



CrI. Appeal No. 870/2020

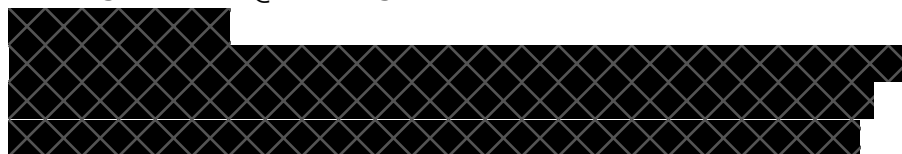
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IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR
&
THE HONOURABLE MR. JUSTICE JOHNSON JOHN
THURSDAY, THE 11TH DAY OF JANUARY 2024 / 21ST POUSHA, 1945
CRL.A NO. 870 OF 2020

CRIME NO.2905/2016 OF PATHANAMTHITTA POLICE STATION
SC NO. 144/2017 OF ADDITIONAL SESSIONS COURT- III, PATHANAMTHITTA
CP 21/2017 OF JUDICIAL MAGISTRATE OF FIRST CLASS -I, PATHANAMTHITTA

APPELLANT/ACCUSED:

THAPAS BERMAN @ THAPAS



BY ADV T.U.SUJITH KUMAR

RESPONDENTS/COMPLAINANTS:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM-682 031.
- 2 THE INSPECTOR OF POLICE,
PATHANAMTHITTA POLICE STATION, PATHANAMTHITTA-689 645.

SRI. E.C. BINEESH, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03.01.2024, THE COURT ON
11.01.2024 DELIVERED THE FOLLOWING:

**'CR'****P.B. SURESH KUMAR & JOHNSON JOHN, JJ.**-----
Crl. Appeal No. 870 of 2020
-----Dated this the 11th day of January, 2023.**JUDGMENT**Johnson John, J.

The appellant is the accused in S.C. No. 144 of 2017 on the file of the Additional Sessions Judge-III, Pathanamthitta and he is challenging the conviction and sentence imposed on him for the offence under Section 302 of IPC as per the impugned judgment dated 09.05.2019.

2. As per the prosecution case, the accused and the deceased were working as employees in a restaurant at Pathanamthitta and in connection with a dispute regarding cooking and supply of foods in the restaurant, there occurred a quarrel between the accused and the deceased and for the reason that the deceased beat the accused in the said quarrel, there was enmity between the accused and the deceased who are natives of Bengal and on 22.08.2016, at about 10 pm., while the deceased Nani Gopal Das was in the kitchen of the restaurant, the



accused, with the intention to kill him, stabbed on his chest with a steel knife and committed his murder.

3. On the basis of Exhibit P1 First Information Statement of PW1, the owner of the restaurant, PW13, Sub Inspector of Pathanamthitta Police Station, registered Exhibit P11 First Information Report and thereafter, PW16 completed the investigation and filed the final report before Judicial First Class Magistrate-I, Pathanamthitta

4. After committal, the case was taken on file as S.C. No. 144 of 2017 and when the accused was produced before the trial court, after hearing both sides, charge was framed under Section 302 of IPC and when the charge was read over and explained to the accused, he pleaded not guilty.

5. Thereafter, the prosecution examined PWs 1 to 16 and marked Exhibits P1 to P29 and MOs 1 to 9, to prove the charge against the accused. Since it is found that the accused is not entitled for an acquittal under Section 232 Cr.P.C, he was called upon to enter on his defence. But, no evidence was adduced from the side of the accused.

6. After hearing both sides and after considering the oral and documentary evidence on record, the learned Additional Sessions Judge, by the impugned judgment dated 09.05.2019, convicted the accused and sentenced him to undergo rigorous imprisonment for life and to pay



a fine of Rs.50,000/- (Rupees Fifty Thousand only) and in default of payment of fine, to undergo rigorous imprisonment for two years.

7. Heard Sri. Sujith Kumar, the learned counsel for the appellant and Sri. E.C. Bineesh, the learned Public Prosecutor.

8. The point that arises for consideration in this appeal is whether the conviction entered and the sentence imposed against the accused is legally sustainable.

9. The learned counsel for the appellant argued that there is no direct witness to the occurrence and the evidence adduced from the side of prosecution is of a circumstantial nature and since the prosecution has not succeeded in fully establishing the circumstances from which the conclusion of guilt is to be drawn, the accused is entitled for the benefit of doubt. It is argued that there is no satisfactory evidence to connect the accused with the incident and the prosecution has not furnished any reasonable explanation for the non-examination of CW2, Pintu Barman, who is alleged to have witnessed the quarrel between the accused and the deceased and also informed PWs 1 to 3 regarding the quarrel between the accused and the deceased at the time of occurrence.

