Joseph Alias Jose vs State Of Kerala on 22 April, 2003

Equivalent citations: 2003 AIR SCW 2507, (2003) 6 ALLINDCAS 119 (SC), 2003 CRI. L. J. 2543, 2003 (4) SCALE 252, 2003 CRIAPPR(SC) 306, 2003 (5) ACE 73, 2003 (11) SCC 223, 2003 (6) ALLINDCAS 119, 2003 CRILR(SC MAH GUJ) 476, 2003 (6) SRJ 220, 2004 SCC(CRI) 93, (2003) 2 KHCACJ 550 (SC), (2003) 3 JCR 42 (SC), 2003 (2) LRI 635, 2003 ALL MR(CRI) 2110, 2003 CRILR(SC&MP) 476, (2003) 3 SUPREME 434, (2003) 1 CHANDCRIC 271, (2003) 4 SCALE 252, (2003) 2 UC 1005, (2003) 2 KER LT 756, (2003) 3 RAJ CRI C 646, (2003) 3 RECCRIR 7, (2003) 5 INDLD 972, (2003) 46 ALLCRIC 1145, (2003) 2 CRIMES 459, 2003 (2) ALD(CRL) 312, 2003 (2) ANDHLT(CRI) 65 SC

Author: B.P. Singh

Bench: N. Santosh Hegde, B.P. Singh

CASE NO.:
Appeal (crl.) 230 of 2002

PETITIONER:
Joseph alias Jose

RESPONDENT:
State of Kerala

DATE OF JUDGMENT: 22/04/2003

BENCH:
N. SANTOSH HEGDE & B.P. SINGH.

JUDGMENT:

J U D G M E N T B.P. Singh, J.

The appellant herein was put up for trial before the Additional Sessions Judge, Kottayam Division in Sessions Case No.68 of 1994 charged of an offence punishable under Section 302 I.P.C. for having committed the murder of the deceased Joseph @ Ouseppachen at about 8.15 p.m. on 25th March, 1994. The Trial Court accepting the evidence produced by the prosecution found the appellant guilty of culpable homicide. In the facts and circumstances of this case it held that though the deceased died as a result of the injuries sustained by him, it could not held that the appellant stabbed him with the intention of killing him. He, therefore, convicted the appellant for the offence punishable under Section 304 I.P.C. Part I and sentenced him to 8 years rigorous imprisonment. The appellant preferred an appeal before the High Court of Kerala at Ernakulam being Criminal Appeal No.93 of 1996 A. The High Court by its impugned judgment and order of 20th July, 2001 dismissed the

appeal. The appellant has appealed to this Court by Special Leave.

PW-1, the brother of the deceased lodged the F.I.R. which was recorded by Sub- Inspector, PW-10 on 25th March, 1994. PW- 1 is not an eye witness but he was told about the incident by PW-2 who according to the prosecution had accompanied the deceased when the occurrence took place. PW-1 went to the place of occurrence and found the deceased lying in an injured condition. He arranged for his removal to the hospital, but on reaching the hospital the deceased was declared dead. Thereafter he went to the police station and lodged the report in the night of 25th March, 1994.

The prosecution examined before the Trial Court three alleged eye witnesses namely PWs - 2, 3 and 4. PWs 2 and 4 did not support the case of the prosecution. PW-3, however, deposed as an eye witness and fully supported the case of the prosecution. The conviction of the appellant is solely based upon the testimony of PW-3 which finds corroboration from the medical evidence on record.

PW-1 is not an eye witness. It is not necessary to discuss his evidence in detail. Suffice it to say that he lodged the F.I.R. but he did not mention therein the name of PW-3 as an eye witness. In the F.I.R. reference was made to the effect that PW-2 had accompanied the deceased on the fateful night when the occurrence took place. PW-4 who is no other than the wife of the accused did not support the prosecution case about having seen the occurrence.

Counsel for the appellant submitted before us that the conviction of the appellant which is based solely upon the testimony of PW-3 is not justified when the circumstances of the case establish that he had not witnessed the occurrence and had falsely deposed in favour of the prosecution.

