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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

&

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

FRIDAY, THE 28TH DAY OF JUNE 2019 / 7TH ASHADHA, 1941

CRL.A.No.1029 of 2013

AGAINST THE JUDGMENT IN SC 136/2010 of ADDITIONAL SESSIONS  
COURT (ADHOC) III (FAST TRACK COURT-III), PALAKKAD DATED 27-  
06-2013

APPELLANTS/ACCUSED NOS.1 TO 4:

- 1 PACHAPPAN @ ARUCHAMI.T.  
S/O THAYYAN, KUNNAMKADU VEEDU, KOTTEKKADU,  
PALAKKAD.
  - 2 SURA @CHIRAKU SURA @SURESH  
S/O MADHAVAN, KUNNAMKADU VEEDU, KOTTEKKADU,  
PALAKKAD.
  - 3 SUKUMARAN P.V.  
S/O VELLA, KUNNAMKADU VEEDU, KOTTEKKADU,  
PALAKKAD.
  - 4 SHAJAHAN V.  
S/O SAIVUKUTTY, KUNNAMKADU VEEDU, KOTTEKKADU,  
PALAKKAD.
- BY ADVS.  
SRI.P.VIJAYA BHANU (SR.)  
SRI.M.REVIKRISHNAN  
SRI.VIPIN NARAYAN

Crl.Appeal No.1029/13

-:2:-

**RESPONDENT/COMPLAINANT :**

STATE OF KERALA

REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF  
KERALA, ERNAKULAM-682 031.

BY ADV.SENIOR PUBLIC PROSECUTOR SRI.S.U.NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON  
21.06.2019, THE COURT ON 28.06.2019 DELIVERED THE FOLLOWING:

**J U D G M E N T**

**Shaffique, J.**

The appeal under consideration is preferred by appellants who are four in number. They were charged for offences under Sections 341 and 302 of the Indian Penal Code, 1860 (for short 'IPC') by the Court of Additional Sessions Judge (Adhoc – III) [Fast Track Court No. III], Palakkad and found guilty for offence under Section 302 of I.P.C. and all the accused/appellants were individually sentenced to undergo imprisonment for life and to pay a fine of ₹1,00,000/- (Rupees One Lakh only) vide judgment dated 27/06/2013 in S.C. No.136 of 2010 arising out of Crime No.106 of 2008 of Malampuzha Police Station. The fine amount if realized was directed to be paid to the wife or children of the deceased with equal right over the same.

2. Prosecution case is as follows:

The deceased Aruchami was the Mandalam Kunnamkadu ward President of Bharatheeya Janatha Party (for short 'BJP'). The accused/appellants were followers of Communist Party of India

(Marxist) [for short 'CPI(M)]. Due to political enmity, accused nos. 1 to 4 in furtherance of their common intention to kill Aruchami, wrongfully restrained him at 08.30 p.m. on 20/07/2008 while he was conversing with PW2 and PW3 in front of the provision shop of one Krishnan bearing building no.2/29 of Maruthathodu Panchayath. The accused were armed with deadly weapons like iron pipes, sticks and concrete blocks. The 3<sup>rd</sup> accused (herein after referred to as 'A3') exhorted “നേതാവിനെ അടിച്ചു കൊല്ലൂടാ ” (Kill the leader by beating) and on the said utterance, the 1<sup>st</sup> accused Pachappan (herein after referred to as 'A1') struck on the scalp of Aruchami with an iron pipe and the 2<sup>nd</sup> accused (herein after referred to as 'A2') beat him on his hands and legs with iron pipe and Aruchami collapsed. A3 Sukumaran struck on the abdomen of the victim with a concrete piece. The victim was taken to hospital and on 22/07/2008 at 07.45 p.m., Aruchami succumbed to his injuries while undergoing treatment in Medical College Hospital, Thrissur.

3. To prove the case, prosecution adduced oral evidence through PW1 to PW21, produced documents Exts.P1 to P23 and

identified MO1 to MO6 material objects. After closure of prosecution evidence, accused were questioned under Section 313 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'). Accused denied incriminating circumstances appearing against them and pleaded innocence. No evidence was adduced from their side.

