

MANI

A

v.

STATE OF KERALA AND OTHERS

(Criminal Appeal No.540 of 2019)

APRIL 01, 2019

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**[DR. DHANANJAYA Y. CHANDRACHUD AND
HEMANT GUPTA, JJ.]**

Penal Code, 1860:

*s. 300, Exception 4, s. 304 (Part I) – Prosecution of seven
accused – For causing death of one person and causing injuries to
eight persons – Trial Court relying on the testimony of injured eye-
witnesses convicted accused Nos. 1 to 4 u/ss. 302, 341 and 324 r/w
s. 34 IPC – Three of the accused were acquitted – High Court upheld
conviction of accused No. 1 (appellant) u/s. 302, and conviction of
accused Nos. 2 to 4 u/ss. 324 and 341 r/w s. 34 – Appeal to Supreme
Court by accused No. 1 challenging his conviction u/s. 302 and
appeal by State challenging the acquittal of accused Nos. 2 to 4
u/s. 302 – Held: There was no common intention in causing death –
Genesis of the dispute was not proved – Statement of witnesses in
respect of injuries caused is not consistent – Plea of private defence
is also not made out – However, all the accused have consistently
deposed that the death was caused by appellant/accused – It was a
case of sudden fight without premeditation – Therefore, it is culpable
homicide not amounting to murder falling within Exception 4 of
s. 300 – Thus, an offence punishable u/s. 304 (Part I) is made out –
Sentence altered to the period already undergone i.e. more than
seven years.*

**Partly allowing appeal of the accused and dismissing the
appeal of the State, the Court**

**HELD: 1. There is no error in the order passed by the
High Court that there was no common intention in causing death.
The prosecution has not produced any evidence showing that
the accused were present at the place of occurrence or that they
were part of the group creating trouble at that place. Genesis to**

A the dispute has not been proved by the prosecution. The statement of the witnesses in respect of injuries caused is not consistent. However, all the injured witnesses have consistently deposed the death of deceased by the appellant. [Paras 11 and 18][1139-A-C; 1136-E]

B 2. The plea that the appellant acted in his private defence is not made out. The injury received by the appellant is not serious, therefore, he could not have attacked the deceased on chest which is vital part, as such injury is likely to cause death. The appellant is not entitled to right of private defence which does not extend to inflict more harm than it is necessary in exercise of right of private defence. [Para 20][1139-D-E]

C 3. The accused had no knowledge or information that the victims were moving towards the place of incident. The prosecution witnesses have deposed that the accused or the victims did not have any personal enmity except political differences. The appellant was suddenly confronted with the victims and in the fight ensued in which the injuries came to be inflicted upon the deceased and other victims. In view of sudden fight without any premeditation, the conviction of the appellant for an offence under Section 302 is not made out. The cause of death of the deceased is knife blow on the chest of the deceased. Such injury is with the knowledge that such injury is likely to cause death, but without any intention to cause death. Thus, the death is a culpable homicide not amounting to murder as the death has occurred in heat of passion upon a sudden quarrel falling within Exception 4 of Section 300 of IPC. Therefore, it is an offence punishable under Section 304 Part I, IPC.[Paras 21 and 22] [1139-F-H; 1140-A-B]

F 4. The appellant has undergone more than seven years of actual imprisonment. Therefore, keeping in view the background and the circumstances in which the occurrence happened, the sentence imposed on the appellant is warranted to be modified to as already undergone while maintaining fine of Rs. 20,000/. [Para 23][1140-B-C]

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Dharam Pal and Others v. State of Haryana AIR 1978 SC 1492 ; Nand Kishore v. State of Madhya Pradesh AIR 2011 SC 2775 : [2011] 7 SCR 1152 – referred to.

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Case Law Reference

AIR 1978 SC 1492 referred to Para 15
[2011] 7 SCR 1152 referred to Para 15

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CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 540 of 2019

C

From the Judgment and Order dated 02.02.2016 of the High Court of Kerala at Ernakulam in Criminal Appeal No. 2144/2011

With

Criminal Appeal No. 541 of 2019.

D

Basant R., K. N. Balgopal, Sr. Advs., Raghenth Basant, Senthil Jagadeesan, G. Prakash, Jishnu M.L., Ms. Priyanka Prakash, Ms. Beena Prakash, Nishe Rajen Shonker, Ms. Anu K. Joy, A. P. Mukundan, Ms. Vitra Ria, Alim Anvar, Ms. Nitya Nambiar, Renjith B. Marar, Ms. Lakshmi N. Kaimal, A. Karthik, Badusha Sulaiman, Ms. Namita Wali, Raghav Mehrotra, Ms. Liz Mathew, Advs. for the appearing parties.

