Krishnan and Another

Vs

State of Kerala

Criminal Appeal No. 456 of 1986

(G. N. Ray, B. L. Hansaria JJ)

02.09.1996

JUDGMENT

G.N. Ray, J. –

1. The judgment dated 18-7-1986 passed by the Division Bench of the Kerala High Court in D.B. Criminal Appeal No. 281 of 1983 preferred by the State of Kerala against the order of acquittal dated 25-2-1983 passed by the Session Judge, Manjeri Division, in Sessions Case No. 29 of 1981 is impugned in the instant appeal. It may be stated here that against the said order of acquittal the wife of the deceased preferred revision petition before the High Court being Criminal Revision Petition No. 119 of 1983. A show-cause notice was also issued by the High Court to the accused, after admitting Criminal Appeal No. 281 of 1983, to show cause against proposed enhancement of their sentence. By the impugned judgment dated 18-7-1986, the High Court disposed of all the said matters by a common judgment. The High Court by allowing Criminal Appeal No. 281 of 1983 and Criminal Revision Petition No. 119 of 1983, set aside the order of acquittal passed by the learned Sessions Judge and convicted both the appellants under Section 302 read with Section 34 of the Indian Penal Code and sentenced each of the accused to life imprisonment. No order of enhancement has, however, been passed by the High Court.

2. It may also be stated here that Accused 1, Krishnan being Appellant 1 in this appeal, has died during the pendency of this appeal. This appeal now relates only to Accused 2, Vijaykumar.

3. The deceased, Madavan, was the younger brother of Accused 1, Krishnan, and Accused 2 Vijaykumar is the sister's son of both the deceased and the said Accused 1. The prosecution case in short is that on account of enmity arising out of property dispute, both the accused with a common intention to kill the said Madavan, were waiting for him under a tamarind tree on 22-8-1981 at 9.30 p.m. When Madavan being accompanied by PW 1, nephew of the deceased, was coming back to his home after lodging a complaint in the Changaramkulam Police Station on account of missing of a pump set of the deceased reached a place called Parappadikkal, both the accused, who were hiding behind a tamarind tree, jumped out in front of the deceased saying that they had been waiting for the deceased. Thereafter, Accused 2 Vijaykumar inflicted a stab injury on the forehead of the deceased with a knife. When PW 1 caught hold of Vijaykumar in preventing his further attempt to give stab injury on the deceased and made him put down his knife on the ground, the first accused proceeded towards the deceased who was trying to escape and gave successive dagger blows and thereafter ran towards the paddy field cutting across the road. When PW 1 let loose the grip of the second accused and proceeded to rescue the deceased, the second accused also ran away after throwing away the said knife near the place of incident. Hearing the noise made by PW 1 and the accused at the time of the incident, PW 4 Velayudha Kurup and PW 3 Ramakrishnan also reached the place of occurrence.

Although the wounds of the deceased were tied with the shirt of PW 1, he died at the spot. The FIR was lodged with the Changaramkulam Police Station by PW 1 by 11.30 on the same night and the case was registered against both the accused under Section 302 read with Section 34 IPC. The Circle Inspector of Police, PW 12, took up the investigation on the next day and proceeded to the place of occurrence and prepared a report (Ex. P-18). The dead body was sent to the hospital for post-mortem. The house of Accused 1 was searched and MOs 5 to 7 were taken into custody and he was arrested. The second accused was arrested on 26-2-1981. The material objects which were seized during investigation were sent to the Chemical Examiner and the Chemical Report was obtained (Ex. P-16).