4. Learned Senior counsel for the appellants Sri.P.Vijaya Bhanu submitted that there is absolutely no evidence against the appellants in this case. Occurrence witnesses cited by the prosecution turned hostile. Alleged dying declaration made to PW1 by the deceased is not deposed to by the witness in Court. Medical and other evidence do not corroborate the prosecution version. He pointed out that PW13 Doctor who was examined to prove autopsy did not depose the injuries noted in post-mortem certificate in Court and hence his opinion lacks evidentiary value. He relied on the decision of this Court in **Raju v. State of Kerala** [2018 (1) KLT 565] to substantiate the said contention. Court below committed serious error in convicting the appellants. He pleaded to acquit the appellants by extending benefit of doubt.

5. On the other hand, learned Senior Public Prosecutor

argued that prosecution proved the case by adducing solid evidence. It is true that some of the witnesses did not support prosecution. But that by itself is not sufficient to discard other available evidence. PW1 in his Ext.P1 FIS as well as in his evidence deposed the dying declaration made by the deceased to him while the deceased was taken to hospital. It is believable. Medical evidence corroborates the oral evidence of PW1, PW9 and PW10. Court below is justified in arriving at the present conclusion and there is no need to disturb the finding. He prayed to dismiss the appeal.

6. We heard both counsels in detail and perused the evidence placed before us. Two questions are to be answered for disposing of this appeal. Firstly, whether the death of Aruchami was a homicide as alleged by the prosecution. Secondly, whether the Court below is justified in holding that the appellants herein caused death of Aruchami in furtherance of their common intention to murder him.

7. Evidence adduced by the prosecution, in brief, are as follows:

PW1 Manikandan is the brother of the deceased. He lodged

Ext.P1 First Information Statement (for short 'FIS') to PW17. PW2 to PW5 were cited to prove occurrence, but they turned hostile to the prosecution. PW6 is an attesor to Ext.P2 inquest report. PW7 is cited to prove Ext.P3 scene mahazar but he did not support the prosecution. PW8 deposed that he signed Ext.P3. PW9 Lakshmi and PW10 Usha were examined to prove the circumstances soon after the alleged commission of the overt acts by the appellants and dying declaration made by the deceased. PW11 is an attesor to Exts.P4, P5 and P6 mahazars prepared at the time of seizure of MO1 to MO3 respectively based on the disclosure statement of A1 to A3 from the residence of Jayan. Ext.D1 is a contradiction marked through him. PW12 admitted his signature appearing in Exts.P4 to P6 but did not support the prosecution by stating the details of recovery. PW13 Dr.Ignasius is the then Assistant Professor and Deputy Police Surgeon, Government Medical College, Thrissur. He conducted autopsy of Aruchami and Ext.P7 is the post-mortem certificate issued by him. PW14 Dr.Suresh Kumar is the then Assistant Surgeon, District Hospital, Palakkad. He examined Aruchami on 20/07/2008 and Ext.P8 is the certificate issued by him. PW15 is the then Assistant Executive

Engineer, Kerala State Electricity Board (for short 'KSEB') who produced Ext.P9 load shedding schedule of the locality at the relevant day. PW16 is the Village Officer, Malampuzha-II Village who proved Ext.P10 scene plan on the request of the Investigating Officer. PW17 recorded Ext.P1 FIS given by PW1 and registered Ext.P1(a) First Information Report (for short 'FIR'). PW18 Vipindas submitted Ext.P5 report altering Sections. He also conducted inquest and Ext.P2 is the inquest report. PW19 Sri.B.Anilkumar conducted major part of the investigation. PW20 played the limited role of submitting draft charge to Public Prosecutor for approval. PW21 laid charge-sheet before Court.

