"C.R."

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

WEDNESDAY, THE 31ST DAY OF JANUARY 2024 / 11TH MAGHA, 1945

CRL.APPEAL NO. 1656 OF 2006

AGAINST THE JUDGMENT DATED 18.08.2006 IN SC 314/2000 OF ADDITIONAL SESSIONS COURT (ADHOC), THALASSERY

APPELLANTS/ACCUSED:

1 SHINOJ SINGH,

2 PARAMBAN MUKESH,

3 K. PRAMOD,

4 V. SUNIL,

5 CHALADAN SUJESH,

6 RAJEEVAN,

BY ADV SRI.S.RAJEEV

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA. (CRIME NO.174/1999 OF, DHARMADAM POLICE STATION).

SMT SEENA C., PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 19.01.2024, THE COURT ON 31.01.2024 DELIVERED THE FOLLOWING:

P.G. AJITHKUMAR, J. **"C.R."**

Crl.Appeal No.1656 of 2006

Dated this the 31st day of January, 2024

JUDGMENT

The appellants were convicted for the offences punishable under Sections 143, 147, 148 and 307 read with Section 149 of the Indian Penal Code, 1860 (IPC) by the Additional Sessions Judge (Adhoc-I), Thalassery, as per the judgment dated 18.08.2006 in S.C.No.314 of 2000. They were sentenced to undergo rigorous imprisonment for various periods and also to pay fine.

2. They challenge legality and correctness of the said judgment of conviction and order of sentence in this appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973 (Code).

3. The allegations against the appellants were that on the morning of 26.10.1999 they formed themselves into an unlawful assembly and in prosecution of their common object, attacked PW2 Sri.Balan using choppers and inflicted him

various injuries, some of which were grievous. PW2 is a C.P.I. (M) worker and due to political enmity he was attacked by the appellants, who are RSS/BJP activists. Before the court below, the prosecution examined PWs.1 to 9 and proved Exts.P1 to P9. MOs.I to VI were identified as well. The incriminating circumstances appeared in the evidence were put to the appellants during their examination under Section 313(1)(b) of the Code. They denied such evidence and maintained that they were innocent. No evidence was let in by them.

4. The court below, after analysing the evidence, found the appellants guilty. Correctness of the findings of the court below leading to their conviction and sentence are challenged in this appeal.

5. Heard the counsel for the appellants and the learned Public Prosecutor.

6. PW2 is the injured. He deposed in detail regarding the attack perpetrated by the appellants. He was working in the Water Authority on contract basis. On 26.10.1999 at about 10.30 a.m. he was returning from the pump house in

the Brennan College, Palayad and at the mud road behind the college, seven assailants attacked him uttering, 'kill him'. He asserted that it was the 1st accused, who so uttered and assaulted him first. He brandished a chopper causing an injury at his right wrist. He was also inflicted with injuries at his left side of chest, left elbow, both knees and back. Besides him, accused Nos.3 to 5 were the other persons who chopped him. When people started coming, the assailants took on their heels.

7. There was a police picket in that area. PW1 was a police personnel on duty there. PW2 stated that policemen from the police picket and later his relatives reached the place. He told the policemen that Shinoj and others attacked him. He was immediately taken to the Co-operative Hospital, Thalassery and from there to Medical College Hospital, Calicut, where he was treated for 19 days. His treatment continued for another 34 days in the Co-operative Hospital, Thalassery.

8. No occurrence witness is available. PW1 testified that while on duty in the police picket post, which is half-a-

kilometre away from the place of occurrence, knew about the incident as told by a jeep driver. He as well as other policemen on duty rushed to the spot where they saw PW2 with bleeding injuries. It is his version that PW2 told him that seven persons, including Shinoj, attacked him. PW1 further stated that he made arrangements to send PW2 to the hospital and submitted a report, which is Ext.P1 to the Sub Inspector of Police. It is based on Ext.P1, the crime was registered by PW8 as per Ext.P5, FIR. The investigation was conducted by PW9, the Circle Inspector of Police.

9. The learned counsel for the appellants would submit that the evidence tendered by PW2 is insufficient to prove the charge, particularly the identity of the assailants. The reason for the attack is said to be political rivalry and therefore the possibility of implicating innocent persons cannot be ruled out. When there is no evidence to render support to the identification of the appellants before the court by PW2, his sole evidence cannot be acted upon. Further, it is submitted that PW2 did not identify the appellants before the

court by pointing out each of them with reference to their overt acts, his identification of the appellants before the court cannot be acted upon at all.

10. The offences charged against the appellants are serious in nature. It is contended, for the reason that PW2 was attacked in a gruesome manner, the court cannot have a conclusion that the appellants were the assailants. The court below, however, acted upon the evidence tendered by the prosecution without appreciating the evidence in an appropriate manner, which resulted in miscarriage of justice. The evidence of PW3 should not have been given any importance. He is a pure and simple chance witness and his presence at the place of occurrence was highly doubtful. Still, the court below accepted his evidence in order to render corroboration to the oral testimony of PW2. The learned counsel for the appellant pointed out such improbabilities in the prosecution evidence and urged that the findings of the trial court are liable to be reversed.