10. But, the learned Public Prosecutor argued that the presence of PWs 1 to 3 near to the place of occurrence at the time of occurrence is not seriously disputed and that PW1 is the owner of the restaurant and



PW2 is a supplier in the very same restaurant and PW3 was working as a security staff in Karur Vysya Bank adjacent to the restaurant and there is no reason for them to falsely depose against the accused in a serious case of murder.

11. According to PW1, the deceased Nani Gopal Das, a native of West Bengal, was working as a cook in his restaurant from 2015 onwards and the accused joined in his restaurant as a cleaner during the period 2015-2016. PW1 deposed that at about 10 pm., on 22.08.2016, while he was standing in front of the restaurant, another employee of his restaurant by name Pintu Barman told him that the accused and the deceased are quarrelling inside the kitchen and when he rushed to the kitchen, he saw the deceased Nani Gopal Das lying in prone position with bleeding injury and he also saw the accused standing there.

12. According to PW1, himself and Pintu Barman took the victim to the General Hospital, Pathanamthitta in his car and there the doctors, after examining the injured, told them that he is no more. PW1 has subsequently given Exhibit P1 First Information Statement to the police and he identified his signature in Exhibit P1 First Information Statement before the court. PW1 further deposed that CW2, Pintu Barman, has also told him that the accused stabbed the deceased with a knife kept in the kitchen



13. PW2 deposed that he was working as a supplier at Chickinns restaurant, Pathanamthitta and the deceased Nani Gopal Das was working there as a cook and the accused was working as helper. PW2 deposed that at about 9.30 p.m., on 22.08.2016, while he was inside the restaurant, Pintu told him that the accused and the deceased are quarrelling inside the kitchen and accordingly, he informed the matter to PW1 who is the owner of the restaurant, and thereafter, when they reached the kitchen, they saw the deceased lying there in a pool of blood and at that time, the accused and Pintu were also there in the kitchen. The evidence of PW2 shows that PW1 and Pintu took the injured to the General Hospital, Pathanamthitta and subsequently PW1 informed him through phone that Gopal Das is no more. The evidence of PW2 further shows that he and two others detained the accused in the restaurant and subsequently, the police came there and they handed over the accused to the police.

14. PW3 deposed that he was working as security in Karur Vysya Bank, Pathanamthitta Branch and Chickinns Restaurant is on the adjacent southern side. According to PW3, on 22.08.2016, in between 9.45 and 10 pm., while he was talking to Rajan Thomas, the owner of the Chickinns Restaurant, a staff of Chickinns Restaurant came running and told Rajan Thomas that Bengalis are quarrelling inside the shop and immediately himself and Rajan Thomas reached the kitchen of the



restaurant and he also assisted others in taking the injured to the vehicle. According to PW3, later, he got information that the injured is no more and therefore, they detained the accused, Thapas Berman, in the restaurant. PWs 1 to 3 also identified the accused before the court

15. PW4 is a witness to Exhibit P3 inquest report. PW5 deposed that he was working as the Manager of Chickinns Restaurant, Pathanamthitta and the deceased Nani Gopal Das and the accused Thapas Berman were also working as kitchen staff in the Chickinns Restaurant. According to PW5, the incident occurred on 22.08.2016 and on that day, he was on leave. PW5 would say that he has not witnessed the accused pointing out the knife to the police and he was declared hostile to the prosecution.

16. PW6, was the Scientific Officer, who collected blood stains from the place of occurrence and handed over the same to the Investigating Officer. Exhibit P5 is the certificate prepared by PW6 in this connection.