8. First question to be looked into is whether death of Aruchami was a homicide or not. Ext.P2 is the inquest report dated 23/07/2008. PW14 is the Doctor who treated Aruchami at District Hospital, Palakkad on 20/07/2008. Ext.P8 is the certificate issued by him. He examined the patient at 08.30 p.m. on 20/07/2008. Alleged history of assault was “ കോട്ടേക്കാട് വെച്ചു CPM പ്രവർത്തകർ വാളുകൊണ്ട് വെട്ടി .” Following are the injuries deposed by him:

*“Lacerated wound 6x2x2 c.m. on the head. Abrasion over left knee 0.5x0.5 c.m., linear abrasion over abdomen 10x1 c.m.”*

9. The history of assault was told by the patient himself. PW13 is the Doctor who conducted autopsy. Ext.P7 is the post-mortem report. He deposed that the cause of death of the victim was blunt injury sustained to the head and Injury no.1 in Ext.P7 is sufficient in the ordinary course of nature to cause death. The same injury could be caused using MO1. Injuries described in Ext.P7 are not deposed by the witness in his evidence. But it is rather clear on overall reading of medical evidence that the deceased Aruchami died due to the severity of injuries sustained by him and his death is a homicide.

10. Answer to next crucial question would settle whether accused were involved in the crime as alleged by the prosecution and found correct by the trial Court. For the same, it is appropriate to look into the evidence of PW1, PW9 and PW10 in detail.

11. PW1 stated that he is a resident of Kunnamkad and is the brother of the deceased Aruchami. He identified all four accused by naming them. He stated that he had not seen the

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incident. But he had seen his brother lying with injuries. It was in front of the shop of Krishnan. There was injury on the head and foot of Aruchami. Himself, PW10 and Devadas took Aruchami to the hospital. The injury on the head was fatal. The patient was taken to Medical College Hospital, Thrissur. Aruchami was unconscious. The incident happened on July 2008 after 7.30 p.m. Light was available from mercury lamp. Fatal hit on the head using concrete stone is the reason for death. Accused are CPM followers and Aruchami is a BJP worker. The incident occurred due to political rivalry. Ext.P1 is the complaint given by him to Malampuzha police. While going to Palakkad in an autorickshaw, Aruchami said something. He told that four accused hit him. He told the names of all the four.

12. PW9 is the elder sister of the deceased. She deposed that her brother got injured on 20<sup>th</sup> July 2008. On the third day, he died. She witnessed the incident. Aruchami had injury on his head. His foot also got injured and there was bleeding. Pachappan, Sagarar, Suresh and Sukumaran were the aggressors. Aruchami was lying down. Accused were standing near Aruchami. It is her version that she cried aloud. Pachappan

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made her flee using iron rod. She ran towards west to her house. She told the matter to Usha, who is the wife of the deceased and Aneesh, the son of the deceased. Aruchami was lying below the shop of Kunnumkad Krishnan. She identified all accused in Court. PW10, PW1 and Devadas took the injured to Palakkad hospital. From there, he was taken to Thrissur hospital and on 3<sup>rd</sup> day, Aruchami died. Due to party rivalry, accused hit Aruchami. Aruchami belonged to BJP. Accused belong to Marxist party. MO1 is used to hit her. While Aruchami was lying down, accused were standing near. As she cried, she was beaten with MO1. During cross-examination, she admitted that she did not give a statement to the effect that Aruchami got up and spoke certain things and also that Pachappan had beaten her using iron rod.

13. PW10 Usha is the wife of the deceased. She stated that her husband got injured and he was taken to hospital in an autorickshaw. Her husband spoke to her. Injuries were found on head and foot. She asked him how it had happened. Her husband told her that Pachappan, Sukumaran, Shahjahan and Suresh caused it. At that time, her son Aneesh Mohanan and PW1 were present in the autorickshaw. Her husband told her that some

people joined BJP and that was the reason why accused did it. Accused belonged to Marxist party. During cross-examination, it is brought out that she had not given a statement to police that her husband had told her that it was the accused who caused injuries to him. It is also admitted by her that she did not have a case before police that her husband told the names of accused to her while they were going to hospital.