4. The trial court did not accept that the prosecution case was proved beyond reasonable doubt and therefore acquitted both the accused. The reasons indicated by the learned Sessions Judge for passing the order of acquittal in favour of the accused may be indicated as under :

> 1. PW 1 is an interested witness and the incident happened during a dark night and there was no occasion for PW 1 to identify the assailants. PW 1 also did not do anything to prevent Accused 1 from stabbing the deceased PW 3 had flashed a torchlight which only indicates that it was a dark night.
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> 2. There was delay in sending a copy of the FIR to the Ilaka Magistrate and the delay was not explained by the Investigating Officer PW 12.
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> 3. There is contradiction in the depositions of PW 1 and PW 3.
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> 4. MO 1 which is said to have been used by Accused 2, appellant Vijaykumar, had no sign of bloodstain which indicates that the said weapon was not used.
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> 5. The post-mortem examination reveals that undigested rice particles were found out in the stomach of the deceased. Since the deceased had not taken any food after 3.30 p.m., such undigested rice particles could not have been found if the deceased had died at 9.30 p.m.

5. The High Court, however, did not accept the reasoning of the learned trial Judge and after giving detailed reasons as to why the view taken by the trial court cannot be accepted on the face of the evidence adduced in the case, it set aside the order of acquittal passed in favour of the accused and as aforesaid, convicted both the accused for the offence of murder and sentenced each one of them to suffer life imprisonment.

6. So far as the case of the defence that there was no light when the incident had taken place at about 9.30 p.m. and there was no chance to identify the assailants is concerned, the High Court has held that according to the calendar the moon was to rise at 9.45 p.m. on the day of the incident. Hence, at about 9.30 p.m. when the incident had taken place, it was not a moonlit night but it has been indicated that from the evidence it transpires that it was not a cloudy night and the incident had taken place in an open field and the cluster of banana plantation was 15 metres away from the place of incident. So, there was sufficient light to identify the assailants who are closely known. The High Court has also indicated that there was no unusual conduct on the part of PW 1 in not preventing Accused 1 from stabbing the deceased because he was already engaged in a tussle for preventing Accused 2 from dealing the second blow. The High Court has also indicated that there was no delay in lodging the FIR. On the contrary, the FIR was lodged within two hours after the incident but the

copy of the FIR could not be sent to the Ilaka Magistrate immediately because there was a transport strike on the next day. So, there was dislocation of the transport and after the end of the strike, the copy of the FIR was sent to the Ilaka Magistrate. The presence of small particles of rice in the stomach of the deceased, according to the High Court, cannot raise any doubt as to the time of the incident as alleged by the prosecution witnesses. The High Court has referred to a number of decisions of this Court for the purpose of holding that although the rice is likely to be digested within 3 to 4 hours, non-digestion of rice even thereafter is not any sure indication that the incident had not taken place beyond 3 to 4 hours after taking rice as a meal by the deceased. The High Court has indicated that deposition of PW 1 gets corroboration from the deposition of PW 3 who had also said that PW 1 was engaged in a tussle with Accused 2 Vijaykumar, and Accused 1 after inflicting dagger injuries on the deceased had run away. The High Court was of the view that the prosecution case was proved beyond any doubt and the order of acquittal was wholly unjustified in the facts of the case and evidence adduced. Therefore, it set aside the order of acquittal.