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The Judgment of the Court was delivered by

HEMANT GUPTA, J. 1. The challenge in the present appeals is to a judgment dated 02.02.2016 maintaining conviction of the appellant-Mani for an offence under Section 302 IPC, whereas, conviction of the other accused i.e. accused No.2-Rathnakumar, 3-Praveen and 4-Selvaraj was maintained for offences under Sections 324 and 341 read with 34 IPC while acquitting the said accused for an offence under Section 302 IPC.

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2. Criminal Appeal No. 540 of 2019 is against the conviction of accused No. 1 for an offence under Section 302 IPC, whereas, Criminal Appeal No. 541 of 2019 is against the acquittal of accused No.2-Rathnakumar, 3-Praveen and 4-Selvaraj (Respondent Nos. 2-4) under Section 302 read with 34 IPC. The parties herein shall be referred to as before the Trial Court.

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A 3. PW2-Vishwanathan son of Kunchu lodged a First Information
Report at about 11.00 PM on 28.09.2005 in respect of an incident which
occurred same day at about 8.10 PM on a slope near Rosy School,
Chozhiyamkod. The statement is that the Accused 1 to 4 who are BJP
sympathisers, in connivance and conspiracy with each other with the
B intention and preparation to kill the complainant and others who are CPM
sympathisers, due to political enmity, collected dangerous weapons of
knife, Vadival sword and iron rod, came in motorcycles in front of Rosy
School, Chozhiyamkod. They illegally stopped the complainant and his
friends. The accused No.1-Mani stabbed Soman, whereas, accused
No.2-Rathnakumar attacked complainant with Vadival sword on his face
C and accused No.3- Praveen gave beatings to Ashraf PW3 with iron rod.

4. Shri V. Pazhanimala, A.S.I., Vadakkancheri Police Station
recorded such statement and took over investigations. He recorded the
statement of Vishwanathan-PW2 under Section 161 Criminal Procedure
Code¹. In his police statement, he stated that at about 8.00 PM on
D 28.09.2005 he along with (2) Kabir son of Muhammed, (3) Ashraf son
of Sheri, (4) Soman son of Appunni, (5) Rajesh son of Karuman, (6) Anil
Kumar son of Velayudhan, (7) Sajeesh and (8) Sanoj sons of Kumaran
Vadukathodiyil were standing near the Mangalam old post office. They
were talking about success of the party in the elections. They received
E information that BJP people are creating troubles at Chozhiyamkod. Eight
of them moved towards the Chozhiyamkod. When they reached the
slope of the road in front of Rosy School, they saw two motorcycles
coming from opposite side. Both the motorcycles stopped. Under the
light of torch, they found that the four accused were armed with Vadival
swords, knives and iron rod and came running towards them. Accused
F 1-Mani shouted that who is CPM worker, cut and kill him and he stabbed
Soman on his chest with knife. He went to stop him, then accused No.
2-Rathnakumar hit him with Vadival sword but he withdrew his head
and sword landed on his right cheek. The second attack landed on his
nose. He saw accused No. 3-Praveen coming to Ashraf PW3 with a
long thing in his hand. He stated that all eight of them were injured. On
G alarm being raised Manikandan son of Madhavan, Vadakkethara
Puzhakkal Parambu and Siju sons of Chamunni, Vadukathodi came
running but the assailants ran away. Injured were taken to Hospital in
the ambulance. Doctor reported that Soman had been brought dead,

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whereas, he and Rajesh had received grievous injuries. On completion of investigation, seven persons were made to stand trial including three Vinod, Mohanan and Selvaraj charged with offence under Section 212 read with 34 IPC. These three were later acquitted of the charges by the learned Trial Court itself. A

5. The learned Trial Court convicted accused Nos. 1 to 4 to undergo imprisonment for life and also sentenced to undergo simple imprisonment for one month for an offence under Section 341 read with 34 IPC and also rigorous imprisonment for a period of six months under Section 324 read with 34 IPC by its judgment dated 24.11.2011. B

6. The entire prosecution case is based upon injured witnesses examined as PW2-Vishwanathan, PW3-Ashraf Ali, PW10-Rajesh and PW13-Anil Kumar. The argument of learned senior counsel for the appellant-Mani is that the appellant has received injury in the occurrence on 28.09.2005 as is made out from the Injury Report as Ex. D-2, wherein, he has stated that at about 7.30 PM, he was beaten with stick by PW2-Vishwanathan, Muhammed Ali, Manikandan, PW3-Ashraf and about thirty other persons. The injury is lacerated wound 5 cms on forehead with fresh bleeding and contusion. It is thus contended that the appellant had acted in right of private defence, therefore, conviction of the appellant for an offence under Section 302 cannot be sustained. C D

