pappu and PW 2. He cried aloud and hearing his cry, his son, accused 2 rushed there but the said accused 2 was also beaten up and fisted by the said persons and accused 1 somehow managed to escape from the said place. The accused 2 also denied any incident happening on the previous night and he made a statement to the effect that having heard a cry in the field he rushed to the spot and found that his father had been beaten by Varkey, Chacko and PW 2. When he rushed to the place and cried for help, he was also beaten and throttled. He somehow escaped from the place, out of fear for life.

5. The learned Sessions Judge, however, acquitted both the accused persons from the charges levelled against them. It may be noted in this connection that at the hearing of the said appeal and revision case, it was not disputed by the learned counsel for the accused that although acquittal order was justified the judgment of the learned Sessions Judge was unsatisfactory and the points for the decision had not been formulated and case of either party had not been discussed properly.

6. From the facts and circumstances of the case and the evidences adduced, it transpires that accused 1 had agricultural property to the north of the property of the deceased Varkey and Chacko. There is a bund running from south to north along the agricultural field in question and such bund is used by cultivators. At the time of the incident, Pappu, nephew of Varkey, was also present near the house of Varkey. PW 2 is Varkey's son and Chacko, the brother of Varkey had also come to the house of Varkey and proceeded to the fields although he had a separate residence of his own. The learned Sessions Judge inter alia held that the knives which were used for the murder of the deceased, (MO 2 and 3) stated to have been recovered by the police did not contain any bloodstain on chemical examination. It was held by the learned Sessions Judge that the first information statement was shrouded in suspicion and the said information report was not the one which had been given by PW 2 at about 9.00 a.m. in the Medical College Hospital. The learned Sessions Judge had indicated that the failure to account for further developments on the basis of the intimation given by the Medical Officer PW 5 who examined the injured witness PW 2 was unusual. It was further observed that the conduct of the SubInspector who although got the information about the murder, proceeded to the hospital and not to the scene of occurrence was also unusual. According to the learned Sessions Judge, the evidence of PW 1, a resident of Trichur and stated to be present at the place of occurrence, also did not inspire confidence. According to the learned Sessions Judge, the evidence of PW 3 was unsatisfactory because he had omitted to mention before the police about PW 2 falling down on the eastern side of bund and having been stabbed on the left side of the chest. According to the learned Sessions Judge, PW 2 was an interested witness. In that view of the matter, the learned Sessions Judge was of the view that the prosecution case was not established and he acquitted both the accused.

7.It was contended on behalf of the accused that accused 1 admittedly had bananaplantation beyond the field of Varkey. He had therefore occasion to proceedtowards his cultivated land. It was contended that the existence of bund was beyond any dispute. Such bund was being used by the cultivators as a passage to go to their respective fields and the people as of right used to go along the bund. The deceased had no right to obstruct such movement along the bund. It was sought to be contended on behalf of the accused that conspiracy was hatched on the previous night against the accused and Varkey obstructed accused 1 from going to his field. On such obstruction, accused 1 tried to assert the customary right of way which led to a scuffle and then his son, accused 2, had rushed to the spot. If due to such scuffle, the said two accused persons had exercised the right of self-defence and both the deceased had died as a result of such exercise of right of self-defence, no conviction was warranted against the accused persons. It was also contended that there was no reason for both the deceased Varkey and Chacko to go to the field early morning to see to the watering of the field because the key of the pump house had not been found near the area of scuffle. It was also contended that it was not natural for the Sub-Inspector of the police to go to the hospital instead of going to the place of occurrence when he had received the information of murder. It was further contended that there had not been proper investigation of the case and a different first information report had been substituted. Hence, the learned Sessions Judge was justified in acquitting the accused persons and there was no occasion to interfere in the appeal.