7. Mr Lalit, the learned Senior Counsel appearing for the surviving appellant Vijaykumar, has submitted that the presence of PW 1 at the place of the incident is highly doubtful. He has submitted that according to PW 1 he was with the deceased since 3.30 p.m. and it is his positive evidence that the deceased had not taken any food in his presence. But the doctor has found undigested rice particles in the stomach of the deceased. Mr Lalit has submitted that if the death had taken place at 9.30 p.m. as alleged, there was no occasion for the presence of rice particles in the stomach of the deceased because admittedly the deceased had not taken any food after 3.30 p.m. Mr Lalit has submitted that even though the presence of rice particles found in the stomach of the deceased after about six hours may not be an impossibility in an unusual case, normally the rice gets digested within 3 to 4 hours. There is no evidence that the deceased was suffering from any digestive disorder or had taken such quantity of food which could not be fully digested. It was therefore reasonably expected that the rice stated to have been taken prior to 3.30 p.m. was completely digested. Hence, there was no occasion to note the presence of undigested rice particles in the stomach by the doctor. Mr Lalit has also submitted that it might not be a cloudy night but it was not a moonlit night as has been found by the High Court. It was, therefore, a dark night for which even a torch was required to be flashed. It was, therefore, not possible either for PW 1 or for PW 3 to notice and identify the assailants. Mr Lalit has submitted that in any event, PW 3 was admittedly little behind PW 1 and he had seen the incident from a distance and in a dark night it was not possible for him to see the incident properly and identify the assailants. Mr Lalit has submitted that PW 1 is a close relation of the deceased and he was moving with the deceased for lodging a complaint against the accused. It is, therefore, quite evident that PW 1 was siding with the deceased in the family dispute and was inimical to the accused. His deposition, in the absence of any reliable corroborative evidence, should not be accepted. Mr Lalit has also submitted that from the deposition of PW 1, it is revealed that he had overpowered Accused 2. Hence, when PW 1 had noticed that Accused 1 was advancing towards the deceased to stab him, it was reasonably expected that PW 1 would have tried to prevent Accused 1 but from his deposition it is found that he did not prevent and Accused 1 stabbed the deceased several times thereby causing his death. Mr Lalit has submitted that such conduct is unusual as has been rightly commented by the trial court.

8. Mr lalit has also submitted that the knife of Vijaykumar was sent for forensic examination but from the report it transpires that his knife did not contain any bloodstain. Mr Lalit has submitted that if Accused 2 Vijaykumar had given the first stab injury on the forehead of the deceased which penetrated substantially, the knife must have contained some bloodstain. The absence of any bloodstain only indicates that he did not cause any injury on the deceased. Mr Lalit has also submitted that there is contradiction in the depositions of PW 1 and PW 3. PW 1 who had seen the

incident from a closer distance, has stated that the injury on the forehead was caused by Accused 2 but PW 3 stated that Accused 1 caused several injuries by stabbing on the head and the chest of the deceased. He has, therefore, submitted that the injury on the forehead of the deceased, according to PW 3, was caused by Accused 1 and not by Accused 2.

9. Mr Lalit has also submitted that in any event, Accused 2 Vijaykumar cannot be convicted for the offence of murder with the aid of Section 34 IPC. Admittedly, Accused 2 was the nephew (sister's son) of both the deceased and Accused 1. Even if Accused 1 had enmity with the deceased, Accused 2 had no such enmity against the deceased, his close relation. At least, he had no intention to cause the murder of the deceased. Even if the deposition of PW 1 is accepted to be correct, Vijaykumar gave a knife blow on the forehead and not on any vital part of the body. Such overt act on the part of Accused 2 only indicates that he did not intend to cause the death of the deceased but to cause injury on a non-vital part of the body. For such action, he is not liable to be convicted under Section 302 IPC and if the prosecution case is accepted, then Vijaykumar, for his overt act of causing simple injury on the forehead is liable to be convicted only for the offence of causing simple injury. He has, therefore, submitted that the conviction of Appellant 2 under Section 302 read with Section 34 IPC is wholly unjustified and against the weight of evidence. The impugned order, therefore, should be set aside.