PW-2, Varghese @ Thankachan deposed that the deceased was his mother's brother, namely his maternal uncle. He also knew the accused who lived in the same locality. However, he had not seen the occurrence leading to the death of deceased. The witness was declared hostile and was cross-examined at length. In his cross-examination, he stated that on 25th March, 1994 at about 7.30 p.m. he and the deceased went to a liquor shop where the deceased consumed arrack. They were in liquor shop for about 10 minutes and thereafter they came out of the shop. The deceased invited him to his house for a meal. Both of them proceeded towards the house of the deceased. At that time the deceased had a burning candle with him. For going to the house of the deceased one has to pass in front of the house of the accused. While they were going to the house of the deceased, the deceased told him that he had to talk to the accused and the deceased thereafter went to the front-yard of the house of the accused while PW-2 proceeded ahead. When he had gone about 20 feet ahead he heard a scream coming from the direction of the house of the accused. He immediately ran towards the house of the deceased and informed the family members about the incident. Thereafter with 3-4 persons he went to the place of occurrence and found that the deceased was lying on the western side of the house of PW-3 with stab injuries. The deceased had a knife in his hand. He did not see PW-3 there, nor did the neighbours gather. The deceased was removed to the hospital where he was declared dead. He denied having made the statement Ex.P-2 before the police. He admitted that he went to the house of PW-1, brother of the deceased and informed him about the occurrence. According to this witness at about 12 mid night he went with PW-1 to the police station where the F.I.R. was lodged. He had also accompanied PW-1 to the hospital.

According to this witness at the time of occurrence there was no light. He had however seen two persons running away from the house of the accused. He did not know those two persons. The arrack bottle was in the hand of the deceased when he was lying injured. The deceased was fully drunk on that day.

It would thus appear from the evidence of PW-2, who was declared hostile, that he had not actually witnessed the commission of offence by the accused.

PW- 3, Shekharan claimed to have witnessed the occurrence. According to this witness on 25th March, 1994 after closing his shop he boarded a bus to come home. After alighting from the bus he started walking towards his house. His house is on the eastern side of the house of the accused intervened by a pathway. He deposed that he found the deceased and PW-2 walking ahead of him at a distance of about 20 feet. He also noticed that the deceased was having a burning candle in his hand and was using a coconut shell as a cover for the burning candle. When they reached near the house of the accused he saw the accused standing in the front yard of his house with a torch. The accused said something to the deceased and thereafter an altercation followed. Thereafter the accused stabbed the deceased with a knife. According to him both of them were drunk and they both fell down. The accused again stabbed the deceased and then went inside his house. The deceased ran through the courtyard of his house and after going eastwards fell near his house. He went to the deceased and found that the knife with which he had been stabbed was stuck in his body. PW-2 came there and removed the knife and put it down there. Thereafter PW-2 went running to inform the brother of the deceased about the occurrence and the witness went inside his house and closed the door. The deceased was taken in a jeep to the hospital later.

At the time of occurrence a kerosene oil lamp was burning in the house of the witness and there was also light from candle in the house of the accused. There was no supply of electricity at the time of occurrence. The supply of electricity was restored only at about 10-10.30 p.m.. According to this witness the occurrence took place between 7 and 8.30 p.m. The witness identified the coconut shell, the candle and the knife which were recovered from the place of occurrence.

This witness denied the suggestion that he wanted to buy the house, which was ultimately bought by the accused and therefore he was not on good terms with the accused. He admitted having told the police that the accused was a short tempered person and used to carry a knife and used to stab persons whenever he lost his temper. He further stated that while walking to his house he had heard the accused and deceased talking something but he could not clearly understand what they were talking about. He did not know on what subject they picked up a quarrel but he had told the police that the deceased had gone near the accused and told him that he should not have done that to him. While talking tempers rose high and they became violent. He had seen 2-3 persons coming to the place where the accused fell down. He had also seen the knife cover falling when the accused removed the knife from its cover. This witness made a significant statement that he had told Baby, another brother of the deceased (not examined) that he had seen the occurrence. He had also seen PW-1 on that night and PW-1 also heard what he told Baby. The witness stated that the coconut shell shown to him did not have traces of either carbon or wax. He was questioned by the police between 3.30 4.00 p.m. on the next day. At the time of occurrence there was usual light.