14. Now let us analyse the evidence. In the case on hand, PW2 to PW5 were cited as occurrence witnesses. They completely turned hostile to the prosecution. Other evidence available in the case consisted of the oral testimony of PW1, PW9 and PW10, medical evidence adduced by PW13 and PW14 and recovery evidence. PW1 gave Ext.P1 FIS to PW17 within a few hours of the incident and the FIR is a prompt one. In Ext.P1, details of incident described by the victim is given by PW1 specifically. PW1 identified all accused in Court. But in evidence, he stated that his elder brother told that four accused hit him and he told their names also. His evidence in chief examination ends here. Though he has a detailed case against appellants in his Ext.P1 statement as to each and every overt act spoken to by the deceased to him,

he did not venture to state them in Court. Hence, the evidence of PW1 alone cannot be said to be sufficient to infer guilt of the accused. That apart, though PW9 deposed before Court that she had seen the appellants standing around the deceased with weapons and as she approached them, A1 made her run by trying to beat her using iron rod, such a case is not found in her previous statements to police. Prosecution brought out the same as a material omission amounting to contradiction. PW10 who is none other than the wife of the deceased deposed before Court that her husband made a dying declaration to her stating the overt acts done by accused herein. She identified all the accused. But defence successfully brought out during cross-examination that PW10 was not having such a case before Investigating Officer. The alleged dying declaration in the evidence of PW10 is an omission. The said omission is a material one and it also amounts to contradiction. Under such circumstances, it is unsafe to rely on other incriminating piece of evidence to convict the appellants. Prosecution failed to prove their case beyond reasonable doubt. Eyewitnesses turned hostile to the prosecution. Evidence of PW9 and PW10 showing dying declaration of the

deceased is proved to be an omission amounting to contradiction. Recovery effected also lie under shadow of doubt. Prosecution could only prove that Aruchami met with a homicidal death. Prosecution is yet to prove their case against the appellants.

15. In the result, the appeal is allowed. Conviction and sentence passed by the trial Court is hereby set aside. The appellants are acquitted of all charges by extending benefit of doubt. Those who are not on bail shall be released forthwith if their presence is not required in connection with any other case. The widow of the deceased shall be paid an amount of ₹1,00,000/- (Rupees One lakh only) under the victim compensation scheme under Section 357A of Cr.P.C.

16. This is also a case in which we find that the investigation agency as well as the prosecution had seriously failed to bring home the guilt of accused. When an FIS is given by PW1 narrating the whole incident in which his brother died, later while being examined before Court, no attempt is seen made to explain the dying declaration in detail. That apart, even without declaring PW2 hostile, he is cross-examined. PW3, PW4 and PW5 were declared hostile and cross-examined, but the

previous statements are not marked in evidence.

17. It is also disheartening to note the laches on the side of prosecutor as well as on the part of the Court in not recording the opinion of Doctor PW13 who conducted post-mortem. It has been repeatedly held by the Apex Court and this Court that post-mortem certificate by itself is not evidence and mere marking of the same would not suffice. The Doctor will have to speak about the contents of the post-mortem certificate and the same should be recorded by the Court and there should be evidence to prove the injury sustained by the victim, the actual cause of death and his findings, and only if these facts are recorded by the Court, it becomes evidence. Such fundamental principles are ignored or rather unattended by the Prosecutor as well as by the Court.

18. The Government should while appointing Prosecutors, especially for conducting serious criminal cases, competent persons are to be appointed taking into consideration their expertise in the field. In most of the cases we find that the Prosecution is not being conducted properly and even the basic knowledge which are necessary to conduct a criminal prosecution is lacking, purely on account of inexperience and lack of competence. The

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Government has to take serious note of the aforesaid factors while appointing Public Prosecutors/Government Pleaders at District levels, dehors the political affiliations. Failure to appoint competent persons amounts to miscarriage of justice. It is for the Government to ensure that competent Advocates are appointed as Government Pleaders and their work has to be constantly monitored to ensure that interest of the State as well as the public at large is not jeopardized.

Registry shall forward a copy of this judgment to the Secretary to Government, Home Department, Government Secretariat, for appropriate action.

Sd/-

**A.M. SHAFFIQUE**

**JUDGE**

Sd/-

**N.ANIL KUMAR**

**JUDGE**

Rp

//True Copy//

PS to Judge