Chacko Alias Aniyan Kunju & Ors vs State Of Kerala on 21 January, 2004

Equivalent citations: AIR 2004 SUPREME COURT 2688, 2004 AIR SCW 1244, 2004 FAJ 1 90, (2004) 1 FAC 90, (2004) 1 KHCACJ 564 (SC), 2004 CRILR(SC&MP) 436, (2004) 16 ALLINDCAS 727 (SC), 2004 (16) ALLINDCAS 727, 2004 (1) KHCACJ 564, 2004 ALL MR(CRI) 1153, 2004 (1) SCALE 625, 2004 (1) ACE 504, 2004 (12) SCC 269, 2004 CRILR(SC MAH GUJ) 436, 2004 (2) SRJ 368, 2004 (1) SLT 941, (2004) 1 JT 358 (SC), (2004) 1 CURCRIR 218, (2004) 1 KER LT 884, (2004) 1 RAJ LW 97, (2004) 1 SUPREME 780, (2004) 18 INDLD 638, (2004) 48 ALLCRIC 450, (2004) 1 CHANDCRIC 124, (2004) 2 ALLCRILR 596, (2004) 1 CRIMES 383, (2004) 2 ALLCRIR 1791, (2004) 1 SCALE 625, (2004) 1 UC 609, (2004) 3 RAJ CRI C 1174, (2003) 3 CURCRIR 611, (2003) 3 RAJ LR 311, (2004) 1 RECCRIR 904, 2004 (1) ALD(CRL) 602, (2004) 2 ANDHLT(CRI) 165, (2003) 12 ALLINDCAS 621 (RAJ), (2003) 4 WLC (RAJ) 187

Author: Arijit Pasayat

Bench: Doraiswamy Raju, Arijit Pasayat

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           CASE NO.:
Appeal (crl.)  87 of 2004

PETITIONER:
Chacko alias Aniyan Kunju & Ors.

RESPONDENT:
State of Kerala

DATE OF JUDGMENT: 21/01/2004

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT

JUDGMENT:
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J U D G M E N T (Arising out of SLP (Crl.) No. 3634/2003) ARIJIT PASAYAT,J.

Leave granted.

The four appellants faced trial for allegedly having caused homicidal death of one Kuttappan (hereinafter referred to as 'the deceased') on 16.6.1994. They were tried for commission of offence punishable under Section 302 read with Section 34 of Indian Penal Code, 1860 (in short 'the IPC').

The learned Sessions Judge, Kottayam, found all the four accused persons guilty and convicted and sentenced them for the offence punishable under Section 302 read with Section 34 IPC and sentenced each of them to undergo imprisonment for life. Fine of Rs.10,000/- with default stipulation was also imposed. The accused-appellants unsuccessfully challenged their conviction and sentence before the Kerala High Court which dismissed the same by the impugned judgment.

Prosecution version as unfolded during trial is as follows:

> There was previous enmity between accused persons and the deceased. In furtherance of their common intention because of such enmity, the accused persons chased and assaulted the deceased on 16.6.1994 at about 11 p.m. A-2 beat the deceased with an iron rod on his back and when deceased ran away to save his life, all the accused persons chased him and near a road side junction, A-4 lighted the torch carried by him which enabled the other accused persons to beat the deceased with handles of axe and spade, and iron rod on different parts of the body. The injuries were caused mostly on the hands, legs and ribs. Only one injury was inflicted on the head which was the fatal injury. Though the deceased was taken to the hospital he breathed his last at about 2.25 a.m. on 17.6.1994. 10 witnesses were examined to further the prosecution version. Rajan (PW-2) was said to be an eyewitness. The information was lodged with the police by Anil Kumar (PW-1). Soman (PW-3) was the brother-in-law of the deceased who was informed about the quarrel between deceased and the accused persons. The deceased allegedly made a dying declaration before them implicating the accused persons. The accused persons pleaded innocence. They pleaded that the actual occurrence was suppressed by the prosecution and, in fact, the deceased attacked them and caused injuries on A-1 and A-2. Since the accused persons were attacked, they exercised their right of private defence and tried to protect themselves and if on account of that the deceased sustained injuries there was no offence involved. Trial Court after analyzing the evidence on record came to hold that the plea of right of private defence was not established. A-1 to A-4 were the authors of the crime. It also did not accept the contention of A-4 that no overt act was attributed to him and there was no material to bring him within the field of Section 34 IPC. The Trial court held that evidence of PW-2 inspire confidence. He was a reliable witness and on his evidence alone the conviction has to be recorded, though additionally the dying declaration was there.
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> In appeal, the Kerala High Court held that merely because the accused persons have sustained some injuries, that cannot ipso facto be a ground for throwing out the prosecution case. Non-explanation of injuries on the accused persons in all cases is not a ground for discarding the prosecution version. It also did not find any substance in the plea of the accused-appellants that on the basis of solitary witness's evidence conviction cannot be recorded. Finally, the plea that offence under Section 302 read with Section 34 IPC was not made out did not find acceptance by the High Court. It also did not accept the plea that there was no material for applying Section 34 to A-4. It was noticed that he was the person who focused the light on the