The investing officer Abrham Mathew, Circle Inspector was examined as PW-13. Though the occurrence took place on 25th March, 1994, he took charge of the investigation of this case on 26th March, 1994. He went to the hospital and prepared the Inquest Report of the dead body of the deceased. He had also seized the clothes worn by the deceased. He then went to the place of occurrence and prepared mahazar Ext. P-6. He collected blood stained earth, a candle, a coconut shell, a blood stained towel, a knife cover and a pair of chappals from the scene of occurrence. He also recorded the statement of witnesses and got prepared a sketch plan of the place of occurrence. He arrested the accused on 5th April, 1994. According to this witness the accused was arrested much later as the witnesses had not stated the correct address of the accused. He admitted that there was neither any blood stain nor wax deposit on MO.1, the coconut shell recovered from the place of occurrence. Though PW-3 stated that he had carried a torch with him that torch was not recovered. The witnesses had deposed that there was lantern burning in the house of PW-3 and that was also not taken into custody. When PW-3 was questioned he did not say that there was light at the time of occurrence.

Dr. S. Gopalakrishnan, Assistant Professor in Forensic Medicine who conducted the post mortem examination was examined as PW-9. His evidence establishes the fact that the deceased had four incised wounds, one on the chest two on the abdomen and one on the left fore finger. Apart from these wounds he had suffered five abrasion and one superficial cut on the inner aspect of right fore arm. The stomach was full with rice particles in a semi fluid medium and smell of alcohol was present. The bladder was full with clear urine. In his opinion, injury nos. 1 and 2 could be caused with a weapon like MO.3, the knife shown to him. The cause of the death was the stab injury on the chest. According to him a person suffering injuries like injuries 1 to 3 may fall down and the death could be very rapid. The medical evidence clearly establishes that the death of the deceased was homicidal.

It was submitted on behalf of the appellant that the sole testimony of PW-3 was not of such quality as could be implicitly relied upon. The evidence on record discloses that there was hardly sufficient light at the time of occurrence which could enable him to identify the assailant even if he had seen the occurrence. However, his submission was that PW-3 had not witnessed the occurrence at all and he became an eye witness on the next day when the prosecution failed to find any clue to the murder that had taken place earlier. According to learned counsel for the appellant the conviction of the appellant cannot be based on the evidence of such solitary witness whose very presence at the time of occurrence was doubtful.

On the other hand counsel for the State submitted that PW-3 being a neighbour whose house was situated just opposite to the house of the accused, intervened by a narrow path way, his presence at the time of occurrence was natural. Moreover, there was sufficient light provided by the candle carried by the deceased himself as also candle light in the house of the accused and the lamp burning in the house of the witness, PW-3. It was, therefore, submitted that PW-3 even though a solitary witness of the offence was fully reliable and his evidence provided sufficient basis for the conviction of the appellant.

It is not clear from the record as to when exactly the occurrence took place. The case of the prosecution is that the occurrence took place between 7 and 8.30 p.m.. However from the testimony of PW-1 it appears that PW-2 came running to him at about 8.30 p.m. and informed him about the occurrence. It also appears from the testimony of PW-2 that he had gone to the arrack shop at about 7.30 p.m. with the deceased and that they had sat there for a while. Thereafter while returning the occurrence took place. The time of occurrence given by PW-3 is rather vague as according to him the occurrence took place between 7 and 8.30 p.m.. In this state of evidence on record the High Court assessed that occurrence may have taken place at about 8.15 p.m. as stated in paragraph 2 of the judgment. It is an admitted position that at the time of the occurrence the supply of electricity was switched off and therefore there was no electrical light available. As admitted by PW-3 the supply of electricity was restored between 10 and 10.30 p.m.. According to the prosecution light was available since there was a candle burning inside the house of the accused and a kerosene oil lamp burning in the house of PW-3. In our view the candle in the house of PW-3 and the kerosene oil lamp burning in the house of PW-3 could hardly provide enough light for one to identify the person committing the offence at the place of occurrence which was outside the house of the accused by the side of the pathway. It is the case of the prosecution that the deceased himself was carrying a candle and was covering the flame with a coconut shell to prevent it from getting extinguished. The candle and the coconut shell were recovered from in front of the house of the accused where stabbing had taken place according to the prosecution. Surprisingly, the coconut shell had no carbon deposit or wax deposit or blood stains on it. This apart, a candle light in the hand of the accused could hardly provide sufficient light to facilitate identification. Moreover, PW-3 did not claim even during investigation that there was sufficient light. In his evidence he stated that there was usual light. Evidence on record is therefore indicative of the fact that there was no sufficient light at the time of occurrence to enable the witness to identify the accused at some distance.

