2024:KER:94622

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT

THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

MONDAY, THE 16TH DAY OF DECEMBER 2024 / 25TH AGRAHAYANA, 1946

CRL.A NO. 2009 OF 2007

AGAINST THE JUDGMENT DATED 17.10.2007 IN SC NO.550 OF 2004 OF ADDITIONAL DISTRICT & SESSIONS JUDGE (FAST TRACK COURT-I) THIRUVANANTHAPURAM

APPELLANTS/ACCUSED: (A1, A2, A4, A7 TO A11)

1 AJI, S/O. SUKU (A1),
PUTHUVAL PURAYIDOM, TC 34/164, RAJEEV NAGAR, WIRELESS COLONY, KARIKKAKOM MURI, KADAKAMPALLY VILLAGE.

2 SURESH @ MONDI SURESH (A2)
S/O. RAJAN, PUTHUVAL PUTHEN VEEDU, TC 34/192, -DO- MURI, -DO- VILLAGE.

3 BIJU, S/O. RETHINAM (A4)
TC 34/128, WIRELESS COLONY, -DO- -DO-

4 PEERU, S/O. SHAMSUDEEN (A7)
PUTHUVAL PURAYIDOM, TC 34/64, WIRELESS COLONY, -DO- -DO-

5 AJEEM, S/O. BASHEER (A8)
-DO- -DO-

6 JOY, S/O. JOSY (A9)
PUTHUVAL PUTHEN VEEDU, -DO-

7 JAYAN, S/O. PEETHAMBARAN (A10)
TC 34/20, -DO-

8 EDISON MIRANDA, S/O. TONY (A11)
TC 34/200, -DO-

BY ADVS.
SRI.SASTHAMANGALAM S. AJITHKUMAR

SRI.SHAJIN S.HAMEED

RESPONDENT/COMPLAINANT:

**STATE OF KERALA, REPRESENTED BY
THE C.I. OF POLICE, POONTHURA.**

BY SMT.SEENA C, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 05.12.2024, THE COURT ON 16.12.2024 DELIVERED THE FOLLOWING:

C.R

J U D G M E N T

This appeal is at the instance of accused Nos.1, 2, 4 and 7 to 11 in SC No.550 of 2004 on the file of Additional District & Sessions Judge (Fast Track Court-I), Thiruvananthapuram challenging their conviction under Sections 143, 147, 148, 307, 452 and 326 r/w Section 149 of IPC and their sentence under Sections 307, 452 and 326 r/w Section 149 of IPC.

2. Prosecution case is that, on 01.09.1998 at about 6 a.m, accused Nos.1 to 12 formed themselves into an unlawful assembly, armed with deadly weapons like sword, chopper, iron rod etc. and trespassed into the house of PW1 in furtherance of their common object of doing away with PW1 and his two sons - PWs 2 and 3, and they inflicted serious cut injuries on vital parts of their body using sword, chopper etc. which was sufficient in the ordinary course of nature to cause death, unless treated properly.

3. A5, A6 and A12 were absconding and so case against them was split up.

4. On committal, A1 to A4 and A7 to A11 appeared before the trial court. Thereafter A3 passed away and hence charge

against him abated.

5. Charge was framed against A1, A2, A4 and A7 to A11 under Sections 143, 147, 148, 452, 326, 307 r/w Section 149 of IPC, to which, all of them pleaded not guilty and claimed to be tried. PWs 1 to 14 were examined, Exts.P1 to P17 were marked and MO1 series to MO3 series were identified.

6. On closure of prosecution evidence, accused were questioned under Section 313 of Cr.P.C. They denied all the incriminating circumstances brought on record and according to them, they were falsely implicated due to some political rivalry. No defence evidence was adduced, except marking of Exts.D1 to D4 contradictions through prosecution witnesses. Ext.X1 was marked as witness exhibit.

7. On analysing the facts and evidence and on hearing the rival contentions from either side, the trial court found accused Nos.1, 2, 4 and 7 to 11 guilty under Sections 143, 147, 148, 452, 326 and 307 r/w Section 149 of IPC and they were convicted thereunder. Each accused was sentenced to undergo rigorous imprisonment for four years and fine of Rs.5,000/- under Section 307 r/w Section 149 of IPC with a default sentence of simple

imprisonment for one year, rigorous imprisonment for three years and fine of Rs.5,000/- under Section 452 r/w Section 149 of IPC with a default sentence of simple imprisonment for six months, and rigorous imprisonment for three years and fine of Rs.5,000/- under Section 326 r/w Section 149 of IPC with a default sentence of simple imprisonment for six months. No separate sentence was awarded under Sections 143, 147 and 148 r/w Section 149 of IPC, and substantive sentences were directed to run concurrently. Aggrieved by the conviction and sentence, A1, A2, A4 and A7 to A11 preferred this appeal.

