SUPREME COURT OF INDIA

Kunju Muhammed @ Khumani

Vs.

State of Kerala

(N. Santosh Hegde and B.P. Singh JJ.)

11.08.2003

JUDGMENT

SANTOSH HEGDE, J.

The two appellants herein who were accused Nos.1 and 2 before the IIIrd Additional Sessions Judge, Ernakulam, are in appeal before us in this appeal filed under Section 379 of the Code of Criminal Procedure. The appeal is filed against the judgment of the High Court of Kerala at Ernakulam made in Criminal Appeal No.41 of 1995. In the said judgment, the High Court reversed the judgment of the learned Sessions Judge and convicted the appellants herein of offences punishable under Sections 302, 323 and 324 read with 34 IPC and awarded a sentence of imprisonment for life as also on the charge for an offence under Section 302. A sentence of RI for one year for offences punishable under sections 323 and 324 read with Section 34 IPC was awarded in addition to the sentence already imposed under Section 302 IPC. The co-accused namely Ummer son of Kochunni who stood convicted under Sections 323 and 324 read with 34 and sentenced to undergo RI for one year by the impugned judgment of the High Court has preferred the connected SLP which will be taken up for consideration separately.

The case of the prosecution as presented to the trial court is that in an altercation that took place between Kunjumuhammed PW-3, Kochunni PW-4, Khadarkunju PW-5 on one side and Moosakutty A-2, Ummer A-3, Ali A-4, Kochunni A-5, Ashraf A-6 and Subair A-7 on the other, on 3.11.1991 at

about 8.15 a.m. on the North-Eastern portion of Korathukudy House No.III/209 of Vengola Panchayat, the abovesaid accused persons assaulted Kochunni PW-4 and Kunjumuhammed PW-3. At that time the deceased Majeed came to the place of the incident and resisted the said accused from assaulting PWs.3 and 4 at which time Ummer A-3 beat Majeed with an iron rod MO-1 which blow was warded off by Majeed who caught hold of the iron rod and a scuffle ensued between Majeed and Ummer A-3. At this point of time, Kunjumohammed A-1 came to the scene with a fishing sword MO-2 and stabbed on the back of Majeed with the same.

Majeed having received the said stab injury then allegedly turned towards A-1 and caught hold of the sword which was pulled back by A-1 who again stabbed Majeed on the left side of his chest. Seeing the assault on Majeed it is stated Muhammed PW-2 rushed to the scene but he was intercepted and stabbed by A-1 on the right side of the lower part of his belly. PW-2 then caught hold of the sword but he was assaulted by Ummer A-3 on the head with the iron rod. At that point of time the prosecution alleges accused 2 and 4 to 7 dragged Majeed to the residential compouned of the 3rd accused and put Majeed in a supine position and A-4 exhorted others by shouting "cut this pig's throat". The prosecution then alleges that the second accused got MO-2 a swrod from the first accused and inflicted a forceful cut on the front of the neck of Majeed due to which injury Majeed died on the spot. It is the further case of the prosecution that on the same day at about 8.45 a.m., Sacaria PW-1 went to the Perumbavoor Police Station which is about 2 to 3 kms. from the place of incident and lodged a complaint as per Ex. F-1. The Assistant Sub- Inspector of Police, PW-18 attached to the said Police Station recorded Ex. P-1 and registered Crime No.408/91, he then sent the file to the Circle Inspector of Police, PW-19, who initiated the investigation of the case and proceeded to the scene of incident at about 9 a.m. and prepared inquest Panchnama as per Ex. P-6 which was attested by PW-10 Azeez. The I.O. (PW-19) also seized MO-4, a lungi found on the body of Majeed, a thorthu (MO-3) found near the body of Majeed and also MO-5 slippers. Thereafter he sent the body to Kottayam Medical College hospital for postmortem examination. He then conducted the Mahazar of the scene of the incident. On search of the house of the 3rd accused he found and seized Mos.1 and 2 as per Ex. P-8 which was attested by Mohammad PW-12.