7. It is argued that as per the prosecution case itself, the victims were eight in number who were proceeding towards Chozhiyamkod side on being informed that there is disturbance at Chozhiyamkod as sari of one of the BJP workers caught fire in the crackers bursted while celebrating victory of CPM in Panchayat elections. However, it is argued that there is no evidence on the part of the prosecution that there was any skirmish at Chozhiyamkod. No witness from the above said locality has been examined. The alleged eight victims were on their way to Chozhiyamkod as per their statements. It is argued that the accused were riding motorcycles unmindful of the fact that the victims' group is proceeding towards Chozhiyamkod. Since, the victims were in large number and suddenly confronted accused, therefore, the appellant has only tried to save himself. E F G

8. It is argued in the alternative that even if benefit of right of private defence is not given to the appellant, it was a case of sudden

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- A fight without any premeditation and therefore, conviction of the appellant for the offence under Section 302 cannot be sustained. It is a case for conviction for offence under Section 304 Part II.

9. On the other hand, learned senior counsel for the State argued that all the injured witnesses are consistent that it is on the exhortation of the appellant- Mani, they have attacked the victims. The learned senior counsel for the State also submitted that the accused Nos. 2 to 4, were part of the assailants who attacked the victims with weapons like Vadival sword, knife and iron rod. It is a case of common intention as all the accused were coming on two motorcycles together, inflicted injuries and then ran away together. The common intention is required to be inferred on the basis of circumstances which clearly proves that the accused had the intention of murderous assault on the victims.

10. It is argued that the common intention may arise at the spur of the moment; therefore, it is not necessary that when the accused reached near the Rosy School, they may not have common intention but when they saw the victims, they decided to assault the victims and such attack is by framing common intention.

11. We find that the statement of the witnesses in respect of injuries caused is not consistent. Though all the witnesses have consistently deposed that Mani has stabbed Soman deceased and he exhorted other to attack. The statement to the Police by PW2-Vishwanathan is that they received the information that the accused are creating trouble at Chozhiyamkod side. While appearing as PW2, Vishwanathan deposed that two-three persons came and told that BJP sympathisers are creating trouble. In the cross-examination, PW2 admitted that incident of “sari burning” is a hearsay. PW3-Ashraf Ali deposed that when they were standing near the slope of Rosy School, two-three persons from Chozhiyamkod came and told that the flag of BJP is missing and BJP people are creating trouble. They were walking to the said spot to ascertain as to what the problem was, when they saw two bikes coming from the west direction. But no person has been examined in respect of trouble being created by any person at Chozhiyamkod either on account of burning of sari or of missing of BJP flag.

12. In the First Information Report, PW 3-Asraf is said to be assaulted with iron rod by Accused 3-Praveen; whereas the Accused

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2-Rathnakumar is said to have attacked complainant with Vadival sword. A
But in evidence, PW3-Ashraf Ali deposed that Accused 2-Rathnakumar
hit him on his nose, left hand and left shoulder, whereas, accused
4-Selvaraj is said to have hit him with a cricket stump.

13. Accused 2-Rathnakumar is said to have inflicted injury on
PW2-Vishwanathan but Rathnakumar (A2) is said to have caused injury B
to PW3-Ashraf Ali. In the First Information Report, there is no allegation
that accused 4-Selvaraj had a cricket stump in his hand.

14. PW10-Rajesh deposed in the same manner as made by other
two witnesses except that he deposed that accused No. 1-Mani, accused
No. 3-Praveen and accused No.2-Rathnakumar had knives in their hands C
and Selvaraj had a cricket stump in his hand. Accused 3-Praveen is said
to have stabbed him using knife in his hand, on left hand and index finger
and chest also and when he turned, he stabbed on the back and on the
left shoulder as well. He did not know whether BJP people knew that
the victims were standing at the place of occurrence. D

15. PW13-Anil Kumar deposed that accused 2-Rathnakumar had
knife in his hand and caused injury on his left forehead. Accused
4-Selvaraj gave him beatings with cricket stump. On the basis of such
evidence and Post-Mortem Certificate Ex. P-1 proved by PW8-Dr.
P.C. Ignatius, the High Court held that there is no reason to convict E
accused Nos. 2-4 with the aid of Section 34 IPC except that there was
commotion in which victims were injured. The High Court placed reliance
upon Supreme Court judgments reported as **Dharam Pal and Others**
v. State of Haryana² and **Nand Kishore v. State of Madhya Pradesh**³.