deceased, facilitating the assaults.

In support of the appeal, learned counsel for the appellant submitted that the Trial Court and the High Court have lost sight of relevant factors. The prosecution version itself indicated that there was quarrel between the deceased and the accused and since the assaults allegedly took place in course of a sudden quarrel, that too in exercise of right of private defence, the accused persons should not have been found guilty. It was pointed out that the prosecution version primarily stands on the solitary evidence of PW-2. The occurrence, according to the prosecution took place late in the night and it was completely dark and necessitated focusing of torch by A-4. These materials adduced by the prosecution go to show that no particular injury was intended. In fact, the post-mortem shows that injuries were on non-vital parts of the body. The reference to these aspects was highlighted to substantiate the plea that Section 302 has not attracted. Alternatively, it is submitted that no offence under Section 34 IPC is made out and so far as accused A-4 is concerned, as admittedly no assault was done by him and, therefore, he should not have been convicted.

Per contra, learned counsel for the State submitted that the Trial Court and the High Court have given adequate reasons for finding the accused persons guilty and sentencing them. As they have analysed the factual position in great detail and have come to the conclusion regarding guilt of the accused, there is no scope for any interference. According to him the case is squarely covered by Section 302 IPC.

Coming to the question whether on the basis of a solitary evidence conviction can be maintained. A bare reference of Section 134 of the Indian Evidence Act, 1872 (in short 'the Evidence Act') would suffice. The provision clearly states that no particular number of witnesses is required to establish the case. Conviction can be based on the testimony of single witness if he is wholly reliable. Corroboration may be necessary when he is only partially reliable. If the evidence is unblemished and beyond all possible criticism and the Court is satisfied that the witness was speaking the truth then on his evidence alone conviction can be maintained. Undisputedly, there were injuries found on the body of the accused persons on medical evidence. That per se cannot be a ground to totally discard the prosecution version. This is a factor which has to be weighed along with other materials to see whether the prosecution version is reliable, cogent and trustworthy. When the case of the prosecution is supported by an eyewitness who is found to be truthful, as well, mere non-explanation of the injuries on the accused persons cannot be a foundation for discarding the prosecution version. Additionally, the dying declaration was found to be acceptable.

Other plea emphasized related to alleged exercise of right of private defence. Merely because there was a quarrel and two accused persons sustained injuries, that does not confer a right of private defence extending to the extent of causing death as in this case. Though such right cannot be weighed in golden scales, it has to be established that the accused persons were under such grave apprehension about the safety of their life and property that retaliation to the extent done was absolutely necessary. No evidence much less cogent and credible was adduced in this regard. The right of private defence as claimed by the accused persons have been rightly discarded.