The postmortem of the body of the deceased was conducted at about 1.30 p.m. on 3.11.1991 by PW-13 the doctor who was then the Asstt. Professor of Forensic Medicine, Kottayam Medical College and who issued Ex. P-12, the postmortem certificate noting that the injuries suffered by the deceased were anti-mortem. On 3.11.1991 the doctor, PW-14 at the Medical Trust Hospital, Ernakulam examined Muhammad PW-2 and issued Ex. P-13 on 4.11.1991. PW-17, the doctor at the Taluk Headquarters Hospital, Perumbavoor examined Kochunni, PWs. 3 and 4 and issued Exs. P-16 and P-20, the medical certificates. This witness also identified the handwriting of CW-28, Dr. T.K. Ibrahim who had issued the certificate Ex. P-22 and who was not available to be examined.

After completing the investigation, accused were committed for trial for an offence punishable under Section 302 and other offences before the Sessions Court, Ernakulam which trial then stood transferred to the III Additional Sessions Court at North Perumbavoor. At the trial since the 7th accused Subair was found to be a minor below the age of 16, his case was separated from the rest of the accused and he was directed to appear before the Juvenile Court. Thus his case stood transferred

to the Juvenile Court while the trial against A-1 to A-6 stood transferred ultimately to the III Additional Sessions Court, Ernakulam. The said learned Sessions Judge as per his judgment dated 29.10.1994 came to the conclusion that though the prosecution has established that the deceased Majeed died due to the injuries suffered by him, further came to the conclusion that the prosecution has failed to establish beyond all reasonable doubt that it is these accused persons who had caused injuries to Majeed leading to his death. It also came to the conclusion that from the prosecution evidence it was not possible to come to the conclusion that the incident in question had taken place at the time and place mentioned by it and on the contrary, it was more probable as stated in the defence version that Majeed must have sustained injuries at the Tapioca cultivation at about 4.30 or 5 a.m. i.e. much prior to the alleged time put forth by the prosecution i.e. 8.15 a.m. It also came to the conclusion, since admittedly the prosecution witnesses had enmity with the accused persons and the prosecution having failed to produce any independent witnesses though such witnesses were present at the time and the place when the incident had taken place, that it was not safe to rely upon the interested testimony of those witnesses produced by the prosecution. The trial court also noticed the fact that even though the prosecution had projected PW-1 as an eye witness to the incident in question, he had not supported the prosecution case and had actually stated in his evidence before the court that he was called to the Police Station on the midnight of 3rd and 4th November, 1991 and was asked to sign a prepared statement which indicated the fact that the investigating agency did not know who the accused persons were till that time. Though this was the evidence of an hostile witness, the trial court found corroboration for this part of the evidence of PW-1 from the fact that even according to the prosecution the special report sent from the Police Station Perumbavoor to the Magistrate, Perumbavoor reached the said court only at about 4.30 p.m. on 4.11.1991 inspite of the fact that the Police Station and the court are located in the same town. It also noticed the fact that the prosecution had failed to explain the clay and mud found on the feet of the deceased which could not have been there on his feet if actually the incident had taken place as projected by the prosecution said court opined that this fact also indicated that incident must have taken place in the Tapioca garden. The trial court also relied upon certain omissions in the evidence of PWs.2 to 5 in regard to dragging of the body of Majeed and in the narration of incident that took place after he was taken to the compound of A-3's building. Thus the trial court came to the conclusion that there is a strong and genuine doubt in regard to veracity of the prosecution case and benefit of that doubt should enure to the advantage of the accused and it is based on that conclusion, it acquitted the accused persons of all the charges levelled against them.

It is against the said judgment of acquittal that the State preferred an appeal to the High Court of Kerala at Ernakulam as stated above, and the High Court as per the impugned judgment on a total re-appreciation of the evidence on record disagreed with the trial court in regard to the involvement of 3 appellants herein and came to the conclusion that the prosecution has clearly established its case against these accused persons namely A-1 to A-3 therefore found appellants Kunjumohammed A-1 and Moosakutty A-2 guilty of offences punishable under section 302 and sentenced them to undergo RI for life. It also convicted A-1 to A-3 of offences punishable under sections 323 and 324 read with section 34 for having caused injuries to PW-2 hence convicted them to undergo RI for a period of 1 year since A-1 and A-2 were already convicted for offence under section 302 for life imprisonment, it made the sentences imposed by it for offences under sections 323, 324 read with 34 to run concurrently with the sentence imposed under section 302, while in regard to A-3 it made it the substantive sentence. It is against this judgment as stated above that the appellants are now before us, challenging their conviction and sentence as awarded to them by the High Court.