8. Pending appeal, on 05.12.2021, the 4th appellant-Peeru (A7) passed away. Since the sentence includes fine amount also, the appeal will not get abated, in spite of his death. Learned counsel for the appellants was ready to argue the matter for the deceased 4th appellant also.

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

10. This is a case where 12 persons armed with deadly weapons like sword, chopper and iron bar, barged into the house of PW1 in the morning hours of 01.09.1998 and unleashed a massive

attack and inflicted serious cut wounds on the body of PW1 and his two sons - PW2 and PW3. PW4-the wife of PW1 is the only occurrence witness apart from the injured.

11. Learned Public Prosecutor would argue that, the number of wounds suffered by PWs 1 to 3, the nature of injuries inflicted and the parts of their body where the injuries were inflicted etc. etc. are sufficient to prove the criminal object of the accused persons, to do away with the life of PWs 1 to 3. PWs 1 and 2 were still in their bed, since it was only 6 a.m, when the accused persons rammed into their house, by breaking open the door. All of them attacked PWs 1 to 3 with deadly weapons like sword, chopper and iron bar, and since it was a group attack, it may not be humanly possible, to narrate the incident by its minute sequence, or to say with exactitude, the overt acts of each and every accused in its chronological order. PW1 lodged F.I Statement at Medical College Hospital, Thiruvananthapuram within 2½ hours of the incident and in that FI statement itself, he had named all the accused. His sons PWs 2 and 3 were also admitted along with him in Medical College Hospital, Thiruvananthapuram with cut injuries all over their body and there was no possibility for PW1, to

implicate any person falsely, at that point of time, due to any political motivation. PW4-the wife of PW1 and mother of PWs 2 and 3, was the natural witness to that incident and her testimony is liable to be believed. Though PWs 1 to 4 categorically deposed about the incident identifying the accused before court, there was no serious cross examination from the part of accused. So, according to prosecution, there is no reason to interfere with the impugned judgment of conviction and sentence.

12. The fact that PWs 1 to 3 sustained serious injuries in the incident which occurred at 6 a.m on 01.09.1998 at the house of PWs 1 to 3 is not disputed by the accused. PW7 Doctor examined PWs 1 and 2 and issued Exts.P4 and P3 wound certificates respectively. Ext.P17 is the wound certificate of PW3 and it was proved through PW14 Doctor. Ext.P4 wound certificate of PW1 Joseph shows the following injury:

i) Incised wound 7x2xMuscle deep on the outer aspect of right arm.

The alleged cause was stated as "വാൾ കൊണ്ട് വെട്ടിയതിൽ വച്ച് at his home at 6 A.M". That certificate was proved through PW7 Doctor.

13. Ext.P3, the wound certificate of PW2-Thadevus, shows the following injuries:

1) Lacerated wound 10 x 0.5 x 1 cm. vertex.
2) Incised wound 7 x 1 x 1 x 1 cm. left shoulder.
3) Incised wound 4 x 1 x 1cm. 5cm. inner to injury No. 2.
4) Incised wound 12 x 1 x 1 cm. 'U' shaped raising upper flap for about 6 to 8 cm upwards.
5) Incised wound left side of right wrist injuring flexor tendon and ulnar nerve.
6) Incised wound right palm on its inner aspect 7 x 1 x 1 cm.
7) Incised wound 12 x 2 x 1 cm. inner aspect of right knee.
8) Incised wound 5 x 1 x 1cm. about 5 cm. below (7)
9) Incised wound 5 x 0.5 x 0.5 cm. on the outer aspect of upper leg.
10) Incised wound 5 x 0.5 x 0.5 cm. about 5 cm. below (9)
11) Incised wound 5 x 2 x joint deep on the back of 5th right metacarpo phalangeal joint.

The alleged cause was stated as "ഉറങ്ങിക്കിടന്നപ്പോൾ വാൾ കൊണ്ട് വെട്ടിയതിൽ വച്ച് at his home". That certificate also was proved through PW7 Doctor.

14. Ext.P17, the wound certificate of PW3-Amal Raj shows the following injuries:

1) Lacerated wound 10 cm. x 2 cm. over dorsal aspect of left forefoot cutting through head of metatarsals.

