IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

MONDAY, THE 21ST DAY OF DECEMBER 2020 / 30TH AGRAHAYANA, 1942

CRL.A.No.1015 OF 2005

AGAINST THE ORDER/JUDGMENT IN SC 42/2004 OF ADDITIONAL DISTRICT COURT (ADHOC), MANJERI

APPELLANT:

ABDUL RAHOOF,
S/O. MUHAMMADALI,
THORAPPA HOUSE,
WEST KODOOR,
AMSOM DESOM.

BY ADVS.
SRI.N.MANOJ KUMAR
SRI.M.RISHIKESH SHENOY

RESPONDENT:

STATE OF KERALA
REP. BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM,
REP. THE, A.S.I OF POLICE,
MALAPPURAM.

R1 BY PUBLIC PROSECUTOR
R1 BY GOVERNMENT PLEADER

OTHER PRESENT:

SRI.ARUN POOMULLI, SMT.MEERA.M AND SRI.BIJU VIGNESWAR- AMICUS CURIAE, SRI.K.B.UDAYAKUMAR, SR.PP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18-12-2020, THE COURT ON 21-12-2020 DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 21st day of December 2020

The renowned Malayalam Poet Ayyappa Paniker, start his famous Poem "Moshanam", like this "വെറുമൊരു മോഷ്ടാവായോരെന്നെ കള്ളനെന്നു വിളിച്ചില്ലേ?". [which means "Just because I have stolen a few things, why should you call me a thief?"]. The case of the appellant/accused in this case is almost like this. The prosecution case is that the prosecution witnesses blame the accused by spreading a rumor that he is a thief. Accused want to remove the label of the thief from his name. He met the prosecution witnesses for clearing this nickname. But instead of discussing the issue, they provoked the accused by characterising him as a thief. In that situation, the incident in this case happened.

2. If a person commits a small theft, society must reform him. The great poet Ayyappapanicker concludes his

above mentioned poem like this:-

"നല്ലത് വല്ലോം മോഷ്ടിച്ചാലുടനെ -
അവനെ - വെറുതെ
കള്ളനാക്കും നിങ്ങടെ ചട്ടം
മാറ്റുക മാറ്റുക ചട്ടങ്ങളെയവ
മാറ്റും നിങ്ങളെയല്ലെങ്കിൽ"

{English version:-

Whenever one steals something good, you people raise a clamour - for nothing and dub him a thief, a thief!

It is the fault of your laws,

Change you then your laws, I say,

lest your laws should change you]

3. This Court does not want to contradict the great poet Ayyappapanicker, because poetry is the spontaneous overflow of powerful feelings. It takes its origin from emotion recollected in tranquility. But with great respect to the poet, I have to say that the concluding portion of the above poem is not entirely correct in the light of Section 360(3) Cr.P.C and Section 3 of Probation of offenders act 1958. The 1st offender in a theft case need not be sent to

jail in all situations in the light of the above provisions. Therefore the law is there, but society also should change by reforming first offenders. The criminal justice delivery system can attain its ultimate aim only with the help of society. To err is human. If a person commits some small mistakes, Section 360 Cr.P.C and Section 3 of the Probation of offenders Act will protect that person. But society should also protect him by not treating him as a criminal or thief. For a better understanding, the relevant provisions are quoted hereunder:-

Section 360(3) Cr.P.C. is extracted hereunder;

360. (1)

(2)

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code (45 of 1860), punishable with not more than two years' imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or

physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

Section 3 of the Probation of offenders Act is extracted hereunder;

> 3. **Power of court to release certain offenders after admonition.**—When any person is found guilty of having committed an offence punishable under section 379 or section 380 or section 381 or section 404 or section 420 of the Indian Penal Code, (45 of 1860) or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code, or any other law, and no previous conviction is proved against him and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence, and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4 release him after due admonition.
> Explanation.—For the purposes of this section, previous conviction against a person shall include any previous order made against him under this section or section 4.