Mr. Sushil Kumar, learned senior counsel appearing in Crl.A. No. 1141/2001 for the appellants very strenuously contended that the High Court was in error in reversing the judgment of the trial court merely on the basis that another view was possible on the same set of facts. He contended that though the High Court while entertaining an appeal under Section 378(3) of the Code of Criminal Procedure acts as an appellate court on facts also still it ought not to have reversed a finding of fact arrived at by the trial court which is otherwise justly arrived at. He submitted that merely because another view could have been possible, the High Court ought not to have substituted its opinion in place of the one arrived at by the trial court, that too without coming to the finding that the conclusions arrived at by the trial court were either perverse or were such which could not have been arrived at by any reasonable person on the facts of the case. He further submitted that the prosecution has failed to establish its case beyond all reasonable doubt especially in regard to the time and place of incident. According to learned counsel, the High Court took a very casual view of the serious discrepancy found in the prosecution evidence while accepting the same to base a conviction.

Mr. Ramesh Babu, learned counsel for the State per contra argued that the finding of the learned Sessions Judge was contrary to the evidence on record therefore the High Court was justified in interfering with such finding of the trial court. He submitted there is absolutely no reason why PWs.-2 and 3 should be disbelieved when they themselves had suffered injuries. He submitted that the arguments of the learned counsel for the appellants in regard to the time and place of incident have no support from the material on record, hence, ought to be rejected.

A perusal of the judgments of the two courts below shows that the trial court noticed 2 major discrepancies in the case of the prosecution. It found that the prosecution case that the incident in question had occurred at about 8.15 a.m. on 3.11.1991 in the front lane on the North-Eastern portion of Korathukudy House NO.III/209 of Vengola Panchayat is highly doubtful and the defence version that the incident in question must have occurred around 4 or 5 a.m. on 3.11.1991 in a Kappapadam (Tapioca garden) is more probable. The High Court of course did not agree with this conclusion of the trial court and preferred to rely on the evidence of the alleged eye witnesses to accept the prosecution case as to the time and place of incident. Since this question goes to the very root of the prosecution case we would prefer to discuss this issue at this stage itself.

From the judgment of the trial court, we notice that in regard to the time of incident, the trial court relied upon the evidence of PW-1 who lodged the complaint Ex. P-1. He in his examination in chief itself has stated that he signed Ex. P-1 on the midnight of 3.11.1991. This witness was treated as hostile and cross examined by the prosecution. If this was the sole piece of evidence on which the trial court relied upon to come to the conclusion that the incident in question might not have taken place at 8.15 a.m. on 3.11.1991 we would have definitely disagreed with the trial court but then the trial court also relies on the fact that Ex. P-1 did not reach the Magistrate Court at least till the evening of 4.11.1991 as could be seen from the endorsement in the FIR. This omission on the part of the prosecution to explain why the FIR did not reach the jurisdictional Magistrate till the evening

