

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.HARIPRASAD

&

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

THURSDAY, THE 31ST DAY OF OCTOBER 2019/9TH KARTHIKA, 1941

CRL.A.No.1276 OF 2016

AGAINST THE JUDGMENT IN SC 148/2010 DATED 28-10-2011 OF
ADDITIONAL DISTRICT COURT (ADHOC)-II, KOTTAYAM

CP 9/2010 OF JUDICIAL FIRST CLASS MAGISTRATE COURT, PALA

CRIME NO.221/2009 OF Ramapuram Police Station, Kottayam

APPELLANT/ACCUSED:-

JOMON @ KAVA
S/O.DEVASIA,
KALLUVETTATHU HOUSE, VALLIYATH BHAGOM,
PIZHAKU KARA, RAMAPURAM VILLAGE.

BY ADVS.
SRI.RENJITH B.MARAR
SMT.LAKSHMI.N.KAIMAL
SMT.RESHMI JACOB
SRI.T.U.SUJITHKUMAR
SRI.P.S.SYAMKUTTAN

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY
THE CIRCLE INSPECTOR OF POLICE,
RAMAPURAM, THROUGH THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

SR.PUBLIC PROSECUTOR MR.ALEX.M.THOMBRA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
31.10.2019, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

JUDGMENT

A.Hariprasad, J.

This appeal is at the instance of the accused in S.C.No.148 of 2010 before the court of Session, Kottayam who was convicted under Section 302 of IPC. The charge framed by the learned Sessions Judge against the accused reads as follows:-

"I, Jose Thomas, Additional Sessions Judge, (Adhoc)-II Kottayam do hereby charge you.

Kava@Jomon,

S/o.Devasia,

Kalluvettathu House,

Pizhaku Kara, Ramapuram Village.

as follows:

That you on or about 7th day of September 2009 at about 10.30 p.m. in the waiting shed situated on the west of Thodupuzha-Pala Road in Pizhaku Palam Junction, Pizhaku, Kadanadu Village did commit murder by intentionally causing the death of Paninjon@Mohanan S/o.Nanu, Mohanavilasom Puthenchantha, Vallikunnam Village, Alappuzha and thereby committed

..3..

offence punishable under S.302 of IPC and within my cognizance.

And I hereby direct that you be tried on the said charge.

Dated this the 1st day of November, 2011.

*Sd/-
Jose Thomas,
Addl.Sessions Judge,
(Adhoc)-II, Kottayam"*

2. The prosecution case in brief is that the deceased Mohanan @ Paninjon originally belonged to a Village in Alappuzha, but he migrated to and was engaged in manual labour at Palam Junction in Pizhaku Kara of Ramapuram Village for a long period. He used to sleep in the veranda of closed shop rooms and in bus waiting sheds. The allegation is that the appellant had enmity towards Mohanan and with an intention to commit murder, on 07.09.2009 at 10.30 pm., he physically assaulted the deceased by hitting and kicking on vital parts of body from a bus waiting shed on the side of a public road. Due to the multiple injuries sustained to the internal organs, the victim died after a short while. Ext.P2 is the First Information Statement. PW7 is the informer. As per

Ext.P2 FIS, PW7 received a phone call on 07.09.2009 at about 10¹⁰ clock in the night from a person by name Dominic and he informed that Mohanan @ Paninjon was found lying unconscious in a bus waiting shed. PW7 along with Dominic, Shinto and Ratheesh went to the bus waiting shed. At that time, they found Mohanan in a critical condition. Immediately, PW7 telephoned to Ramapuram Police Station. After a short while, police party came to the place of occurrence and the victim was taken to a hospital at about 11.30 hours in the night. He was declared dead from the casualty of the hospital. PW7 had been informed by the witnesses that there was a wordy duel between the deceased and appellant. It is also seen that both the deceased and appellant used to stay either in the bus waiting shed or in the veranda of nearby shops closed during night. The deceased and appellant were in the habit of drinking.

3. Heard Sri.Renjith.B.Marar, learned counsel for the appellant and Sri.Alex M.Thombra, learned Senior Public Prosecutor for the respondent-State.