10. Mr George, the learned counsel appearing for the State, has however, disputed the contention made by Mr Lalit. Mr George has submitted that it has been specifically found that although the moon was scheduled to rise at 9.45 p.m. according to the calendar, it was a cloudless night. The incident had taken place in an open place in the field and on a starry night, when the moon was about to rise, there could not have been any difficulty in identifying the assailants particularly by the witnesses to whom the assailants were known. Mr George has also submitted that Accused 2 is a teacher. He was not an agriculturist for which there was any occasion for him to come to the field at night and to wait for the deceased. There was also no reason for him to carry a dagger with him. Mr George has also submitted that it was Accused 2 who opened the attack. He jumped and stabbed the deceased but it is not unlikely that because of such jumping, he could only hit on the forehead. Accused 2 thereafter did not desist but attempted to cause further injuries with the dagger. It was only at that stage, he was prevented by PW 1 and a tussle ensued between the two as a result of which the dagger dropped from the hand of Accused 2. The facts established by the evidence adduced by the prosecution witnesses clearly demonstrate that Accused 1 and 2 came together with the intention to cause the death of the deceased. Accused 2 first opened the attack by inflicting stab injury on the forehead of the deceased and attempted to give other injuries when he was prevented. Accused 1 in the meantime made a number of stab injuries on the deceased causing his death. It has also come out in evidence that both the accused were waiting behind a tamarind tree by concealing their presence and when the deceased reached near the tree, they came out for the purpose of killing him. Mr Gorge has submitted that it is immaterial that Accused 2 could not give a fatal blow on the deceased because he was prevented from giving such fatal blow. The common intention shared by him in killing the deceased is clearly discernible from the facts established. His conviction under Section 302 IPC is, therefore, fully justified. Mr George has also submitted that PW 3 had seen the incident from a little distance. He had noticed that a number of stab injuries were caused by Accused 1. It is not unlikely that he could not notice accurately the situs of each of such injuries and the statement that injuries had been caused on the head and chest of the deceased by Accused 1 is therefore, easily explained. He has submitted that such contradiction is not at all material and the High Court has rightly not given undue importance to such minor discrepancy. Mr George has, therefore, submitted that no interference is called for and the appeal should be dismissed.

11. After giving our careful consideration to the facts and circumstances of the case and the evidence adduced, we do not find any reason to interfere with the well-reasoned judgment passed by the High Court in convicting Appellant 2-Vijaykumar. So far as the contention of insufficient light is concerned, we may indicate that in an open field on a cloudless starry night, there was no difficulty in identifying a known person from a close distance. That apart, it should be kept in mind that there was no difficulty in identifying the victim by the assailants because of existence of some light with which identification was possible. PW 1 being a close relation of both the accused, there was no difficulty for PW 1 to identify them. The accused were also known to the other witness for which he could also identify them. So far as appellant-Vijaykumar is concerned. PW 1 had physically prevented him from causing further injury on the deceased and there was a tussle between the two. Hence, there was no difficulty for PW 1 to identify Accused 2-Vijaykumar. His deposition gets corroboration from the deposition of PW 3 who had seen Vijaykumar at the place of occurrence. PW 3 had not seen Vijaykumar causing any injury on the deceased because by the time PW 3 came near the place of the incident and noticed the incident, Vijaykumar had been prevented by PW 1 and his knife had fallen on the ground.

12. Presence of a few rice particles in the stomach of the deceased does not in any way raise any serious doubt about the time of the incident and also the presence of PW 1. In Modi's Medical Jurisprudence and Toxicology, several instances have been cited by Mr Modi that although normally 3 to 4 hours are taken to get rice digested, such digestion may take place even long thereafter in some cases. The High Court has also referred to a few decisions where this Court has not disbelieved the prosecution case about the time of death because of the presence of undigested food particles by indicating that presence of undigested food particles after usual hours of digestion is not a decisive factor for discarding the time of death. In the instant case, there is clear and cogent evidence against both the accused. The absence of any bloodstain on the knife of Appellant 2-Vijaykumar can be reasonably explained. It is in evidence that he had thrown the knife. The injury caused by him was not on any vital part of the body and it had only caused a superficial injury on the forehead. It is not unlikely that a little bloodstain on the knife had been wiped off when the knife was thrown in the field. In our view, the evidence adduced in the case has clearly established the complicity of both the accused in causing the murder of the deceased. So far as Appellant 2 is concerned, the argument of Mr Lalit that his intention to murder has not been established, cannot be accepted. It has been rightly contended by Mr George that Accused 2 being a teacher was not supposed to carry a dagger at night and to accompany Accused 1 also carrying a dagger and wait in the darkness for the deceased. The appellant had given out by proclaiming that they had been waiting for the deceased. It is Accused 2 who first opened the attack by jumping and it is not unlikely that as he jumped, he could only cause the injury on the forehead of the deceased. Even if he would have wanted to cause further injury on the deceased, he could not have done so because he was prevented by PW 1. By that time, Accused 1 chased the deceased and stabbed him on a number of occasions thereby causing his death. In the aforesaid facts, it can be reasonably inferred that Vijaykumar had shared the common intention with Accused 1. In our view, there was no unusual conduct on the part of PW 1 by not attempting to prevent Accused 1. From his evidence, it is quite evident that when Accused 2 intended to cause further injury on the person of the deceased, he tried to prevent Accused 2 and while he was engaged in a tussle with Accused 2, Accused 1 stabbed the deceased. PW 1 also deposed that he also proceeded towards the deceased to save him from Accused 1 after overpowering Accused 2 but by that time, Accused 1 had given fatal blows to the deceased and run away.