4. Coming to the facts of this case, the appellant is

the accused in S.C No. 42/2004 on the file of the Additional Sessions Judge, Fast Track Court No.I, (Adhoc), Manjeri. Above case is charge sheeted by the Malappuram Police against the appellant alleging offences punishable under Sections 324 and 308 IPC.

5. The prosecution case, in brief, is that on 06-06-2003 at 8.30 p.m, the accused stabbed on the abdomen of one Sakkeer with a dagger, and thereafter he also stabbed on the groin of the defacto complainant, namely Jaffer with the same weapon due to the previous enmity in connection with the theft of one motor, belongs to one Bava Haji. Hence it is alleged that the accused committed the offence punishable under Section 324 and 308 IPC.

6. To substantiate the case the prosecution examined PW1 to PW10. Exts.P1 to P11 are the documents marked on the side of the prosecution. One witness was examined on the side of the defence as DW1. Exts. D1 to D9 are the exhibits marked on the side of the defence. MO1 to MO4 is the material objects.

7. After going through the evidence and documents, the trial Court found that, the accused committed the offence under Sections 308 and 324 IPC. The accused is sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 1,000/- under Section 308 IPC. In default of payment of fine, the accused is directed to undergo imprisonment for 6 months. No separate sentence was imposed under Section 324 IPC. Aggrieved by the conviction and sentence, this Criminal Appeal is filed.

8. When this Criminal Appeal came up for consideration, there was no representation to the appellant. Hence this Court directed the Investigating Officer to give notice to the appellant informing that the above appeal is posted for hearing. But the investigating officer could not serve notice to the appellant because he was not available in the locality. The same was reported by filing a statement before this Court. Hence I appointed Adv.Sri. Arun Poomulli as amicus curiae in this case.

9. Heard the Amicus Curiae Adv. Sri. Arun Poomulli, who is assisted by Adv. Smt. Meera.M and Adv. Sri. Biju Vigneswar. I also heard the learned Public Prosecutor.

10. The amicus curiae supported the case of the appellant. The learned counsel submitted that, even if the entire allegations are accepted, the accused in this case, is entitled to the benefit of the doubt. The learned counsel produced an argument note, which will be a part of this appeal's records. According to the counsel, there are two injured witnesses and one occurrence witness in this case. PW1 and PW5 are the injured. PW6 is the alleged eye witness. According to the learned counsel, the incident has not happened as alleged by the prosecution. According to the learned counsel, actually, the prosecution witnesses were attacking the accused and his father. The accused sustained injury, he was examined by a Doctor. A case was also registered against the prosecution witnesses in this connection. The prosecution suppressed the wound certificate and the FIR in the counter case. The learned

counsel submitted that the suppression of the injury sustained to the accused itself is enough to acquit the accused in this case. The learned counsel submitted that, in a case of private defence the accused need not prove his case beyond reasonable doubt. The learned counsel submitted that the nonexplanation of the injuries sustained to the accused is fatal to the prosecution. The learned counsel also submitted that, when there is case and counter case registered in connection with the same incident, the prosecution has to produce all the documents of the counter case also. In this case, the accused produced the documents and therefore on that ground itself, it is clear that the prosecution is not coming forward with the correct picture of the case. The learned counsel also submitted that the trial Court erred in relying the circumstance that the accused is involved in some other case. The learned counsel relied Section 54 of the Evidence Act to defend such a finding of the lower Court. The learned counsel submitted that this is a case in which the

incident has not happened as alleged by the prosecution. In such circumstance, the accused is entitled the benefit of doubt.

11. The learned Public Prosecutor submitted that, there is evidence of PW1 and PW5, the injured witnesses, which is supported by the evidence of PW6, the eye witness. The learned Public Prosecutor submitted that, in the light of the evidence of PW1, PW5 and PW6 and in the light of the evidence of PW9 the Doctor, the prosecution proved the case beyond reasonable doubt. The learned Public Prosecutor also submitted that, PW1 and PW5 sustained very serious injuries and the injuries suffered by the accused is minor. In such circumstances non explanation of injuries sustained by the accused is not fatal to the prosecution. Hence the learned Public Prosecutor submitted that, there is nothing to interfere with the conviction and sentence imposed on the accused.