of 4.11.1991 even though the incident in question had taken place at 8.15 a.m. and reported to the police at 8.45 a.m. on 3.11.1991 itself casts very serious doubt which lends support to the evidence of PW-1 that the complaint was got ready only on the midnight of 3/4.11.1991. It should be borne in mind that the distance between the Magistrate's court and the Police Station being in the same town was very close. Then again it is to be noticed from the evidence of PW-10 who is admittedly a very close friend of deceased Majeed that on 3.11.1991 at about 7 a.m. when he was in his house, he had come to know that somebody had killed Majeed which was told to him by a friend and he reached the Police Station by 7.30 a.m. which was again a time much earlier than the time of incident as projected by the prosecution. This also supports defence version that the incident in question could not have taken place at 8.15 a.m. We further notice that the doctor PW-13 who conducted the postmortem examination had noted that the rigor mortis had formed and was found all over the dead body at the time when he conducted the postmortem. He in his evidence had stated that in his opinion the rigor mortis sets in within about 4 to 7 hours of the death. If we apply the yardstick as spoken to by PW-13 of the starting of rigor mortis to the facts of this case then we notice that in the instant case the death must have occurred prior to 8 a.m., because if the rigor mortis starts within 4 to 7 hours of death then it would taken some time to reach all parts of body and in the instant case, rigor mortis was found in the entire body of the deceased, therefore, to reach this stage if we take 4 hours as the starting point, it would have taken some more time to reach different parts of the body, therefore, we think it is reasonable to take the upper limit of rigor mortis reaching the entire body as 7 hours and if we work backwards then we notice that the death in question must have occurred before 6.30 a.m. on 3.11.1991 which actually fits into the other facts noticed by us hereinabove while discussing the time of death.

We also notice from the evidence of PW-10 and others that when they touched the body of the deceased they found the body was cold and frozen, (may be a terminology used by the locals for the body having become stiff). Therefore, we think the trial court was justified in its finding that death had occurred much earlier to the time mentioned by the prosecution, and the High Court was in error in coming to a contra conclusion. Thus relying on (a) the statement of PW-1 that the complaint was signed on the midnight of 3.11.1991; (b) the FIR reaching the jurisdictional Magistrate more than 36 hours after the incident in question though the court is situated in the same town; (c) the evidence of the doctor as to the presence of rigor mortis on the body of the deceased indicating death must have occurred much earlier than 8.15 to 8.30 a.m. on 3.11.1991; (d) recording in the inquest report Ex. P-6 that the body of the deceased when examined was found to be cold and frozen; we find that the conclusions arrived at by the learned trial Judge that the incident in question did not take place as indicated by the prosecution is a probable one.

Next point to be considered is in regard to place of incident. We are aware of the fact that the witnesses who have supported the prosecution have stated that the incident in question started in the lane on the north-eastern portion of House No.III/209 of Vengola Panchayat. Thereafter the deceased was dragged by A-4 to A-7 to the compound of building No.III/206 where the deceased was put in a supine position and at the behest of A-4, A-2 cut the neck of deceased with MO-2. The trial court disbelieved this part of the prosecution case also by noticing that even according to eye witnesses the injury to the neck of the deceased was such that there was profuse bleeding but none of the eye witnesses who supported the prosecution case in their evidence before the court noticed any blood on the ground where Majeed was attacked for the second time which according to the

trial court was a glaring omission in the evidence of the eye witnesses giving room for doubt as to the place of the incident. The trial court also noticed the fact that in the inquest report there was no reference to the blood found at the place where the deceased's neck was cut. In the said report it was merely mentioned that the blood had clotted in the wound on the throat. The trial court observed that these are indications of the fact that the attack on deceased could not have taken place at the place suggested by the prosecution. This doubt as to the place of incident gets further compounded by the fact that PW-13 the doctor who conducted the post mortem examination in his evidence has stated that when he examined the body of the deceased he found his legs covered with mud and clay. Nowhere in the prosecution case it has come in evidence that the place where deceased was attacked consisted of either soft mud or clay similar to what was found on the foot of the deceased. On the contrary, the trial court which we presume had the knowledge of the area in question had observed that such mud or clay is normally found in a Tapioca field or garden, hence, justly came to the conclusion that the attack on the deceased must have taken place as pleaded by A-2 in his 313 Cr.P.C. statement.