13. We, therefore, find no reason to interfere with the conviction and sentence passed against Appellant 2, the surviving appellant in this appeal. The appeal is, therefore, dismissed. Appellant 2

has been released on bail during the pendency of this appeal. His bail bounds will stand cancelled and he would be taken into custody to serve out the sentence.

HANSARIA, J. (concurring) –

Despite my respectful agreement with my learned brother in all the conclusions he has arrived at, which includes the acceptance of the prosecution case that appellant Vijaykumar had shared the common intention of killing the deceased, a need has been felt by me to say a few words on the very persistent submission of Shri Lalit that as there is reason to accept that the appellant had not caused the head injury, he cannot be convicted under Section 302 with the aid of Section 34, as in that case no overt act on his part stands proved. The learned counsel was at pains to submit that without any overt act being attributable to Vijaykumar, Section 34 would not be available to fasten him with the guilt of causing the death of Madavan.

15. Question is whether it is obligatory on the part of the prosecution to establish commission of an overt act to press into service Section 34 of the Penal Code. It is no doubt true that the court likes to know about an overt act to decide whether the person concerned had shared the common intention in question. Question is whether an overt act has always to be established ? I am of the view that establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch as this section gets attracted when "a criminal act is done by several persons in furtherance of the common intention of all". What has to be, therefore, established by the prosecution is that all the person concerned had shared the common intention. Court's mind regarding the sharing of common intention gets satisfied when an overt act is established qua each of the accused. But then, there may be a case where the proved facts would themselves speak of sharing of common intention : res ipsa loquitur.

16. Now, take this case. The appellant is a school teacher. He is supposed to be armed with a pen and not a knife. He should be normally found in his school and not on a road at night, and that too in the company of another who is also armed with a knife. Not only this, seeing the deceased coming, the appellant and the co-accused came out from behind a tree and proclaimed to the deceased that they were waiting for him. Thereafter, the deceased is belaboured, and let it be conceded, only by the co-accused. The question is whether the appellant had also the intention which had animated the co-accused in causing the death ? According to me, it would definitely be permissible to draw the inference that both the accused had shared a common intention and the criminal act in question had been done in furtherance of the intention. Section 34 does not require anything more to get attracted.

17. Lest it be thought that this view is being taken for the first time by this Court, reference may be made to Chinta Pulla Reddy v. State of A.P. [1993 Supp (3) SCC 134 : 1993 SCC (Cri) 875]. There also A-1, out of the two accused, alone had stabbed the deceased twice which had resulted in the death of the person concerned. But then, having noted that A-2 was also armed with a knife and had gone to the house of the deceased and was present in the middle of the night at the spot, this Court upheld the conviction of A-2 under Sections 302/34, even though he had not by himself caused any specific injury to the deceased. (See para 11.) May it be pointed out that Chinta Pulla case [1993 Supp (3) SCC 134 : 1993 SCC (Cri) 875] is incidentally very close on facts to the one at hand.

18. So, even if it were to be conceded that appellant Vijaykumar had not caused the head injury, his conviction under Sections 302/34 does not suffer from any infirmity.

ORDER

19. The criminal appeal above-mentioned stands dismissed for the reasons recorded in the separate and concurrent judgments.