12. The point for consideration, in this case, is whether the accused committed the offence punishable

under Sections 324 and 308 IPC.

13. Altogether, 10 witnesses were examined in this case. PW1 and PW5 are the injured witnesses in this case. PW2, is the Head Constable, who recorded Ext.P1 first information statement. PW3 is the Assistant Sub Inspector, who registered Ext.P2 FIR. PW4 is the Sub Inspector, Malappuram, who arrested the accused. PW5 is another injured in this case and PW6 is the eye witness to the alleged incident. PW7 and PW8 are the witnesses in the scene mahazar and seizure mahazar, which are Exts. P4 and P5. PW9 is the Doctor, who examined PW1 and PW5 and he issued Exts. P6 and P7, wound certificates. PW10 is the Investigating Officer in this case.

14. The alleged incident happened in front of one Bava Haji's residential compound situated on the side of Malappuram Kottackal Public Road. The incident occurred outside his residential compound and near the gate leading to the house. Accused and his father had gone to the house of the above said Bava Haji along with some local

people to talk concerning the theft of one Motor pump belongs to the said Bava Haji. The alleged motive is that the accused had developed enmity against PW1, PW5, and their close relatives, for spreading the news that it was the accused who committed theft of the motor pump. The accused was being treated as a habitual offender. They developed an impression in the society that the accused is involved in several theft cases in the local area. Bava Haji came to the conclusion that his motor is stolen by the accused, and he sold it to somebody who is now abroad. For having a resolution to the issue, all of them reached the house as required by Bava Haji on the relevant date and time. All of them had discussed the matter. Bava Haji had declared that he understood as to who had committed the theft. He has not disclosed the name of the offender. Without disclosing any specific name he made an announcement that he knows the actual culprit and he does not want to declare it openly, but the real culprit knows the fact and it is better for him to pay the cost of the stolen

motor pump. He has also asked the gathering to go out of his house and decide according to their perception. Accordingly, all of them came out of the house and reached the gate of the said compound. Up to this part of the evidence spoken by PW1,PW5 and PW7, the accused has no disagreement or dispute. Thereafter according to the prosecution, out of the gate of the Bava Haji there was a verbal altercation started between the accused and others gathered there. Immediately thereafter, it is alleged that the accused inflicted an injury on PW5, using a knife. At that time, PW1 tried to stop him. Then it is alleged that the accused inflicted injury on PW1 also. Thereafter, the accused left the place. This is the prosecution case.

15. On the other hand the accused has got a definite case in Ext. D4 first information statement. According to him, the incident has not happened as alleged by the prosecution. On 06-06-2003, after the talk from the house of the Bava Haji, he and his father was coming out. At that time PW1, sprinkled chilly powder towards the accused.

Then one Alivikutty attacked the accused using an iron rod, and he sustained injury. He fell down. When he fell down, one Sainudheen and his brothers Ummer, Jaffer, Muhammedali and others assaulted him using hand. The accused sustained injury and he was taken to district hospital Manjeri. Then he was treated by DW1 at 12.05 am, on 07-06-2003.