8. The case of the prosecution about the murder of the said two deceased was sought to be established by three eyewitnesses, namely PWs 1, 2 and 3. It has been observed by the High Court that although PW 1 at the relevant time was a permanent resident of Trichur, but it was the prosecution case that he came on the said festive occasion of St. Sebestian's day and he also had his inlaws at Mayala. The High Court has held that PW 1 admittedly used to stay in of the locality of Varkey the deceased. It was not unusual for him to come to the said village on the occasion of St. Sebastian's day because of his long association in the locality. The High Court has also noted that his presence at the place of occurrence also gets corroborated by the fact that on the day of occurrence, he was examined by the Sub-Inspector, PW 10. The High Court has also held that the contention of the accused that the place of occurrence could not be seen by PW 1 from the place where he was standing, was unacceptable in view of the fact that there was a slope and it was possible to see the place of occurrence. According to the High Court, such feature and topography had been ignored by the learned Sessions Judge. The High Court has also held that the taking of coffee referred to in the testimony of PW 1 has not been properly appreciated and the morning coffee was sought to be substituted as a regular breakfast. According to the High Court, the learned Sessions Judge overlooked the social habits of the village people and rejection of the testimony of PW 1 on such improper view was unjustified and perverse. The High Court has also held that the identification of the knife by PW 1 was not unnatural because he had occasion to see the same and he had also given the description of the knives earlier when he stated that the knives were Mallappuram knives. The High Court has come to a categorical finding that the reasons given in discarding the evidence of PW 1 are absolutely untenable and without any substance. The High Court has further held that PW 2 was an injured witness and was taken to the hospital and it will be improper to reject his evidence simply on the ground that he had not mentioned that Chacko had been stabbed on the chest and that he had not indicated the exact location where he himself had sustained the injuries. It has also been held by the High Court that since he is an interested witness, his evidence is required to be scrutinised with care and circumspection. The High Court has further held that PW 3 had deposed that PW 2 had fallen on the eastern bund and the injuries were inflicted on him thereafter by the accused. The omission to give the detail to the police by PW 3 about the exact location where PW 2 had fallen and the place where stabbing injuries were inflicted should not be highlighted out of proportion to discard the evidence of PW 3. According to the High Court, the evidence adduced by PWs 1, 2 and 3 are convincing and should be accepted and if such evidences are accepted then the murderous assault committed by the accused persons and the injuries inflicted on PW 2 are fully established. The High Court has also held that presence of Pappu in the house of Varkey was not at all unnatural specially in the context of an important event in the church at that time. The High Court has held that the allegation of hatching the conspiracy on the side of the prosecution cannot be accepted because of the presence of Pappu or Chacko in the house and in the field at the time of occurrence because both are very close relations. The High Court has further held that the existence of pathway used by villagers along the bund cannot be accepted in view of the clear evidence given on behalf of the prosecution. In this connection, the High Court has referred to the evidence of PW 4. Although PW 4 was declared hostile, the said PW 4 stated that there was no pathway along the cultivated area and there was only a ridge. So far as the recovery of knives with which the injuries were inflicted is concerned, the High Court has indicated that there was no suggestion in the cross-examination of the Sub- Inspector, PW 10, about non-recovery of said knives. The High Court has also come to the finding that almost immediately after the occurrence, statement was made by PW 2 and the prosecution had also produced the first information report before the Court and the said first information report was also filed in the Magistrate's Court. The High Court has held that Ext. P-1 is a genuine document and the circumstances under which it was recorded were properly explained with reference to the

documentary and oral evidence.

9. Coming to the conclusion of right to private defence of the accused, the High Court has observed that in the statement under Section 313 Criminal Procedure Code, no plea of right to private defence had been taken by any of the accused. The High Court has held that there was no mischief committed by either of the deceased for which there was any occasion to exercise right of private defence and as there was no customary right of pathway which might amount to mischief such plea of self-defence was not at all acceptable. The High Court has further held that even if there was any customary right of pathway, there was no occasion to inflict knife injuries on vital pans of the body to cause instantaneous death of both the deceased for an alleged interference with a right of pathway, when admittedly, the deceased Varkey and Chacko had no weapons with them. In the aforesaid facts, there was no occasion for any threat to the person or to the property justifying stabbing the deceased to death. The High Court has, therefore, held that the judgment of the learned Sessions Judge was completely against the weight of the evidence and was perverse. Accordingly, the High Court set aside the said judgment and convicted both the accused under Section 302 IPC and passed sentence to undergo rigorous imprisonment for life against both of them.

10. The learned counsel for the appellant has reiterated the arguments which were advanced at the hearing of the appeal before the High Court. It has been sought to be contended that not only the right of pathway was obstructed by the deceased and their associates but they also assaulted both the accused. It was only on such assault that there was retaliation by the accused for which the said two persons had died. It has been contended that in exercise of right to selfdefence if knives were used to save the lives of the accused no exception should be taken. It was riot possible to weigh in golden scales the exact force which was required to be applied by way of right of self-defence. If in such a case, the deceased had suffered injuries on vital parts which were not intended, the accused cannot be held to be guilty for an offence under Section 302 IPC. It has been contended that in any event in such a case, the conviction under Section 302 was not warranted and at best if the accused had exceeded the right of private defence, the conviction under Section 304 IPC could have been awarded. The learned counsel has, therefore, submitted that the decision of the High Court is not proper particularly when some features in the case of the prosecution were not accepted fully by the learned Sessions Judge by indicating cogent reasons. The learned counsel has submitted that although the judgment passed by the learned Sessions Judge may not be a well-written judgment for which criticism had been advanced at the hearing of the appeal, it cannot be held that the points indicated by the learned Sessions Judge could not and did not warrant an order of acquittal.

11. After giving our anxious consideration to the facts and circumstances of the case and the materials and evidences adduced in the case, it appears to us that there are clinching evidences to establish the prosecution case. In our view, the High Court has given very cogent reasons as to why the evidences of PWs 1, 2 and 3 should be accepted. PW 2 is an injured witness who made statement at the hospital shortly after the incident when he was taken for treatment. His evidence gets corroborated by the evidences given by the other witnesses. The reasons advanced by the learned Sessions Judge for discarding those evidences do not stand scrutiny as rightly held by the High Court. It is not necessary to consider about the incidents happening on the previous night. If the murderous assault by the accused is established by clear and clinching evidences of the eyewitnesses, it will not be necessary to investigate the motive behind such commission of offence. In our view, the High Court is wholly justified in holding that the case of right to self-defence cannot be accepted. The accused did not plead any right to self-defence. On the contrary, they simply stated that they were assaulted and out of fear for life they escaped from the place of

occurrence. That apart, both the deceased were unarmed and serious injuries were inflicted with knives on the vital parts of the bodies of the deceased by the accused persons. The nature of such injuries negatives any just plea for right to self-defence. Accordingly existence of customary right of way need not be considered in the facts of the case. We, therefore, find no justification to interfere with the conviction and sentence passed by the High Court. The appeal, therefore, fails and is dismissed. The appellants were released on bail during the pendency of this appeal. They should be taken into custody to serve out the sentence imposed on them.