11. Soon after the incident, PW1 reached the place of occurrence. PW6 is a jeep driver. He along with the son-in-law of PW2 reached the place of occurrence on knowing the incident and they took PW2 to the hospital. PW2 was examined at the Medical College Hospital, Calicut by PW4. He had issued Ext.P2 certificate noting the injuries on the body of PW2. He had extensive injuries on various parts of his body. Injury Nos.1, 3 and 4 were stated by PW4 to be grievous in nature. Following are those injuries:-

(1) Incised wound having length of 10 cm just proximate to its pattala exposing the joint.

(3) 4 cm long transverse wound at the middle third lower third forearm right side postero-medial aspects of right arm.

(4) 7 cm long incised wound on the lateral aspect of right eblow.

12. From the nature of the injury sustained by PW2, the extent and gruesome manner of the attack perpetrated on him is evident. The oral testimony of PW2 that he was assaulted and inflicted such injuries by a group of six persons using choppers is corroborated by the medical evidence. PW4 opined also that such injuries could be inflicted using sharp

edged weapons. Therefore, the case of the prosecution that PW2 sustained such serious injuries as a result of attack by a group of persons at or around 10.30 a.m. on 26.10.1999, stands proved.

13. The Apex Court in **Ashish Batham v. State of Madhya Pradesh [(2002) 7 SCC 317]** held that realities or truth apart, the fundamental and basic presumption in the administration of criminal law and justice delivery system is the innocence of the accused. Until the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely carried away by heinous nature of the crime or the gruesome manner in which it was found to have been committed. With that in mind, I shall consider the contentions of the appellants.

14. PW2 deposed in court that it was the 1st accused, who first brandished choppers causing him injuries. He also stated that the 1st accused uttered to kill him. He further deposed the overt acts of accused Nos.3, 4 and 5 that they

also assaulted him using choppers causing injuries. Except stating that those accused using choppers attacked him, PW2 did not identify by pointing out each of them from among those present in the dock during examination.

15. The prosecution placed reliance on the evidence of PW3 to show that the appellants left the scene in a perplexed mood. Of course, if the assailants were spotted soon after the incident near the place of occurrence in an agitated mood, that may be a subsequent conduct having nexus to the offending act. The version of PW3 is that while he was passing along the road, the accused were seen leaving the place of occurrence. But his other version is that at the time when he reached the place of occurrence police personnel and others were there. Going by the version of PW1, he along with other policemen reached the spot after getting information from a jeep driver. He came from a distance of half-a-kilometre. It was after his reaching near PW2 only, PW3 came there. If so, he could have seen the appellants fairly at a distant place. His evidence cannot then

be used to connect the appellants with the alleged incident. The question then is whether the evidence of PW2 together with other circumstances is sufficient to establish the identity of the assailants.

16. It is in evidence that immediately when PW1 approached, PW2 told him that seven persons, including Shinoj, attacked him. Such a version was given in Ext.P1 report by PW1. The learned counsel for the appellants attributed bias on the side of PW1 and the delay of a few hours in lodging Ext.P5 F.I.R. is highlighted to contend that during that period, the name of the 1st appellant was falsely added on political intervention. The crime was registered on the same day and Ext.P5 F.I.R. received in court the same day. Such a contention was raised by the learned counsel without support of any material or circumstance. Attributing malice on the part of PW1, who as part of his duty reached the place of occurrence immediately after the incident, cannot be appreciated in the absence of any evidence or circumstance in support thereof. Based on Ext.P1, crime was

registered without any delay and sent the F.I.R. to the court. Therefore, the version in Ext.P1 certainly lends support to the oral testimony of PW1 divulging the name of the 1st appellant.

17. In **Vayalali Girishan and others v. State of Kerala [2016 (2) KLT SN 2]** this Court held that the identification of the accused in court, which was conducted in an omnibus and perfunctory manner, cannot be held to be reliable to establish the complicity of the accused. In that case, 25 accused stood trial. While all of them were in dock, the witnesses identified them in a wholesome manner, without pointing out each one with reference to their overt acts. In such a situation the court held that the omnibus and perfunctory manner of identification is insufficient to establish the identity of each and every accused. The said view was followed by this Court in **Manu G. Rajan and another v. State of Kerala [2021 (6) KLT 227]** and **Nazirudheen K. v. State of Kerala [2022 (2) KLJ 277]**.

18. It is true that in this case PW1 did not identify by pointing out each of the appellants before the court and

stating which act he has committed. He, however, stated that it was the 1st accused, who uttered to kill him and attacked him using a chopper first. Accused Nos.3, 4 and 5 also stated to have attacked him. But, their names were not mentioned in Ext.P1 F.I.statement.