Coming to the evidence of PW-3, he did not claim that while in his house he had seen the occurrence which took place just outside the house of the accused, who lived across the narrow path way. According to this witness he had closed his shop and had come by bus. After alighting from the bus he was proceeding toward his house when he saw the deceased and PW-2 walking ahead of him at a distance of about 20 feet. It is thereafter that he claims to have witnessed the occurrence in front of the house of the accused. After the assault the deceased ran towards his house and fell down on the eastern side of the house. The conduct of PW-3 appears to us to be rather unnatural. He did not disclose what he had seen to anyone that night, and for the first time on the next day at about 4.00 p.m. he disclosed the fact of his being an eye witness to the investigating officer. According to him he went to see the deceased who had fallen down near his house. When he was there, PW-2 also came and pulled out the knife from the body of the deceased and kept it there. Thereafter PW-2 rushed to inform the brother of the deceased. From his deposition it does not appear that he talked to PW-2 at all about the occurrence. Moreover, PW- 2 has not stated that he met PW-3 when he had gone to the place where the deceased had fallen. He does not even state that he had pulled out the knife from the body of the deceased and kept it near the body of the deceased. What however appears to be rather unnatural is the fact that thereafter when several persons came to the place where the injured was lying, he did not disclose to them about his having seen the occurrence. It is not disputed that after sometime PW-2 along with the brother of the deceased PW-1 and some others had come to the place where the deceased was lying injured which was just near the house of PW-3. No doubt, PW-3

stated that when the brothers of the deceased had come he had told one of the brothers, namely Baby, that he had seen the occurrence and he further asserted that when he told this fact to Baby, PW-1 was also present and he had said this in presence and within the hearing of PW-1. PW-1 does not say that PW-3 had disclosed the name of the assailant to him or to any other person. What is of considerable significance is the fact that in the F.I.R. lodged by PW-1, the name of PW-3 is not mentioned as an eye witness, nor is it stated that he had disclosed that he had seen the occurrence. It therefore appears that this witness did not talk about the occurrence to anyone after the occurrence, and for the first time on the next day at about 4.00 p.m. he discloses the fact of his being an eye witness to the investigating officer. His keeping silent for such a long period and not disclosing the fact that he was an eye witness to the brothers of the deceased and others, who had come to the place where the deceased was lying injured just next to his house, creates a serious doubt in our mind about this witness being an eye witness. In normal course he, being an eye witness, would have disclosed this fact at the earliest opportunity. He could have said so to PW-2 who was the first to come or at least to the others who came to the place where the injured was lying which included PW-1. Rather than disclosing to them that he was an eye witness, the witness remained inside his house and did not communicate with anyone. There is, therefore, force in the submission of the counsel for the respondent that on the next day, finding no clue for the murder, PW-3 was got up as an eye witness.

There is one other aspect of the prosecution case for which we find no good explanation. If really the name of the assailant was known, there was no reason for his being arrested several days after the occurrence on 5th April, 1994. It is not disputed that the accused lived near the house of PW-3, and his house is also very near to the house of the deceased. His address was known to all and in fact in the F.I.R. itself his name and address had been disclosed. Despite this he was arrested 10 days later, and it appears from the deposition of the investigating officer that this delay was on account of the fact that the correct address of the appellant was not disclosed by the witnesses. This explanation is hardly convincing. Counsel for the appellant submitted that in fact even the statement of PW-3 may have been recorded much later but was shown to have been recorded on 26th March, 1994. That is why appellant was arrested many days after the occurrence. It is not for us to speculate on this aspect of the matter, particularly when at that stage even PW-2 clamed to be an eye witness, though he turned hostile at the trial.

For the reasons discussed above, we have serious doubt about PW-3 having actually witnessed the occurrence. There was hardly sufficient light to identify the assailant at the time of occurrence. The conduct of the sole eye witness PW-3 in remaining silent for a long time, and his failure to disclose the facts to the persons who had gathered near the place where the deceased lay injured, creates a serious doubt about the truthfulness of this witness.

We, therefore, find it unsafe to sustain the conviction of the appellant on the sole testimony of PW-3. Giving to the appellant the benefit of doubt, we allow this appeal and set aside the conviction and sentence of the appellant and direct that he shall be released forthwith unless required in connection with any other case.