17. PW7 was the doctor who conducted the postmortem examination on 23.08.2016 and issued Exhibit P6 postmortem certificate. The ante-mortem injuries noted in Exhibit P6 are the following:

- “1) Abrasion 2 X 0.6 cm on the left upper eyelid 1 cm above the outer angle of eye.
- 2) Incised penetrating wound 4 cm long, 1 cm width,



obliquely placed on the left side of front of chest, its upper outer rounded end was 11 cm outer to midline and 8 cm above the lower costal margin, and the lower inner end was sharply cut. Left chest wall was penetrated (4 x 1.3 x 1.5 cm) through the VIth intercostal space, just above the lower rib border. The front wall of pericardium was adherent to the lower edge of lower lobe of left lung, and was punctured, (2 x 0.5 x 1.7 cm). The front wall of left ventricle heart was penetrated making an incised wound (2.2 x 0.2 x 1 cm), obliquely placed, its left upper end was 1 cm above the apex, cutting the inter ventricular septum making an incised wound of 3 x 0.4 x 0.5 cm and terminated by perforating the root of aorta 0.2 x 0.1 cm just below the aortic cusp. The wound track was seen directed upwards, backwards and to the right for a total minimum depth of 4.3 cm. Left lung was collapsed. Left chest cavity contained 2 litres of fluid blood.”

The opinion of PW7 as to the cause of death is that the death was due to penetrative injuries sustained to the chest .

18. The learned counsel for the appellant argued that the evidence of PWs 1 to 3 connecting the accused to the alleged occurrence is based on the information they received from CW2, Pintu Barman, and the prosecution has failed to examine the said Pintu Barman as a witness in this case and in that circumstance, the evidence of PWs 1 to 3 before the court can only be treated as a hearsay evidence and hence, not admissible in view of Section 60 of the Indian Evidence Act, 1872.

19. But, the learned Public Prosecutor argued that facts connected with the fact in issue so as to form part of the same transaction are relevant under Section 6 of the Indian Evidence Act and that the



principle of *res gestae* is an exception to the hearsay rule. Section 6 of the Indian Evidence Act reads thus:

“6. Relevancy of facts forming part of same transaction.— Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(b) A is accused of waging war against the [Government of India] by taking part in an armed insurrection in which property is destroyed, troops are attacked and goals are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d) The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.”

20. The evidence of PWs1 to 3 and Exhibit P29, copy of the muster-roll of the employees at the restaurant during the relevant period, shows that apart from the accused and the deceased, CW2 Pintu Barman and PW2 Anil Kumar @ Hari were also working there. Further it is not in dispute that PW1, Rajan T. Samuel, was the owner of the



restaurant and it is in evidence that CW2, Pintu Barman, who witnessed the quarrel between the accused and the deceased in the kitchen informed PWs 1 to 3 about the quarrel and immediately they rushed to the kitchen and saw the deceased lying there in a pool of blood.

21. PW1 also deposed before the court that CW2, Pintu Barman, has told him that the accused stabbed the deceased with a knife kept in the kitchen when there occurred a quarrel in connection with the cooking between the accused and the deceased. Therefore, it can be seen that CW2, Pintu Barman, who witnessed the occurrence in the kitchen, immediately approached PW1, the owner of the restaurant, and we find that this conduct of CW2, Pintu Barman, is so closely connected with the fact in issue as to be, in reality, the part and parcel of the same transaction and hence, admissible under Section 6 of the Indian Evidence Act.

22. PW9 was the doctor at General Hospital, Pathanamthitta, who examined the body of the deceased on 22.08.2016 around 10.21 pm., and according to PW9, the victim was brought dead in the casualty by the co-workers following a stab injury on the left chest and after examination, intimation was given to the police and the certificate issued by PW9 in this regard is marked as Exhibit P7.

23. PW13 was the Sub Inspector of Pathanamthitta Police Station,



who recorded Exhibit P1 First Information Statement of PW1 on 22.08.2016 at 23 hours and registered Exhibit P11 FIR.

24. PW16 was the Sub Inspector of Pathanamthitta Police Station who took charge of the investigation on 23.08.2016 and prepared Exhibit P3 inquest report. According to PW16, he recovered the blood stained dress of the deceased, his chappals and a thread from his waist and the same are marked as MOs 4 to 8. The property list prepared for producing the said properties before court is marked as Exhibit P14. According to PW16, after reaching the place of occurrence and questioning the witness, he prepared Exhibit P16 scene mahazar and thereafter, recorded the arrest of the accused, who was detained in the Police Station. The arrest memo, custody memo and inspection memo prepared at the time of the arrest of the accused are marked as Exhibits P17 to P19.

25. According to PW16, he questioned the accused with the assistance of Sri. Madhusoodanan Nair, Home Guard of Pathanamthitta Traffic Station, who translated the confession statement of the accused in Hindi to Malayalam and at that time, he also recovered the election ID card and mobile phone of the accused as per Exhibit P10 mahazar. Exhibit P20 is the property list prepared for producing the same before the court. The mobile phone of the accused is identified and marked as



MO9.

