IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.SOMARAJAN

THURSDAY, THE 11TH DAY OF JANUARY 2024 / 21ST POUSHA, 1945

CRL.A NO. 1968 OF 2007

AGAINST THE JUDGMENT DATED 28/06/2007 IN SC 267/2002 OF DISTRICT COURT & SESSIONS COURT,THALASSERY

CP 13/2002 OF ADDITIONAL CHIEF JUDICIAL MAGISTRATE ,THALASSERY

APPELLANT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY SPL PP SRI S U NAZAR

RESPONDENTS/ACCUSED NO.6, 8, 9:

1 KUNIYIL SHANOOB, S/O NANU
KUNIYIL HOUSE, KADIRUR AMSOM DESOM.

2 KOVVERI PRAMOD
KADIRUR AMSOM, DIAMOND MUKKU.

3 THYKKADNY MOHANAN, S/O. KUMARAN,
DRIVER, THYKKADY HOUSE, PATTIAM AMSOM, PATHJAYAKKUNNU.

BY ADV SRI.S.RAJEEV

OTHER PRESENT:

THIS CRIMINAL APPEAL HAVING COME UP FOR HEARING ON 11.01.2024, ALONG WITH CRL.A.1187/2007, 1190/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.SOMARAJAN

THURSDAY, THE 11TH DAY OF JANUARY 2024 / 21ST POUSHA, 1945

CRL.A NO. 1187 OF 2007

AGAINST THE JUDGMENT DATED 28/06/2007 IN SC 267/2002 OF DISTRICT COURT & SESSIONS COURT,THALASSERY

APPELLANTS/ACCUSED 4, 5 & 7:

1 PARA SASI, S/O ANANDAN, AGED 44 YEARS
DIAMOND MUKKU, KADIRUR AMSOM.

2 ELAMTHOTTATHIL MANOJ, S/O CHATHU
AGED 32 YEARS, COOLIE, ELAMTHOTTATHIL HOUSE, PATTIAM AMSOM, KIZHAKKE KADIRUR.

3 J.P. @ JAYAPRAKASHAN, S/O.KUNJIKANNAN
AGED 40 YEARS, DRIVER, KADIRUR AMSOM, DESOM.

BY ADV SRI.S.RAJEEV

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, (CRIME NO.169/1999 OF PANOOR POLICE STATION).

BY SPL PP SRI S U NAZAR

THIS CRIMINAL APPEAL HAVING COME UP FOR HEARING ON 11.01.2024, ALONG WITH CRL.A.1968/2007 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.SOMARAJAN

THURSDAY, THE 11TH DAY OF JANUARY 2024 / 21ST POUSHA, 1945

CRL.A NO. 1190 OF 2007

AGAINST THE JUDGMENT DATED 28/06/2007 IN SC 267/2002 OF DISTRICT COURT & SESSIONS COURT,THALASSERY

APPELLANTS/ACCUSED NOS.1 TO 3:

1 KADICHERY AJI @ AJITH KUMAR
S/O ANANDAN, AGED 43 YEARS, DRIVER, KADIRUR AMSOM,
DIAMOND MUKKU.

2 CHIRUKANDOTH PRASANTH
S/O NANU, AGED 34 YEARS, COOLIE, CHIRUKANDOTH HOUSE,
KADIRUR AMSOM.

3 KOYYON MANU @ MANOJ
S/O NANU, AGED 37 YEARS, COOLIE, KOYYONDAVIDA HOUSE,
PATTIAM AMSOM, KIZHAKKE KADIRUR.

BY ADVS.
SRI.P.S.SREEDHARAN PILLAI
ARJUN SREEDHAR
SMT.C.G.PREETHA
SMT.P.RANI DIOTHIMA

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,ERNAKULAM.

BY SPL PP SRI S U NAZAR

THIS CRIMINAL APPEAL HAVING COME UP FOR HEARING ON 11.01.2024, ALONG WITH CRL.A.1968/2007 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Crl.Appeal No.1187/2007 is by the accused No.4, 5 and 7 against the judgment of conviction and order of sentence. Crl.Appeal No.1190/2007 is by accused No.1, 2 and 3. The other appeal - 1168/2007 is by the State against the order of acquittal of accused No.6, 8 and 9. During the pendency of appeal, accused No.5 and 8 passed away and nobody turned up to implead and to represent the deceased accused No.5 and 8.

2. Heard the learned counsel for the petitioners Sri.S.Rajeev and Sri.Arjun Sreedhar and the learned Special Public Prosecutor Sri.S.U.Nasar.