4. PW7, who when examined, substantially supported the versions in Ext.P2 FIS. Even though Sri.Renjith.B.Marar, learned counsel for the appellant pointed out some aspects in PW7's evidence deviating from his First Information Statement, we find no serious incongruity to disbelieve his version that he along with other prosecution witnesses found the deceased in a state of unconsciousness in the bus waiting shed. However, we shall look for collaboration from other witnesses also. PW1-Nishadh Joseph was working as a Constable in the Railway Protection Force, Madras Division. According to him, he used to come to his native place on leave every month. He knew the appellant and deceased. The appellant is a native of PW1's locality. He deposed that on 07.09.2009 he was supposed to return to Madras for joining duty next day. He was expected to entrain Thiruvananthapuram-Chennai express at 8.30 pm. But he missed the train and therefore he decided to go back home. He boarded a KSRTC bus and reached at about 10.00 hours in the night near the bus waiting shed where the incident had

happened. At that time, he heard noise emanating from the bus waiting shed as if two persons were fighting. When he came close to the bus waiting shed he found one person lying down and another man, sitting on his chest, fisting and hitting him. Thereafter, the man stood up and kicked the person lying on the floor. There was light in the area originated from a street light. He identified the appellant as the aggressor. On seeing PW1, the appellant stopped assaulting the deceased. PW1 did not go close to the place as he knew the appellant was having criminal antecedents and also that he was under the influence of alcohol. When he retraced his steps, again he heard the sound of a fight at the instance of the appellant. At that time, he telephoned to his friend Ratheesh informing him that a fight was going on in the bus waiting shed. As informed, Ratheesh and Shinto came to the place. All the three went to the bus waiting shed again and found the deceased lying down and the appellant assaulting him. In the light of a mobile phone they could identify the person lying down as the deceased. He was lying naked and he was

..7..

completely unconscious. PW7 was informed from the place and he came. Thereafter, police also came. This witness was cross-examined but no worthwhile material could be elicited in the cross-examination to hold that PW1 was uttering a falsehood. Even though a case was tried to be developed that the prosecution witnesses were hostile to the appellant on political reasons there is no acceptable material to buy that version.

5. PW2-Ratheesh also deposed in terms of PW1. He also emphatically deposed that the appellant assaulted the deceased from a bus waiting shed on 07.09.2009 at about 10.30 pm. Testimonies of PWs.2, 7 and 1 are in perfect harmony.

6. PW4 was examined to prove that on the evening previous to the incident, the appellant had assaulted the deceased and local persons intervened in the matter. Finally, the appellant was forced to seek a pardon from the deceased for which the appellant was having hostility towards him. According to the prosecution case spoken to by PW4 the

motive for the incident is the occurrence on the previous day. No effective cross-examination was done on PW4.

7. PW11-Dr.Premji issued Ext.P6 Death Intimation. It can be seen from Ext.P6 that name of the deceased was not mentioned, instead he was recorded as an unknown person. He was dead before reaching hospital as is seen from Ext.P6. Death intimation was issued at 11.40 pm. on 07.09.2009. When PW11 was examined, he deposed that, no other person except some police officers were present at the time of preparing Ext.P6. Sri.Renjith.B.Marar, learned counsel for the appellant contended that, going by Ext.P1 and the testimony of PW7, he along with other persons were present in the hospital. But still, neither the police informed the Doctor about the identity of the deceased nor the Doctor asked any one present there. According to the defence case, the chance of some one else assaulting the deceased with a mistaken identity cannot be ruled out. But that defence case was not effectively projected at the time of cross-examination. The prosecution evidence available in the records do not

probabilise such a version.

8. PW12 conducted postmortem on the body of the deceased. Ext.P7 is the postmortem certificate. Altogether 22 injuries are noted on Ext.P7 postmortem certificate. Most of them are contusions and abrasions. PW12 deposed that death was due to injury sustained to head, chest and abdomen. Injury No.5 would show that the deceased had subarachnoid haemorrhage on the left occipital lobe of cerebrum. In addition to that, he had fracture of 12th rib as per injury No.11. It is evident from Ext.P7 postmortem report that he was subjected to a brutal assault. The prosecution has no case that any weapon was used for assaulting the deceased.

9. PW13 is the Scientific Assistant who wrote Ext.P8 report. PW18 is the Investigating Officer who spoke about preparation of scene mahazar, conduct of an inquest, arrest of appellant, etc. No serious cross-examination was done on this witness to find any material flaw in the investigation.

10. Having regard to the entire evidence and submissions at the Bar, we are of the view that, the

prosecution has succeeded in proving that the appellant was responsible for causing injuries on the deceased by assaulting him. It is the case that he was fisted and kicked on various parts of the body causing the injuries noted on Ext.P7.