16. While appreciating the evidence of the four injured witnesses,
the High Court returned findings that such witnesses have already been F
decided to go to Chozhiyamkod side, hearing about the trouble created
by the BJP sympathisers, but the said fact will not mean that the accused
carried common intention to do away with the members of the other
group. The High Court recorded the following findings:

“54. It is extremely difficult to accept the finding of the court G
below. Relying on the principles laid down in the various decisions
referred to above and applying the test laid down therein, it is
difficult to come to the conclusion that the fatal stab injury was

²AIR 1978 SC 1492

³AIR 2011 SC 2775

A inflicted as in furtherance of the common intention shared by the accused persons.

55. First of all, the accused persons had no notice that the victims would come to Chozhiyamkod to find out what the commotion created by the BJP sympathisers about and much less they had any knowledge about Soman coming in that group. It may be true that the two groups were at loggerheads. But that is far from saying that one of the groups always carries a common intention to do away with the members of the other group.

56. Even going by the prosecution sequence of events, the stab inflicted on Soman was a spontaneous and sudden act committed by the first accused and there seems no materials to come to the conclusion that the said act committed by the first accused was in furtherance of the common intention shared by the other accused persons. Probably, from the evidence, it would appear that the other accused persons namely, accused Nos. 2, 3 and 4 did not anticipate such an act from the first accused and they were taken aback by the said act of the first accused. It would appear that the accused persons who had far outnumbered by the victims' group might have apprehended assault from them and that is probably the reason why PWs 2, 3, 10 and 13 would say that soon the members of the assailants group began brandishing the knives to keep the victims at bay. This Court is not omitting to note the fact that the injuries were inflicted on PWs 2, 3, 10 and 13.

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59. It is extremely difficult to accept the finding of the court below that the act committed by the first accused of inflicting a fatal stab on Soman was in furtherance of the common intention of accused Nos. 1 to 4 for reasons already stated. The conviction of accused Nos. 2 to 4 by taking aid of Section 34 of IPC in the facts and circumstances of the case seems to be a misplaced one."

17. The High Court also found that the infliction of injuries on the injured witnesses cannot be said to be in furtherance of common intention, as it cannot be said that initial injury by the appellant-Mani is a consequence of the common intention shared by the accused. The High

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Court found that though the witnesses have been injured but the injuries are not serious. A

18. We do not find any error in the order passed by the High Court that there was no common intention in causing death of Soman. The prosecution has not produced any evidence showing that the accused were present at the place of occurrence at Chozhiyamkod or that they were part of the group creating trouble at that place. There is no evidence that any incident occurred at that place either of burning of sari due to fire crackers or of missing of flag. Therefore, genesis to the dispute has not been proved by the prosecution. B

19. The victims were eight in number and in a jubilant mood to celebrate the victory of their party in the panchayat elections. They decided to go towards Chozhiyamkod side. The accused suddenly came from the opposite direction on two motorcycles. One of the accused received injuries as well which fact is admitted by one of the witnesses PW2-Vishwanathan also. C

20. Be that as it may, the fact remains that all the injured witnesses have consistently deposed the death of Soman by the appellant. The injury received by the appellant is not serious, therefore, he could not have attacked the deceased on chest which is vital part, as such injury is likely to cause death. Therefore, the appellant is not entitled to right of private defence which does not extend to inflict more harm than it is necessary in exercise of right of private defence. Therefore, the plea that the appellant acted in his private defence is not made out. D E

21. However, the appellant-Mani came from west direction at the place of occurrence riding on a motorcycle. The accused had no knowledge or information that the victims are moving towards Chozhiyamkod. The prosecution witnesses have deposed that the accused or the victims did not have any personal enmity except political differences. The appellant was suddenly confronted with the victims and in the fight ensued in which the injuries came to be inflicted upon the deceased and other victims. F G

22. In view of sudden fight without any premeditation, the conviction of the appellant for an offence under Section 302 is not made out. The cause of death of the deceased is knife blow on the chest of the deceased-Soman. Such injury is with the knowledge that such injury is H

A likely to cause death, but without any intention to cause death. Thus, the death of Soman is a culpable homicide not amounting to murder as the death has occurred in heat of passion upon a sudden quarrel falling within Exception 4 of Section 300 of IPC. Therefore, it is an offence punishable under Section 304 Part I, IPC.

B 23. It is pointed out that the appellant has undergone more than seven years of actual imprisonment. Therefore, keeping in view the background and the circumstances in which the occurrence happened, we find that the sentence imposed on the appellant is warranted to be modified to as already undergone while maintaining fine of Rs. 20,000/.

C 24. In view of the above discussion, Criminal Appeal No. 540 of 2019 filed by the appellant-Mani is partly allowed and Criminal Appeal No. 541 of 2019 filed by the State of Kerala is dismissed.

Kalpana K. Tripathy

Appeals disposed of.