2) Lacerated wound 8 cm. long over medial aspect of right big toe extending to foot.
3) Lacerated wound 1cm. over anterior aspect of middle of left skin.
4) Lacerated wound 1 cm. above previous wound.
5) Lacerated wound over proximal phalanx of index middle ring finger at level of proximal phalanx cutting bone and tendons.
6) Lacerated wound 2 cm. over lateral aspect of left elbow.
7) Lacerated wound 12 cm. x 4 cm. over superio lateral aspect of scalp.
8) Lacerated wound 1 x 0.5 cm. over left forearm.

The alleged cause was stated as assault with sword at his home.

15. PW7 and PW14 Doctors opined that, the injuries noted in Exts.P3, P4 and P17 wound certificates, could be caused as alleged. The nature of injuries on the body of PWs 2 and 3 and the portion of body where those injuries were inflicted, will give a clear picture about the intention of the accused. Moreover, PW1 deposed that, on breaking open the door, the accused persons entered into the hall room of his house and attacked him and his sons uttering to kill them. PW4-the wife of PW1 and mother of PWs 2 and 3 would say that, after the incident, accused left the

place saying 'died, died'. That also will indicate what was the common object of that unlawful assembly.

16. PWs 1 to 4 categorically stated that the accused persons forming a group, attacked PWs 1 to 3 with deadly weapons, causing serious injuries on the vital parts of their body. Learned counsel for the accused would contend that, as per the F.I statement, PW1 was attacked first by A2 and thereafter, PWs 2 and 3 were attacked. But, before court, he was saying that, the accused persons attacked PW2 first and only thereafter they attacked PW1 and PW3. Moreover, learned counsel for the appellants argued that, PWs 1 to 4 were not able to say the overt acts of each and every accused, the weapon used by each of them or about the sequence of their acts. As we have seen, it was a group attack with deadly weapons, in the morning hours, after trespassing into the house of PWs 1 to 4. The accused persons were 12 in number and PW1 would say that, all of them were carrying sword, chopper, iron bar etc. with them. During that heavy attack, causing serious bleeding injuries, it was not humanly possible, to separately identify, the overt acts of each accused in its chronological order. Even then, PW1 was able to name all the

accused in his F.I statement, which was recorded within 2½ hours of the incident.

17. Learned counsel for the appellants would contend that, though several injuries were found on the body of PWs 2 and 3, there is nothing to show that, any of the injuries were grievous one in order to attract an offence punishable under Section 326 of IPC. But, injury No.5 in Ext.P17 is a lacerated wound over proximal phalanx of index middle ring finger at level of proximal phalanx, cutting bone and tendons. PWs 1 to 4 deposed that the injuries were inflicted with weapons like sword. So, it will attract an offence punishable under Section 326 of IPC. Since all the accused came in a group and attacked PWs 1 to 3, being members of that unlawful assembly, each of the accused is vicariously liable for the overt acts of all or any member, of that group. So, each accused is vicariously liable for the offence under Section 326 of IPC also, even if that overt act was committed by a particular member of that group.

18. In **Masalti v. State of U.P** [1965 KHC 476], a Constitution Bench of the Hon'ble Apex Court held thus:

> "17….What has to be proved against a person who is alleged to be a member of an unlawful assembly is that

he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by Section 141, I.P.C. Section 142 provides that however, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continue in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. It is in that context that the observations made by this Court in the case of Baladin [AIR 1956 SC 181] assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the

> common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.…"

19. In the decision **Parshuram v. State of M.P** [2023 KHC 6973 : 2023 Live Law (SC) 953], Hon'ble Apex Court, relying on *Masalti's case* cited supra, held that, "it is not necessary that every person constituting an unlawful assembly must play an active role for convicting him with the aid of Section 149 of IPC. What has to be established by the prosecution is that a person has to be a member of an unlawful assembly, i.e. he has to be one of the persons constituting the assembly and that he had entertained the common object along with the other members of the assembly, as defined under Section 141 of IPC. As provided under Section 142 of IPC, whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly".

20. In the case on hand, there is evidence to show that the appellants were members of the unlawful assembly which attacked PWs 1 to 3 using deadly weapons like sword. So each of them is vicariously liable for the overt act done by any member of that assembly.

21. Learned Public Prosecutor would argue that, there was no sudden quarrel and the blows were not inflicted in the heat of the moment and so there is every reason to think that it was a pre-planned and pre-meditated attack by the accused with their common object of doing away with the life of PWs 1 to 3. The injuries were serious cut wounds on vital parts of the body. So, an offence under Section 307 r/w Section 149 of IPC was made out against the appellants.