11. Sri.Renjith.B.Marar, learned counsel for the appellant contended that, even if we accept the prosecution case in toto, the crime alleged against the appellant will not fall within the definition of murder under Section 300 of IPC. Fact that Mohanan @ Paninjon died on account of injuries inflicted by the appellant is established. However there is no material on record to hold that he had an intention to commit murder of the deceased. Postmortem certificate would show that the deceased was a moderately well built person with 158cm. height and only 39 kgs. of weight. It has also come out in evidence that he was a habitual drunkard. It is borne out from the records that the deceased was a weak and fragile person. Indiscriminate kicking, fisting and stamping on the body of such a person would certainly result in serious consequences including loss of life. It is also an admitted fact

that the appellant and deceased were known to each other even prior to the incident. On evaluating the totality of circumstances we can only find that the appellant had knowledge that by incessantly assaulting the deceased it was likely to cause his death. We are inclined to think that the appellant has committed culpable homicide falling under Section 299 of IPC. But in the absence of any intention to commit murder and also any of the ingredients under Section 300 of IPC to attract the offence of murder, we are of the view that the appellant is guilty of culpable homicide not amounting to murder falling under Section 304 Part II of IPC. The oral and medical evidence available in this case would prompt us to alter the conviction of the appellant from Section 302 of IPC to Section 304 Part II of IPC. It is seen that the appellant is in jail from the date of his arrest. The occurrence was on 07.09.2009. The appellant was apprehended on 11.9.2009 and from that day onwards, initially he was in judicial custody and after conviction, he is undergoing sentence.

12. Considering the facts and circumstances in this case, we modify the conviction and sentence of the appellant as follows:-

1. The appellant is found not guilty of an offence of murder under Section 300 of IPC and he is acquitted of a charge under Section 302 of IPC. However, he is found to be guilty under Section 304 Part II of the IPC and sentenced to undergo seven years rigorous imprisonment. Considering the financial status of the appellant, we are not inclined to impose any amount of fine on him.
2. Records show that he had undergone a pre-trial detention and also sentence for nearly 10 years. If he had undergone a period of detention more than the sentence awarded as above, we hereby direct the Superintendent, Central Prison, Thiruvananthapuram to release him forthwith, if he is not required in connection with any other case.

13. Before parting with this case, as pointed out by Sri.Renjith.B.Marar, learned counsel for the appellant, a

disturbing fact, not only in this case, but in many sessions cases, has come to fore wherein legal aid lawyers did not take proper efforts to study the case and effectively defend the accused. As pointed out by him, there are limitations for a lawyer at the appellate stage to argue effectively in appellate Court and/or the appellate Court to show leniency in the matter of conviction and sentence, if the evidence suggest otherwise. At times, the material witnesses on the prosecution side are not properly cross-examined and even material contradictions are not marked properly.

14. Having regard to these facts, we are constrained to observe that, though there are provisions in the Legal Services Authorities Act, 1987 and the Kerala State Legal Services Authority Regulation, 1998, their implementation falls short of the expected standard. It is a disheartening state of affairs. Section 13 of the Said Act says that persons who satisfy all or any of the criteria specified in Section 12 shall be entitled to receive legal services provided the concerned Authority is satisfied that such person has a *prima facie* case to prosecute

or to defend. When we refer to Chapter VII of the Kerala State Legal Services Authority Regulation, 1998 we find Regulation No.41 which reads thus:-

"41. Panel of names of Legal Practitioners.-

The High Court Legal Services Committee, District Legal Services Authority and the Taluk Legal Services Committee each shall prepare and maintain the following three panels of names of legal practitioners to conduct cases of persons eligible for free legal services-

- (a) Panel of Honorary Legal Practitioners;*
- (b) Panel of Senior Legal Practitioners; and*
- (c) Panel of Junior Legal Practitioners.*

Each panel shall consist of three parts namely:-

Part I for Civil Courts;

Part II for Criminal Courts; and

Part III for Tribunals and other authorities.

The Junior panel shall consist of lawyers who have put in not less than 2 years practice but not more than 10 years.

Senior panel shall consist of lawyers who have put in practice for a period of over 10 years.

The panel of Honorary Legal Practitioners shall consist of Lawyers who have put in at least 3 years experience at the Bar.