This aspect of the defence case also finds some support in the evidence of PW-2 who when taken for the medical examination had told the doctor PW-14 when asked about the history of the case that the incident in question had taken place in a Kappapadam (Tapioca garden). If really the incident had taken place as suggested by the prosecution, we fail to understand how PW-2 could have thought of Tapioca garden even by inadvertence. The explanation given by this witness that he was either in an unconscious state or in a disoriented state has been belied by the certificate given by PW-14, the doctor, who in his certificate had in specific terms recorded that the deceased was conscious and "was in no way disoriented". Thus the following factors noticed by the trial court i.e. (a) omission on the part of the prosecution to establish there were blood stains on the ground where the deceased's neck was cut either through the evidence of eye witnesses or through the inquest report; (b) presence of clay/mud on the feet of the deceased which is similar to the one found in Tapioca garden; (c) the statement made by PW-2 to the doctor PW-14 when he was examined that the incident in question took place at Kappapadam are in our view sufficient in the absence of any independent evidence supporting the prosecution to create a serious doubt in the prosecution case as to the place of incident also. Therefore, we do not agree with the High Court when it rejected the above discrepancies found in the prosecution case as either being irrelevant or very minor in nature.

Be that as it may, the trial court has also considered the eye witness evidence produced by the prosecution bearing in mind of course the close relationship between the parties as also the longstanding enmity between the parties. It is in this background while discussing the evidence of PW-2 the trial court came to the conclusion that the discrepancies in the evidence of this witness as to place of incident as stated to the doctor PW-14 and in his evidence before the court itself were sufficient to reject his evidence. However, the High Court proceeded on the basis that the evidence of PW-2 in regard to the incident in question was not challenged by the defence, hence, the trial court was not justified in rejecting his evidence.

It took PW-2's evidence in examination-in-chief as the gospel truth and proceeded to accept the same. In regard to the contradicting version given by PW-2 as to the place of the incident to the

doctor, PW-14, the High Court brushed aside same by observing : "Merely because the doctor recorded that the incident took place in Kappapadam near the house on 3.11.1991 at 8.45 AM it is not a ground to discard the effect of the evidence of PW2 ..." From the above, we notice that the High Court proceeded on the basis that the doctor had committed a mistake in noting down the place of the incident, without noticing the fact that PW-2 in fact, in his evidence, did admit the contradiction but explained it away by stating that he was disoriented at the time of medical examination, which fact was found to be false on the basis of medical report. Thus, in our opinion, the High Court missed a very important contradiction in the evidence of PW-2 which certainly makes his evidence doubtful.

We notice the learned Sessions Judge rejected the evidence of PW-3 primarily on the ground that he was not able to state who are the accused persons who lifted the body of Majeed from the place of first incident to the place of second incident. The explanation given by this witness for this omission that he became unconscious at that point of time was rejected by the trial court as a mere excuse which on facts and circumstances of the case, in our opinion, is a good and valid reason to reject the evidence of PW-3 who when it came to the crucial part of the attack, did not support the prosecution case.

The High Court did not notice this aspect of the evidence of PW-3 but proceeded to accept his evidence by relying upon his examination in chief only.

PW-4's evidence was rejected by the trial court because he was not able to remember how A-2 inflicted the injury on the deceased in the second place of the incident. It is seen as per prosecution case the deceased after he was dragged to the second place of incident, was placed in a supine position and A- 2 cut his neck with MO-2 causing the fatal injury. If really PW- 4 had witnessed this incident as observed by the trial court, we also think it would have been very difficult for him to have forgotten this part of the prosecution case. It is not his case that he did not witness this part of the incident but he stated before the court that he did not remember how the attack took place. In our opinion, the evidence of this witness is not worthy of any credence, hence, has to be rejected.

PW-5 as noticed earlier is the person who initiated the original fight. Learned Sessions Judge noticed that while answering the questions, he found that this witness would answer only the leading questions and to certain inconvenient questions he would say that he did not remember that part of the incident in question. The trial court also noticed that he was unable to say who actually had given the fatal blow to the deceased nor could he say who were the persons who dragged the deceased from the first place of incident to the second place of incident. It is on this basis the trial court rejected his evidence. The High Court in its turn while considering the evidence of this witness observed : "The learned Sessions Judge also forgot the fact that the witness was related to the accused as well as to the deceased and a reading of his evidence as a whole would clearly show that he was trying to help the accused while giving his testimony. We are of the view that merely because the witness adopted such an attitude, his clear evidence corroborating the version of others

regarding the infliction of injury on the back and on the chest should not be discarded." We are at pains to appreciate this reasoning of the High Court. This witness has not been treated hostile by the prosecution, and even then his evidence helps the defence. We think the benefit of such evidence should go to the accused and not to the prosecution. Therefore, the High Court ought not to have placed any credence on the evidence of such unreliable witness.