26. PW16 deposed that on the basis of the information received from the accused that he kept the steel knife in the kitchen of the restaurant where he is working, he proceeded to that place along with the accused and when they reached the kitchen of the restaurant, the accused took out MO1 steel knife from the bottom side of the steel shelf and handed over it to him and he seized the same by preparing Exhibit P4 seizure mahazar.

27. PW8 is the home guard who assisted PW16 at the time of questioning the accused and translated the disclosure statement from Hindi to Malayalam and the evidence of PW8 further shows that he was also present at the time of recovery of MO1 knife from the kitchen of the restaurant.

28. PW10 was the doctor at Government Hospital, Pathanamthitta who examined the accused on 23.08.2016 and issued Exhibit P8 certificate. PW11 was the Village Officer, who prepared Exhibit P9 scene plan. PW12 deposed that on 23.08.2016, while working as Civil Police officer in Pathanamthitta Police Station, he witnessed the recovery of the identity card and mobile phone from the accused and he also identified his signature in Exhibit P10 seizure mahazar. PW15 was the secretary of Pathanamthitta Municipality, who issued Exhibit P13 certificate stating that Sri. Rajan T. Samuel is conducting the restaurant in Building Nos. 200/6 and 200/7 in Ward No. 26 of Pathanamthitta Municipality.

29. PW14, Civil Police Officer of Traffic Unit, Pathanamthitta, is a



witness to Exhibit P12 seizure mahazar prepared by the Investigating Officer for the recovery of the dress of the accused and he identified his signature in Exhibit P12 seizure mahazar and MOs 2 and 3 t-shirt and jeans of the accused recovered as per Exhibit P12 mahazar.

30. The learned counsel for the appellant argued that the recovery of MO1 knife on the basis of the alleged disclosure statement of the accused is not at all reliable. It is pointed out that the Investigating Officer prepared Exhibit P15 scene mahazar at 12.30 hours on 23.08.2016 and in Exhibit P15, it is stated that there is a steel shelf having five compartments placed adjacent to the eastern wall of the kitchen and that steel plates and other kitchen utensils are seen kept in the said shelf and there was no difficulty for the Investigating Officer who inspected the place of occurrence along with the Scientific Officer to trace out the knife used as the weapon of offence from the steel shelf at the time of preparing the scene mahazar.

31. It is further pointed out that Exhibit P4 mahazar for the recovery of MO1 on the basis of the alleged disclosure statement of the accused is prepared at 14.30 hours on 23.08.2016 and there is nothing in Exhibit P4 mahazar to show that MO1 was concealed by the accused in a place not visible to others. But, the learned Public Prosecutor pointed out that the evidence of PW16, Investigating Officer, and Exhibit P4 recovery mahazar would clearly show that MO1 was kept concealed



under the steel shelf in the kitchen and in that circumstance, it cannot be held that MO1 was visible to the Investigating Officer when he prepared Exhibit P15 scene mahazar. In this connection, it is pertinent to note that while cross examining PW16, Investigating Officer, there was no suggestion from the side of the defence that MO1 was lying visible to others in the kitchen at the time of preparing Exhibit P15 scene mahazar and further the defence has also not sought for any explanation from PW16 for not recovering MO1 steel knife at the time of preparing Exhibit P15 scene mahazar.

32. It is true that PW16 has admitted in cross examination that the stains and dirt said to be seen in MO1 at the time of recovery are not seen in MO1 at the time when the witness identified the same before the court. But, it is not in dispute that after the recovery of MO1, the same was subjected to scientific examination in the Forensic Science Laboratory. A perusal of Exhibit P27, copy of the forwarding note, and Exhibit P29, report from the forensic science laboratory, shows that when MO1 Knife was forwarded for scientific examination, even though blood was detected, the same was insufficient for determining the origin and group.

33. It is also pertinent to note that PW7, doctor who conducted the postmortem, has stated that he examined the weapon and has given



the opinion that MO1 could be the weapon used to cause the ante-mortem injuries noted in Exhibit P6 postmortem certificate. In cross examination, PW7 clarified that it was after noting the measurements of injury No.2 in Exhibit P6 that he had given the opinion regarding the nature of the weapon used.