This brings us to the crucial question as to which was the appropriate provision to be applied. In the scheme of IPC culpable homicide is the genus and "murder", its specie. All "murder" is "culpable homicide" but not vice versa. Speaking generally, "culpable homicide" sans "special characteristics of murder is culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of the generic offence, IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the gravest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section

304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

The academic distinction between "murder" and "culpable homicide not amounting to murder" has always vexed the courts. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences :

Section 299	Section 300
A person commits	Subject to certain exceptions
culpable homicide if the act by	culpable homicide is murder if the the death is caused is act by which
the death is caused done - is done -	
INTENTION	
(a) with the intention of causing	(1) with the intention of causing death; or death; or
(b) with the intention	(2) with the intention of causing of causing such such bodily injury as the
bodily injury as is	offender knows to be likely to likely to cause death; or cause the death of the
person to whom the harm is caused; or	(3)With the intention of causing bodily injury to any person
and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause	
death; or KNOWLEDGE	
(c) with the	(4) with the knowledge that the knowledge that act is so imminently the act is likely to
dangerous that it must in all cause death. probability cause death or such bodily injury as is likely to	
cause death, and commits such act without any excuse for incurring the risk of causing death or such	
injury as is mentioned above.	

Clause (b) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the "intention to cause death" is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by Illustration (b) appended to Section 300. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist-blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. In clause (3) of Section 300, instead of the words "likely to cause death" occurring in the corresponding clause (b) of Section 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice. The difference between clause (b) of Section 299 and clause (3) of Section 300 is one of degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (b) of Section 299 conveys the sense of probability as distinguished from a mere possibility. The words "bodily injury ... sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. Rajwant Singh v. State of Kerala (AIR 1966 SC 1874) is an apt illustration of this point.

In Virsa Singh v. State of Punjab (AIR 1958 SC 465) Vivian Bose, J. speaking for the Court, explained the meaning and scope of clause (3). It was observed that the prosecution must prove the following facts before it can bring a case under Section 300 "thirdly". First, it must establish quite objectively, that a bodily injury is present; secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly, it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention

of the offender. The ingredients of clause "thirdly" of Section 300 IPC were brought out by the illustrious Judge in his terse language as follows :

> "12. To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 'thirdly'; First, it must establish, quite objectively, that a bodily injury is present;
>
> Secondly, the nature of the injury must be proved; These are purely objective investigations.
>
> Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.
>
> Once these three elements are proved to be present, the enquiry proceeds further and, Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

The learned Judge explained the third ingredient in the following words (at page 468):

> "The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion."

These observations of Vivian Bose, J. have become locus classicus. The test laid down by Virsa Singh case (supra) for the applicability of clause "thirdly" is now ingrained in our legal system and has become part of the rule of law. Under clause thirdly of Section 300 IPC, culpable homicide is murder, if both the following conditions are satisfied i.e. (a) that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death viz. that the injury found to be present was the injury that was intended to be inflicted.

Thus, according to the rule laid down in Virsa Singh case (supra) even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this point.

Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons - being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each, that it may not be convenient to give a separate and clear cut treatment to the matters involved in the second and third stages.

The position was illuminatingly highlighted by this Court in State of A.P. v. Rayavarapu Punnayya (1976 (4) SCC 382 and Abdul Waheed Khan alias Waheed and ors. v. State of A.P. (2002 (7) SCC 175).

The factual scenario goes to show that late at night in a stage of complete darkness, the occurrence took place. According to the prosecution itself for visibility A-4 used the torch and focused the light on the deceased so that the other accused persons could assault him. The distance from which the light was focused is also not very small. It was no doubt possible on the part of the accused persons to place the deceased and assault him; but taking into account the fact that almost all the injuries were on non-vital parts and only one was on head, it cannot be definitely said that any particular injury was intended. As noticed by Courts below weapons used were not of considerable weight or length. They axe or spade was not used but their handles of small length and weight were used. Taking the totality of the evidence into consideration and the special features noticed, it would be appropriate to convict the accused persons under Section 304 Part I read with Section 34 IPC instead of Section 302 IPC. A-4 has been rightly roped in under Section 34. He accompanied the accused persons, and actively facilitated the assaults to be effectively made on the accused by focusing the torch. His conduct prior and subsequent to the occurrence clearly shows that he shared the common intention so far as the assaults on the deceased is concerned. Custodial sentence of 10 years would meet the ends of justice. The appeal is partly allowed to the extent indicated.