19. The learned counsel for the appellants would submit that only on 01.11.1999 Ext.P8 report disclosing the names of appellant Nos.2 to 6 was submitted before the court. It is submitted that the said delay is fatal to the prosecution, especially in the absence of any evidence as to how the identification of those appellants was fixed by the investigating officer by that time. No identification parade was held. Whether the appellants were got identified by the witnesses after arrest is also not known. Pointing out the said aspects, it is contended that the prosecution of the appellants is bad in law.

20. In **Shahid Khan v. State of Rajasthan [(2016) 4 SCC 96]** the Apex Court held that when statements of witnesses to the occurrence were recorded after three days

and no explanation for that delay is forthcoming, the possibility of a deliberate shaping of the case could not be ruled out. Such a view was taken in the facts and circumstances of that case. However, the said principle has bearing in this case also, since the name of none of the assailants, except the 1st appellant, was disclosed any time before submitting Ext.P8 report in the court. Concerning the effect of delay in submitting F.I.R. before the court and also in kicking start the investigation immediately after registration of the crime, the Apex Court in **Jafarudheen v. State of Kerala [(2022) 8 SCC 440]** held that an inordinate and unexplained delay may be fatal to the prosecution case, but it is a matter to be considered by the court on the facts of each case.

21. Here, on the very next day, Ext.P8 report was prepared and sent to the court. It is seen received in the court on 01.11.1999. In it the names of the persons involved in the offence were disclosed. Therefore, it cannot be said that there occurred an inordinate delay. But when the names of all the

assailants did not find a place in the F.I.R., the delay in recording the statements of witnesses, who could have identified the assailants, created doubts about the identification of accused Nos. 2 to 6 by the prosecution witnesses.

22. Yet another contention raised by the learned counsel for the appellants is that the witnesses from the locality were not cited by the prosecution. In that regard, the learned counsel placed reliance on the decision in **Joginder Singh v. State of Haryana [(2014) 11 SCC 335]**. The Apex Court held that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, is not convincingly brought to fore, or where there is a gap or infirmity in the prosecution case which could have been bridged or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency. Withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution.

23. PW2 categorically stated that nobody came to the spot while he was being attacked. He further stated that on realising that the people from the neighbourhood were thronging in, the assailants left. If so, there is no possibility for any of the neighbours seeing the actual incident. From the available evidence, it is quite sure that it was PW1, who reached the spot soon after the incident and took action to send PW2 to the hospital. Although persons from the neighbourhood reached there, there is no evidence to show that any of them had seen the incident. In the circumstances, the prosecution cannot be found fault with for non-examination of any of the neighbours as a witness.

24. The evidence tendered by PW2 that he was attacked by Shinoj and his companions is devoid of any infirmity. His version that he knew Shinoj even earlier can certainly be believed. When he stated soon after the incident to PW1 that seven persons, including Shinoj were the assailants, there cannot be any doubt about his complicity to the offence. Although PW2 identified other appellants also

before the court as the assailants, there is no other evidence to corroborate that version. None of such assailants was identified by PW2 during the investigation. Based on the claim of PW2 that he knew appellant Nos.2 to 6 before, there cannot be a finding that they were the parties to the unlawful assembly of the assailants. In the circumstances, I am of the view that the court below went wrong in holding that besides the 1st appellant, the persons formed the offending group were appellant Nos.2 to 6. The prosecution could prove beyond doubt the complicity of the 1st appellant alone; whereas the identity of the others could not be proved beyond reasonable doubt. Therefore, conviction of the 1st appellant is confirmed. The benefit of doubt is extended to appellant Nos.2 to 6 and they are acquitted by setting aside their conviction by the trial court. Appellant Nos.2 to 6 are set at liberty.

25. The 1st appellant was sentenced to undergo rigorous imprisonment for six months under Section 143 of the IPC; rigorous imprisonment for three years under Section 148 of IPC; and rigorous imprisonment for seven years and to

pay a fine of Rs.10,000/- under Section 307 of the IPC. Having considered the period elapsed after the date of commission of the offence and the entire circumstances borne out from the records, I am of the view that the amount of substantive sentence imposed on the 1st appellant can be reduced and the amount of fine can be increased. Accordingly, the 1st appellant is sentenced to undergo rigorous imprisonment for six months under Section 143 of the IPC; rigorous imprisonment for one year under Section 148 of the IPC; and rigorous imprisonment for five years and to pay a fine of Rs.50,000/- under Section 307 of the IPC. In default of payment of fine, the 1st appellant shall undergo rigorous imprisonment for a further period of six months. In the event of realisation of fine, the same shall be paid as compensation to PW1, the injured. Set off under Section 428 of the Code is allowed.

Sd/-

P.G. AJITHKUMAR, JUDGE

dkr