22. Learned Public Prosecutor relied on the decision **Sadakat Kotwar and Another v. State of Jharkhand** [2021 KHC 6698], in which Hon'ble Apex Court held that, "it is not the case of the accused that the offence occurred out of a sudden quarrel. It also does not appear that the blow was struck in the heat of the moment. On the contrary, considering the depositions of PW7 and PW8 the accused persons pushed and took the husband of PW7 out

of the house and thereafter the accused caused the injuries on PW7 and PW8 and stabbed with dagger. Thus, deadly weapons have been used and the injuries are found to be grievous in nature. As the deadly weapon has been used causing the injury near the chest and stomach which can be said to be on vital part of the body, the appellants have been rightly convicted for the offence under S.307 read with S.34 of the IPC. As observed and held by this Court in catena of decisions, nobody can enter into the mind of the accused and his intention has to be ascertained from the weapon used, part of the body chosen for assault and the nature of the injury caused. Considering the case on hand on the aforesaid principles, when the deadly weapon - dagger has been used, there was a stab injury on the stomach and near the chest which can be said to be on the vital part of the body and the nature of injuries caused, it is rightly held that the appellants have committed the offence under S.307 IPC".

23. In the case on hand, the incident was not a fight on sudden provocation. There is nothing to show that, there was any kind of provocation from the part of PWs 1 to 3, inviting the incident. PWs 1 and 2 were sleeping inside their house and PW3

who was brushing teeth near the well, came to the hall room, hearing hue and cry. So, obviously, the attack made by the accused was pre-planned and pre-meditated and they trespassed into the house of PWs 1 to 3 with their clear object of committing murder. But, somehow PWs 1 to 3 survived, as they were given timely treatment.

24. Learned counsel for the appellants would submit that, the recovery effected was not proper, as it was based on a confession by several accused persons together. Moreover prosecution has no case, at whose instance each weapon was recovered. Learned trial court convicted the accused not based on recovery, but on the basis of oral evidence adduced by PWs 1 to 4. In the decision **State through the Inspector of Police v. Laly @ Manikandan and Another Etc**. [2022 KHC 7089], Hon'ble Apex Court held that, accused can be convicted even in the absence of recovery of weapon, when there is direct evidence of eye witness. Learned Public Prosecutor would argue that, the ocular evidence of PWs 1 to 4 is there to prove the incident, even though some minor discrepancies are there, which is bound to happen, naturally. The conviction based on the ocular evidence of the injured and the

eyewitness cannot be taken away, if at all, the recovery was not proved properly.

25. Learned Public Prosecutor would argue that, since PW4 was a natural witness, there was no reason to doubt her credibility. A Division Bench decision of this Court in **Shinoj and Others v. State of Kerala** [2019 KHC 862] was relied on to say that, PW4 cannot be treated as an interested witness. We get the definition of an interested witness in *Shinoj's case*, as a witness who derives some benefit from the result of a litigation. A witness who is a natural one and is the only possible eye witness, cannot be said to be "interested". A close relative who is a very natural witness, cannot be regarded as an interested witness under all circumstances. Since the incident occurred at 6 a.m inside the house of PW1, naturally, only the residents will be there at that time. PWs 1 to 3-the injured are father and sons and PW4 is the wife of PW1 and mother of PWs 2 and 3. So, she has to be treated as a natural witness.

26. Though some independent witnesses were cited by prosecution, it was only to say that, they saw the accused persons going out of the house of PW1 after the incident. Prosecution has

no case that they were eyewitnesses to the incident. The independent witnesses did not support the prosecution and they deposed that they had not seen the accused going out of the house of PW1. It has come out in evidence that the accused persons are gundas of that locality and so the independent witnesses may be afraid of giving evidence against them. So, their hostility is not a matter of surprise, and it may not be a ground to discard the testimony of the injured and the eye witness, as it is reliable and trustworthy.

27. On an overall analysis of the facts and evidence, this Court is of the view that prosecution succeeded in proving its case against the appellants. The trial court appreciated the evidence in its correct perspective, realising the normal and natural course of events. So this Court finds no reason to interfere with the impugned judgment.

The appeal fails and hence dismissed.

Registry to forward a copy of this judgment along with the trial court records, to the trial court, to execute the sentence against the appellants/A1, A2, A4 and A7 to A11, forthwith.

As far as the 4th appellant (A7) is concerned, since he is no

more, the trial court can straight away issue distress warrant against him, to realise the fine amount, from his assets if any held by his legal heirs.

Sd/-

SOPHY THOMAS
JUDGE

smp