

## **Mohammed Mytheen Shahul Hameed vs State Of Kerala on 1 August, 1979**

**Equivalent citations: AIR1980SC108, 1980CRILJ192, (1979)4SCC708, 1980(SUPP)SCC18, 1979(11)UJ600(SC), AIR 1980 SUPREME COURT 108, 1979 CRI LJ 192, 1980 CRI APP R (SC) 33, 1979 UJ (SC) 600, 1979 SCC(CRI) 1010, 1979 (4) SCC 708**

**Author: R.S. Sarkaria**

**Bench: O. Chinnappa Reddy, P.N. Shinghal, R.S. Sarkaria**

### **JUDGMENT**

R.S. Sarkaria, J.

1. This appeal by special leave is directed against a judgment, dated July 28, 1972, of the High Court of Kerala, whereby the appellant's conviction under Section 299(1) (Section 304?), Penal Code was converted into one under Section 302, Penal Code, with a sentence of imprisonment for life. The facts of the prosecution case, as found by the Court below, are as under:

2. Shahul Hameed, the appellant herein, was a Class IV employee in the Accountant General's Office, Trivandrum Vijayachandran, the deceased, who had studied upto the predegree course, was residing at Pettdh, about 2 or 3 miles away from the city of Trivandrum. Mohanchandran (PW 1), the brother of the deceased, was studying for the B.Sc. degree course, at the relevant time.

3. On March 5, 1970, the appellant who was original accused 1, and one Perumal who was original accused 2, gave a beating to Ramchandran, and Suseelan, friends of the deceased. After that beating, both the assailants were waiting for a bus at the Statue Bus Stop near the University College. The deceased and his brother, PW 1, came to the bus stop, where they learnt from their friends about their beating. The deceased then slapped the appellant and a scuffle ensued. The by standers interceded and separated them. The appellant proclaimed that he would see that the deceased did not beat any person any more.

4. Two days thereafter on March 7, 1970 at about 7.00 p m., the appellant and his three 'co-accused were standing at the bus stop called Spencer Junction near south eastern gate of the University College. The deceased and his brother, PW 1, alighted from a bus at the University College Bus Stop and proceeded south along the main road towards the Indian Coffee House, where their friends, one Radhakrishnan, had invited them to tea to celebrate the latter's appointment in the Syndicate Bank. When the deceased and his brother came near the Spencer Junction, the appellant shouted that he

was waiting for them, adding whether they had become so bold as to come from their house there to the main road to settle matters. On hearing this challenge, PW 1 and she deceased quickened their pace. The appellant and his companions ran after them and gave blows with their hands. On receiving the blows, the deceased and his brother ran south pursued by the appellant and his companions. The appellant was carrying the dagger (M C. 1). He reached close on the heels of the deceased and stabbed him in the back. On receiving the blow, the deceased turned round. The appellant then stabbed him again with sufficient force on the left chest below the nipple. The deceased staggered further 7 or 8 paces and fell down. The appellant was about to stab him again, when PW 7, who was nearby, picked up an iron rod from near the Statute and hit the appellant on the head. Thereupon, the appellant and his companions fled from the place toward the north. Apart from PW 1 the occurrence was witnessed by PW 2, whose shop was situated close to the scene of occurrence. Just after the occurrence, the Mayor passed that way. He phoned to the City Control Room from the shop of PW 2 for rendering necessary assistance to the deceased who lay injured on the spot. Within five minutes, the Police van arrived and removed Vijayachandran to the Medical College Hospital; while PW 1 went to the Cantonment Police Station, 300 metres away, and lodged the First Information Report (Ex P-1) at 7.00 p.m. The deceased was examined on his arrival in the Hospital at 7.45 p.m. and was declared dead by the doctor. The appellant and accused 2 and 3 were arrested on March 13, 1970, while the 4th accused was arrested later.

5. After his arrest, the appellant is said to have made a statement Ex. P 15(a) regarding the injuries sustained by him. On the basis of that statement, a cross-case under Section 324, 323 read with 34, Penal Code, was registered against PW 1, PW 7 and the deceased. After investigation, the Police referred the cross case; while in the other case, the appellant and his companions were charge sheeted to stand their trial to respect of various offences, including that of the murder of Vijayachandran.