PW-6's evidence was rejected by the Sessions Court on the ground that the same was inconsistent with the versions given by PWs.2 and 4. He also admitted that he did not know who had dragged Majeed from the first place of incident to the second place of incident. The Sessions Court had noted that like PW-5 this witness was unable to say who actually dragged deceased and it was only when the Additional Public Prosecutor repeatedly asked these questions, he stated that accused 2, 4 and 6 as the persons who dragged the deceased. Even this answer, as noticed above was inconsistent with the version given by PWs.2 and 4. Despite this the High Court preferred to accept his evidence in the examination in chief which on facts of the case is unsustainable.

Evidence of PW-7 was rejected by the Sessions Court holding that his version of the attack and dragging and attack on Majeed, on the property of the 3rd accused was entirely different from the version given by PWs. 2 and 4 to 7. The trial court had observed that his evidence is inconsistent, improbable and unbelievable. We have perused the evidence and are in agreement with the learned Sessions Judge and we think the High Court was wrong in accepting a part of his evidence inspite of noticing the discrepancy in his evidence regarding the dragging of Majeed.

Thus, we find most of the reasons given by the High Court for rejecting the conclusions of the learned Sessions Judge are unacceptable. At this juncture, we would like to bear in mind the law laid down by this Court in regard to reappreciation of evidence by the High Court in appeal against acquittals. This Court in Dhanna etc. v. State of M.P. [1996 (10) SCC 79] had laid down that though the High Court has full power to review the evidence and to arrive at its own independent conclusion whether the appeal is against conviction or acquittal. While doing so it ought to bear in mind : first, that there is a general presumption in favour of the innocence of the person accused in criminal cases and that presumption is only strengthened by the acquittal. Secondly, it should bear in mind that every accused is entitled to the benefit of reasonable doubt regarding his guilt and when the trial court acquitted him, he would retain that benefit in the appellate court also. Thus, the appellate court in appeals against acquittals has to proceed more cautiously and only if there is absolute assurance of the guilt of the accused, upon the evidence on record, that the order of acquittal is liable to be interfered with or disturbed.

In Shailendra Pratap & Anr. v. State of U.P. (2003 (1) SCC 761), this Court held : "It is well settled that the appellate court would not be justified in interfering with the order of acquittal unless the same is found to be perverse. In the present case, the High Court has committed an error in interfering with the order of acquittal of the appellants recorded by the trial court as the same did not suffer from the vice of perversity." The above principles have been consistently followed by this

Court in a large number of cases. If we apply the said principle to the facts of this case, we notice that the High Court in the instant case has not come to the conclusion that the finding of the Sessions Court was in any manner perverse or one that cannot be arrived at by a reasonable person. Therefore, in our opinion, assuming another view was possible to be taken on the material on record, the High Court ought not to have substituted its view in place of that of the Sessions Court, and reverse an order of acquittal on such substituted view of its own. At any rate, on the facts of this case, we have come to the conclusion that the view taken by the learned Sessions Judge was the only possible view, hence, the High Court ought not to have interfered with the same. From the material on record, the defence has been able to establish that the prosecution case in regard to the time and place of incident is highly doubtful even the evidence of the eye witnesses apart from being interested was full of contradictions and improbabilities based on which no conviction could have been recorded against the appellants.

For the reasons stated above, this appeal succeeds and the judgment and conviction awarded to the appellants by the High Court is set aside. The appellants, if in custody, shall be released forthwith, if not required in any other case.

Crl. Appeal No��/2003 @ SLP (Crl.) No.6744 of 2001:

Leave granted.

Following the judgment delivered by us in Criminal Appeal No.1141/2001, we allow this appeal, set aside the judgment and the conviction awarded by the High Court. If the appellant is in custody, he shall be released forthwith, if not required in any other case.