(2) Copies of panels so prepared by the High

Court Legal Services Committee, District Legal Services Authority and Taluk Legal Services Committee shall be sent to the State Legal Services Authority.

(3) The remuneration payable to the Legal Practitioners shall be such as is specified in the Schedule.

(4) The panels shall remain in force for 3 years.

(5) Work shall be entrusted to the lawyers in the panel, by rotation.

(6) If the Authority or Committee is satisfied that the continuance of a lawyer is against the interest of the party, the Authority or the Committee, as the case may be, remove his name from the panel and withdraw the case from him.

(7) If it appears to the State Authority, High Court Committee, District Authority or Taluk Committee that a lawyer in the panel has committed any professional misconduct in respect of any legal services matter so entrusted to him the issue shall be referred to the Bar Council of Kerala for appropriate action.

(8) The lawyers shall be paid [Clerkage@Rs.750] per case for legal representation."

15. Regulation 43 is relating to the duties of the legal practitioner. It reads thus:-

"43. Duties of the Legal Practitioner.-(1) *The Legal practitioner conducting a case on behalf of a person to whom legal services have been extended, shall, as soon as the case is decided apply for copies of judgments and decrees, if any, and immediately on receipt of the copies submit them to the Authority or Committee as the case may be, together with detailed comments thereon. The Authority or the Committee, as the case may be, shall take steps to recover costs, if any, awarded by the Court to the person to whom legal services are extended and consider the feasibility of filing an appeal or revision, if*

(a) the case has been decided against the person to whom legal services were extended and the case is prima facie fit for appeal, revision or review; and

(b) if that person has applied for legal services for filing appeal, revision or review petition as the case may be, and if it is a fit case for appeal, revision or review such Authority or Committee shall take necessary further steps.

(2) *It shall be the duty of a legal practitioner to whom a case has been entrusted to give the acknowledgment for all the papers received in the case from the Authority or Committee concerned*

and to retain them safely till the disposal of the case and to return all those papers to the Secretary of the Authority or Committee concerned under acknowledgment before receiving his fees in the case.

(3) As far as possible the Authorities, the Committees and the legal practitioners should take only photo copies or typed copies of the original duly attested by the party or counsel and originals shall be returned to the party."

16. The avowed object of the Act and Regulation, that the legal aid counsel engaged as above must show utmost dedication and sincerity to his job so as to effectively defend the accused persons, especially those who are involved in serious cases of this nature, should be fulfilled in letter and spirit. They should prepare the case thoroughly and conduct the case effectively so as to elicit appropriate answers from the prosecution witnesses to establish the innocence of the accused. It is to be remembered that the evidence collected from the trial court alone will be considered, even if a case goes to the highest court in this country. Responsibility vested with the legal aid counsel is very heavy and they are expected

to discharge it with utmost commitment.

17. The Chairmen of the District Legal Services Authorities have the responsibility to engage legal aid counsel having integrity and competency for defending Sessions Cases. Life and liberty of individuals will be jeopardised, if callousness is shown in the conduct of cases. Therefore, without mechanically appointing a legal aid counsel from the panel of legal aid lawyers, the Chairman, District Legal Services Authority shall apply his mind to the facts and circumstances in each Sessions Case and appoint a competent person for defending the accused who has no means to engage a counsel of his choice.

18. As pointed by Sri.Renjith.B.Marar, learned counsel for the appellant and Sri.Alex M.Thombra, learned Senior Public Prosecutor, we are of the view that the empanelled legal aid counsel throughout the State, who conduct Sessions Cases, should be properly trained periodically so as to increase their efficiency level. For that, Kerala State Legal Services Authority in collaboration with the Kerala Judicial Academy

may evolve steps to impart training to the legal aid counsel, who conduct sessions cases, so that the object of the Legal Services Authorities Act and the sublime principles on which the criminal justice system rests will be subserved effectively.

19. The Registrar (Subordinate Judiciary) shall communicate a copy of this judgment to the Member Secretary, Kerala State Legal Services Authority and the Director, Kerala Judicial Academy for taking up the matter on the administrative side. A copy of this judgment shall also be communicated to all Chairmen of the District Legal Services Authorities in the State.

The Criminal Appeal is disposed of as above.

Sd/-

**A.HARIPRASAD,
JUDGE**

Sd/-

**N.ANIL KUMAR,
JUDGE**

skj