6. The appellant also filed a private complaint (Ex P.19), wherein he named nine persons, including PWs. 1, 6 and 7 and Suseelan as his assailants. The complaint was to the effect, that those accused-persons, including the deceased, formed an unlawful assembly in furtherance of the common object of which on March 7, 1970, they made a concerted assault on the complainant when he was about to cross the road for going to the India Coffee House. In particular, it was alleged that PW 1 had fisted the complainant with a folded knife; while PW 7 kicked him in the abdomen falling him to the ground. It was further alleged that when the complainant was lying on the ground, the deceased stabbed him on the head with a weapon which looked like a chopper. Several persons collected there, Then the complainant escaped and ran south to the Cantonment Police Station and gave an information. The Police took his signatures on several blank sheets and detained him in the Police Station till March 13, 1970. One motive for the occurrence, mentioned in the complaint, was that the accused named by him harboured hostility on account of a previous quarrel that took place on March 5 1970, when PWs 1 and 7 and the deceased had harassed the complainant and exchanged blows.

7. Both the cases were tried separately but concurrently. The complaint made by the appellant against some of the PWs, and deceased ended in acquittal; while in Vijayachandran's murder case, the Session Judge convicted the first accused (appellant) under Section 299 Part II, Penal Code,

(evidently a mistake for Section 304, Part II) and sentenced him to five years' rigorous imprisonment. He convicted accused 2 to 4 under Section 323, Penal Code, and sentenced each of them to six months' rigorous imprisonment.

8. Aggrieved by the acquittal of the appellant on the charge of murder, the State preferred an appeal to the High Court, The Division Bench, who heard the appeal, was divided in its opinion. According to Narayana Pillai J., the acquittal of the appellant on the capital charge deserved to be reversed and converted into the under Section 302, Penal Code. On the point of sentence, he would award death penalty to the appellant, V. Kallid J., in his dissenting judgment held that the prosecution witnesses were unreliable and it was not safe to accept the prosecution evidence as wholly true. He left considerable doubt regarding the manner in which the first accused sustained injuries. He would therefore accord the benefit of doubt to the first accused and acquit him of the murder charge. He would acquit accused 2 to 4, also. On account of this difference of opinion, the connected appeals were placed before Issac J. for decision, under Section 429, Criminal Procedure Code. After a careful examination of the entire evidence., Issac J set aside the acquittal of the appellant on the murder charge, and convicted him under Section 302, Penal Code and sentenced him to imprisonment for life.

9. Hence this appeal by special leave.

10. Mr Harindra Nath, learned counsel for the appellant, firstly, tried to contend that the evidence of the alleged eye-witnesses, namely, P.W, 1 PW 2 and PW 7 was not worthy of credence. He adopted the reasons given by Kbalid J in his dissenting opinion. Secondly, it was argued that the appellant had inflicted the injuries, if at all, on the deceased in the exercise of his right of private defence. Support for this contention was sought from the following circumstances:

(a) The deceased and his brother PW 1, were residing in Pattah at a distance of about 2 or 3 miles from the place of occurrence. They had no good reason to come to the place of occurrence at that time. The explanation given by them, that they had been invited there by one Radhakrishnan to take tea at the Coffee House, was false because to such person was present any where near the scene for incident. Nor was the said Radhakrishnan examined.

(b) The deceased and his companions, including PW 7, must have come armed to wreak Vengeance upon the appellant on account of the beating by the latter to their friends and the exchange of blows with the appellant on the 5th March 1970. The explanation given by PW 7 that he picked up the iron-rod from a compound near the place of occurrence was false. His evidence with regard the place where he found the rod was contradictory. In his earlier statement, PW 7 stated that he had picked up the iron-rod from the compound of the Accountant-General's Office whereas in his subsequent statement he deposed to have found it lying near the Statue.

(c) Medical evidence shows that the appellants had sustained a grievous injury on the head involving fracture of the outer table of the skull. This injury, was attributed by

the appellant in the criminal complaint filed by him to PW 7 and the deceased. PW 1 suppressed the injuries caused to the appellant by the deceased and his companions.

11. In the alternative, it is urged that, in any case, Exceptions II and IV to Section 300, Penal Code, would be attracted, and the offence committed by the appellant was one under Section 304, Part II only. In this premise, it is submitted that the conviction and sentence recorded under Section 304, Part II, Penal Code, by the trial court should be restored; and since the appellant has already undergone imprisonment for more than five years, he should not be committed to jail for an enhanced term.

