

Kochu Maitheen Kannu Salim

Vs

State of Kerala

(G. T. Nanvati, V. N. Khare, JJ.)

05.03.1998

JUDGMENT

NANAVATI J

1. The appellant is challenging in this appeal his conviction by the High Court under Section 302 IPC. He was tried alongwith his brother Jalal for committing the murder of their cousin - Ummer in the Sessions Case No. 100/86 in the Court of Sessions Judge, Trivendrum but was acquitted on the ground that the prosecution had failed to prove its case.

2. In order to prove its case, the prosecution had examined PW 2 - Surenderan Nair who stated that he was accompanying the deceased when the incident took place and that he had seen the assault made on the deceased by both the accused. His evidence was sought to be supported by the evidence of PWs 3 and 4 and also by PWs 7 and 8. The prosecution has also relied upon the recovery of MO 3 - Knife at the instance of the appellant. The trial court disbelieved the evidence of PW 2 as the supporting evidence was not found to be reliable and his own version was found inconsistent with the medical evidence. The trail court also held that as PW 2 had failed to explain all the injuries that were found on the person of the deceased it created a doubt regarding his having seen the incident. Evidence of PW 7 and PW 8 was discarded by the trila court as it was found to be inconsistent inter se. The trail court did not place any reliance on PW 1 who had not only not seen the incident but had denied to have made some statements contained in the FIR lodged by him. The evidence of recovery of MO 3 - knife was not believed because the witness who had attested the Mahazar, Ex. P.10, was not an independent witness and the find of human blood on that knife after 16 days was considered doubtful.

3. The High Court did not place any reliance upon the evidence of PWs 1, 6, 7 and 8. It did not believe the evidence of PWs 1, 7 and 8 as regards the oral dying declaration stated to have been made before them by the deceased. It, however, held that the FIR - Ex. P. 1 given by PW 1 could be relied upon and as it referred to the presence of PW 2 at the time of the incident and to that extent it supported the evidence of PW 2. It also held that PW 2's presence deserved to be believed as it was supported by evidence of PW 4. It also believed the evidence regarding recovery of MO 3 - knife as human blood was found on it.

4. Mr. U.R. Lalit, learned senior counsel for the appellant, submitted that the High Court has committed a grave error in placing reliance upon the evidence of PW 2 on the ground that the FIR - Ex. P. 1 also supported his version. He further submitted that the High Court has also overlooked certain aspects while considering the evidence of PW 2 and the reason, given for accepting his evidence are not proper. He also submitted that the recovery evidence ought not to have been

believed as the attesting witness was not an independent and reliable person.

5. We find considerable substance in the contentions raised by Mr. Lalit. It is difficult to appreciate how the High Court could consider FIR - EX P. 1 as correct when PW 1 himself stated that certain statements contained in it are not correct and PW 1 himself has not been believed. It is really doubtful whether the FIR was recorded at 9.45 p.m. on 1/12/85 as stated therein. The evidence discloses that the investigation in this case had started after 3.00 p.m. on 2/12/85. If really the FIR was recorded at 9.45 p.m. then the investigation would have started much earlier and statement of PW 2 who was stated to be the eye witness would have been recorded much earlier. The statement of PW 2 was recorded after 3.00 p.m. on 2/12/85. The High Court has not considered this aspect.

6. The High Court has also not considered another important aspect, viz. the conduct of PW 2. According to PW 2, the deceased came to his shop requested him to close it and then both of them went to the shop of PW 3 to purchase plantains and thereafter both of them were walking on the road and at that time the incident took place. He has further stated that thereafter he went near the intersection of the road and shouted that salim and Jalal had given knife blows to Ummer. If his relations with Ummer were so friendly as stated by him then in that case he would not have left Ummer like that and gone near the junction shouting that Salim and Jalal had given knife blows to him but would have really taken him to his aunt's place which was near by or to a hospital for treatment or gone to the police station for lodging a complaint. He did not do either of these things and just disappeared till next day evening. This conduct has to be regarded as inconsistent with his being with the deceased at the time of incident. PW 3 from whose shop the deceased and PW 2 are stated to have purchased plantains did not support PW 2. According to PW 2, he had informed PWs 7 and 8 about the incident. But their evidence has been found to be inconsistent both by the trial court and the High Court. That would mean that he had not really informed those witnesses. All this creates a serious doubt regarding his having seen the incident.

7. The High Court also committed an error in relying upon the evidence regarding discovery of MO3 - Knife. It appears from the evidence of the attesting witness - PW 16 that he was a man of the police and not an independent person. If he was thus a selected person, it becomes difficult to appreciate how the evidence of the Investigating Officer - PW 20 could have made the discovery evidence reliable. The trial court has rightly pointed out that no independent person of the locality was associated with the preparation of Mahazar - Ex. P.10 even though as admitted by PW 16 himself, there were number of houses near the place from where the knife was alleged to have been discovered.

8. Having scrutinised the evidence, we are of the view that the High Court was not right in setting aside the acquittal of the appellant and convicting him under Section 302 IPC. We, therefore, allow this appeal. The order of conviction and sentence passed against him are set aside and he is acquitted of the charge levelled against him. His bail bonds are ordered to be cancelled.