34. The knowledge of the accused as to where the weapon of offence is concealed is a material fact relevant under Section 27 of the Indian Evidence Act. In this case, the information given by the accused in his own language is seen extracted in Exhibit P4 recovery mahazar and the evidence of PW8, who translated the same to Malayalam and also witnessed the recovery of MO1, lends credence to the evidence of PW16 that MO1, weapon of offence, was recovered on the basis of the information given by the accused that he kept the steel knife in the kitchen of the restaurant where he is working.

35. Another aspect that requires consideration is the detection of blood in MO1 steel knife and the dress of the accused as per Exhibit P28 report from the Forensic Science Laboratory. At the time of arrest, the dress worn by the accused at the time of occurrence was recovered and the same was produced before the court as per Exhibit P22 property list and thereafter, as per Exhibit P27, forwarding note, the dress of the accused was also forwarded to the Forensic Science Laboratory for



scientific examination. From Exhibit P28 report, it can be seen that blood was detected in items 9 and 10 t-shirt and jeans of the accused, though it was insufficient for determining the origin and group.

36. The learned counsel for the appellant argued that the evidence of PWs 1 to 3 regarding the time of occurrence does not tally and that PW1 stated that the occurrence was at about 10 p.m. on 22.08.2016 and according to PW2, the occurrence was at about 9.30 pm on 22.08.2016. But, the evidence of PW3 is that the occurrence was in between 9.45 pm and 10 pm on 22.08.2016. In this connection, it is also pertinent to note that in cross examination, PW16 also created confusion by admitting that the time of occurrence is 22 hours on 22.08.2016 and that the FIR was registered at 9.30 pm. But, subsequently when PW16 was recalled by the prosecution, he admitted that his statement in cross examination regarding the time of occurrence and time of registration of FIR were mistakenly made and that the FIR was registered only at 23 hours on 22.08.2016. A perusal of Exhibit P1 FIS and Exhibit P11 FIR would clearly show that the occurrence was at about 21.30 hours on 22.08.2016 and the FIR was registered at 23 hours on 22.08.2016.

37. Further the evidence of PW9, doctor, who was working at General Hospital, Pathanamthitta, also shows that the deceased was



brought dead in the hospital by his co-workers around 10.21 pm on 22.08.2016 and regarding the same, he has also given intimation to the police. Therefore, it can be seen that there is a prompt FIR in this case and it cannot be disputed that FIR is the most immediate and first version of the incident and has great value in ascertaining the truth, because a prompt FIR diminishes the chances of an informant being tutored and the false implication of the accused.

38. We find that the variation in the evidence of PWs 1 to 3 regarding the exact time of occurrence are only due to normal errors of observation and normal errors of memory due to lapse of time and such discrepancies and errors will always be there and the same cannot be accepted as material discrepancies touching the core of the case.

39. In ***State of Uttar Pradesh vs. M.K. Anthony*** [AIR 1983 SC 48], the Honourable Supreme Court held that minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter, would not ordinarily permit rejection of the evidence as a whole. It is well settled that when a material witness is examined at length it is possible for him



to make some discrepancies and no true witness can possibly escape from making some discrepant details.

40. In this case, the proved circumstances clearly shows that the accused and the deceased were working in the kitchen of the restaurant and immediately on getting information about the quarrel inside the kitchen and when PWs 1 to 3 rushed to the kitchen, they saw the deceased lying there in a bleeding condition and at that time, the accused also was standing there and it is in evidence that it was CW2, Pintu Barman, who informed PWs 1 to 3 regarding the quarrel between the accused and the deceased and the proceedings of the court below shows that in spite of repeated issuance of summons, the presence of CW2, Pintu Barman, could not be secured and hence he could not be examined.

41. It can be seen from the proceedings of the trial court that summons was repeated for about 15 times against CW2 and in that circumstance and in the absence of any other explanation from the side of the accused as to how the deceased sustained the stab injuries which caused his death while the accused and the deceased were inside the kitchen of the restaurant, we find that the proved circumstances are of a conclusive nature and tendency excluding every other hypothesis, except the one pointing to the guilt of the accused and therefore, on an



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overall analysis of the circumstances proved, we find that the prosecution has succeeded in proving the case against the accused beyond reasonable doubt.

In the result, this appeal is dismissed confirming the conviction entered and the sentence passed by the learned Additional Sessions Judge-III, Pathanamthitta in S.C No. 144 of 2017. Interlocutory applications, if any pending, shall stand closed.

sd/-

**P.B. SURESH KUMAR,
JUDGE.**

sd/-

**JOHNSON JOHN,
JUDGE.**

Rv