12. We are unable to accept any of these contentions.

13. P.W. 1 is, no doubt, the brother of the deceased and, as such, could be called an 'interested' witness. But his version was amply corroborated by the other evidence on the record. His evidence was corroborated by the F I R. which was lodged by him with great promptitude at the Cantonment Police Station, 300 metres away, when he had no time to spin out a false story. Further, PW 2 was an independent and natural witness. He had no axe of his own to grind against the appellant. The stabbing of the deceased took place at a distance of 30-40 feet only in front of his shop. He testified that on hearing the commotion, he came out into the verandah and saw the appellant, dagger in hand, chasing the deceased, and then giving him the first blow on the back and the next on the chest. He further stated that when the appellant was about to strike the deceased again, a fair-complexioned boy, meaning PW 7 hit the appellant on the head. The evidence of PW 2, hit any way shaken in cross examination.

14. In his examination under Section 313, Criminal Procedure Code, the appellant states that PW 1 and PW 7, the deceased and some others attacked him : PW 7 hit him with an iron rod on the head, while Vijayachandran struck him, on the head with a chopper. The appellant then succeeded in snatching the chopper from the deceased. The appellant disowned the statement (Ex P:15/A) on the basis of which the Police had registered the cross case.

15. The presence of P.W. 7 at the spot and his participation in the occurrence was thus not denied by the appellant.

16. PW 7, also supported the prosecution story in all material details, Court below have accepted his evidence and we see no reason to take a different view.

17. Dr. G. Gopinathan (PW 12) who had examined the injuries of the appellant on March 13, 1970, found two injuries on the person of the appellant. One was an infected wound on the left side of the head. The outer table of the skull was found fractured. This defect in the bone was felt at the base of the injury and pus was present in the wound. The second injury found by him was a healed abrasion on the left side of chest. Injury No. 2 was evidently caused with a blunt weapon. With regard to injury No. 1, PW. 12 opined that it could be caused with an iron rod or even with a sharp weapon. Since the doctor did not note that there was a cut on the outer table of the skull, the greater probability was that this injury had been caused with an iron rod and not with a chopper or other

cutting weapon, After the receipt of this stunning injury on the head, the appellant, must have, temporarily at least, lost the capacity to cause any injury to anybody. This means, the appellant received this injury only after he had caused the fatal injury to the deceased. The deceased was unarmed. After being manhandled by the companions of the appellant, the deceased and his brother had turned tail and taken to their heels, Dagger in hand, the appellant chased the fleeing victim, and first stabbed him in the back. He did not stop there and followed up with a stab on the left side of the chest of the deceased, with great force. Even after infliction of this fatal injury, the appellant was poised for striking the deceased further, when this was foiled by the intervention of PW 7. All these facts unmistakably show that the appellant was the aggressor, and he inflicted these injuries on the deceased maliciously and vindictively, and not in self defence.

18. Exception II to Section 300, Penal Code does not apply, because no right of private defence ever accrued to the appellant.

19. As regards Exception IV to Section 300. Penal Code, the same also is not attracted. It is impossible to believe that the deceased and his companions came prepared for a fight. The deceased was empty handed. The assertion of the appellant that the deceased came armed with a chopper with which he caused an injury to the deceased, was manifestly false. No such chopper was found or discovered. The version of the appellant, was that he had snatched away that chopper from the deceased and used it against him. This was also patently untrue. The appellant could produce that Chopper before the police. He did nothing of the kind. Moreover, as already observed, the nature of the skull-fracture underneath the injury as noted by the medical witness, shows that the injury on the head of the appellant was not caused with a cutting weapon but with a blunt weapon like an iron-rod. Similarly, the injuries found on the back and chest of the deceased were caused with a stabbing weapon, Thus, the deceased being unarmed, did not and could not cause any injury to the appellant. There was no mutual exchange of blows between the appellant and the deceased. The assault on the deceased by the appellant was deliberate and pressed with determination, when the victim was fleeing for his life.

20. The other contentions advanced by the counsel for the appellant were raised before the High Court also, and were tightly negated by Issac J. We are in entire agreement with the reasoning employed and the conclusions drawn by that learned Judge of the High Court.

21. In the result, the appeal fails and is dismissed.