16. I perused the oral evidence of PW1, PW5 and PW6. They have no case, that the accused sustained any injury in the same incident. There is no explanation from the Investigating Officer also about the injury sustained to the accused. In this case the accused proved that he suffered injuries, and the injuries are two lacerated wounds on the back of his scalp. The FI statement and FIR registered as a counter case is also produced by the accused. When the Exts.D4 and D5 were put to the Investigating Officer, he admitted the same. So there are two versions about the same incident. PW1,PW5 and PW6 says that the accused attacked PW1 and PW5. The defence

says that he was attacked by the prosecution witnesses and others. The prosecution has no explanation about the injury sustained to the accused. The trial Court says that the injuries are minor. I do not think that when the injury noted in Ext.D6 is compared with the injury in Exts.P6 and P7, the injury sustained to the accused is minor, as alleged by the prosecution. There are two lacerated wounds on the back of scalp. Absolutely no explanation to the injured witness or PW6, how the accused sustained such an injury. Simply because the prosecution proved that PW1 and PW5 sustained injury and there is medical evidence to prove the same, prosecution cannot succeed. It is a settled position that the prosecution has to prove the case beyond reasonable doubt. Admittedly here is a case where the accused sustained injuries, and there is a counter case also. The prosecution witnesses are silent about the same. How the accused sustained the injury is not explained by the prosecution. Serious injuries are sustained to the accused also. The learned counsel takes me through Ext.P6 and P7

wound certificate of PW1 and PW5. The learned counsel submitted that the depth of the injury is not mentioned in Exhibits. P6 and P7, and only the length is mentioned. Therefore, according to the learned counsel, if the injury sustained by the defence is simple the injury sustained to the prosecution witnesses is also minor. I think there is some force in the arguments of the learned counsel for the appellant. Here is a case where the prosecution deliberately suppressed the injury sustained to the accused. It is settled by several decisions of this Court and the apex Court that, if there is nonexplanation of the injury sustained to an accused, that is fatal to the prosecution. The learned counsel relied the judgment in ***Lakshmi Singh and Others vs. State of Bihar (1976 (4) SCC 394) and Ashokan vs. State of Kerala (2017 (2) KHC 669)***. I think these judgments are relevant in the facts and circumstances of the case. Similarly, the learned counsel also relied the judgment of the apex court in ***Partab v. State of UP (1976 (2) SCC 798) and Krishnan vs.***

State of Tamilnadu (2006 (11) SCC 304) in which it is stated that in the case of private defence the prosecution has to prove the case beyond reasonable doubt, whereas the defence can discharge his onus by establishing a mere preponderance of probability. In this case, the defense probablised his case by examining DW1 and producing the wound certificate and First Information Statement. The prosecution deliberately suppressed the same. The prosecution is not coming with the correct picture of the case. That itself is a ground to give benefit of doubt to an accused in a case like this. The learned counsel also submitted that, this is a case and counter case and the principle laid down by the Apex Court in ***State of MP vs. Misrilal and others (2009 SCC (2003) 9 SCC 426)*** is flouted by not conducting the simultaneous trial. In my opinion here is a case where the prosecution proved only the main case. The prosecution suppresses the Details of the counter case. The defence produced the wound certificate of the accused and also produced the counter

case details. I think the accused is entitled the benefit of doubt in this case. Simply because some injured witnesses deposed that the accused inflicted injury on them and they sustained grievous hurt, the Court cannot convict an accused unless the prosecution is coming forward with the correct picture of the case. The prosecution has to prove the beginning of the incident till it's ending. Here is a case where, admittedly the accused sustained injury and there is a definite version to the defence, that the prosecution witnesses attacked the accused. The defence probabalised the case by a preponderance of probabilities.

17. Considering the entire facts and circumstances, I think the accused in this case is entitled the benefit of the doubt. Before concluding, I wish to place on record my deep appreciation to the Amicus curiae Adv.Arun Poomulli, and the lawyers who assisted him namely Adv. Smt.Meera.M and Adv. Sri. Biju Vigneswar for arguing the appeal to the satisfaction of the Court.

As a result, this Criminal Appeal is allowed. The

conviction and sentence imposed on the accused as per judgment dated 25-04-2005 in S.C No. 42/2004 on the file of the Additional Sessions Judge, Fast Track Court No.I, (Adhoc), Manjeri, is set aside. The appellant is set at liberty. The bail bond, if any, executed by the appellant, is cancelled.

(Sd/-)

P.V.KUNHIKRISHNAN

JUDGE

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