3. At the very inception, it was submitted that what is involved is a very serious offence, the result of political enmity between two fractions of CPIM on one part and RSS and BJP on the other part. The injury sustained by the victim - PW1 comes to more than ten in numbers, which would sufficiently show that there are separate independent

blows atleast more than ten in number. The nature of injury alleged to have been sustained as discernible from Ext.P6 wound certificate are six chopped wounds and another four incised wounds having extensive measurements. The first injury noted is a chopped wound on the elbow. The second wound is also a chopped wound on the upper arm having the measurement of 11 x 6 x 3 cm. The third one is also a chopped wound on the right leg outer aspects 12 x 6 x 3 cm, fourth one is also chopped wound right thigh having a measurement of 13 x 7 x 6 cm, the fifth wound is also a chopped wound lying on the outer portion of the para spinal region having the measurement of 15 x 5 x 3 cm,, the sixth one is an incised wound on dorsum right foot 1 x 0.5 x 1 cm., seventh wound is incised wound on the right side of chest 3 cm above the costal margin, eighth one is also an incised wound 3 x 1 x 1 upper stereo mastoid fibre and ninth one is an incised wound on the scalp left parietal region having measurement of 5 x 1 x 1 cm and the tenth one is also a chopped wound on the left thumb. This would show the nature of attack on PW1.

4. The prosecution case is that accused No.1 and 2 were carrying two billhooks and accused No.4 and 5 were carrying two swords. Both the swords were found to be stained with human blood of the group of victim. PW1 is the victim. PW2 is the wife of victim. PW3 is the lady residing in the neighbourhood and rushed to the house of victim on seeing a march of mob consisting of several persons towards the house of victim. PW4 and PW5 are the two neighbours who rushed to the place of occurrence on hearing hue and cry. PW6 is the sister of the victim.

5. It is submitted that PW2 is a planted witness and her presence in the occurrence place is highly improbable and it is evident from the admitted fact that the alleged incident had happened inside the family house of her husband. It happened within the secrecy of the family house of the victim, PW1. The mahazer prepared would reveal the various dimensions and measurements, wherein the alleged incident had happened. Even according to the prosecution, two country bombs were exploded during the course of attack on the victim, PW1. But, PW2, the wife

admittedly did not sustain any injury in the alleged incident. It is quite against the natural response of a human being to remain a silent spectator when her husband was attacked by a mob brutally. The prosecution did not have any case that her dress was also stained with human blood or there was any stain of human blood. Her dress was not recovered or let in evidence in order to show that there were blood stains on her dress. If she was actually present in the room wherein the alleged incident had happened, certainly there will be some evidence on her dress pertaining to the blasting of bombs or the injuries alleged to have been sustained which comes to more than 11 in numbers on the body of victim, PW1 – her husband. If there was any blood stains or any other evidence of damage sustained to her dress, there is no occasion for escaping the same from the notice of investigation. The fact that no such materials were collected by the investigation would probabilise and lend support to the contention raised by the accused challenging the very presence of PW2 in the family house of victim, PW1 at the relevant time. Further,

she did not accompany her husband to the hospital,though he had sustained very serious injuries. The said conduct of the wife, PW2 would also lend support to the defence set up by the accused that she was not there in the occurrence place and she was residing in her house at that time. At this juncture, it has to be borne in mind that the alleged incident happened due to political enmity and not pertaining to any personal grudge. Necessarily, the oral evidence of each and every witnesses should be scrutinized carefully so as to rule out the possibility of planting of witnesses.

6. The other witnesses examined by the prosecution are PW3, PW4 and PW5. Among them, PW3 is the lady neighbour, who rushed to the house of victim just to intimate that a mob armed with weapons is proceeding towards the house of victim. But admittedly, she did not witness as to what actually happened inside the house within its secrecy. She was standing outside the house, i.e. the courtyard of the house. So she cannot say anything about the attack on the victim by the respective accused

with specific overt act. PW4 and PW5 are the other two neighbours. Going by the mahazer, it is clear that the house is facing towards north. The prosecution case is that PW4 and PW5 entered through the back door of the said house. Necessarily, it should be on the southern side. No evidence was adduced to show that they are the neighbours of the southern side or backside of the house. Even according to them, they rushed to the house of victim on hearing hue and cry. Then there may not be any occasion for them to witness the sudden attack on the victim inside the house. Even otherwise, the version given by them is inconsistent on material aspects as to the specific overt act against the accused and hence cannot be relied on.

7. PW6 is none else, the sister of the victim. Her presence in the house is also doubtful. The dress worn by her was not seized. She did not sustain any injury and no such case was advanced. Hence, it is highly improbable that she was present at the house at the relevant time and witnessed the incident, hence it is under a shadow of doubt.

8. Further, the persons, who accompanied the victim to the hospital Sujith, Sudeve, Sanoj, Vijesh and Shijil were not either cited as witnesses to the prosecution or examined as witnesses. It is not explained by the prosecution why they were not examined as witnesses to the prosecution or cited as witnesses. The highly delayed FIR and FIS should be read along with the abovesaid material omission in the examination of the persons, who brought the victim to the hospital after the alleged incident. It is not clear whether they have witnessed the alleged incident, when they came to the occurrence place and on what account or reason they came to the occurrence place. This would bring the prosecution case under the shadow of doubt to a large extent especially when PW2, the wife of victim is found to be a planted witness. The oral evidence tendered by the doctor, PW11 regarding the recording of dying declaration would further weaken the prosecution case. PW11 deposed that dying declaration of the victim was recorded and it was endorsed in the wound certificate also. But that dying declaration was not let in evidence or produced by

the prosecution. The prosecution further suffers a serious draw back pertaining to the main substratum as the accused were found not guilty of the offence punishable under Section 380 IPC regarding theft of a ladies watch in the course of alleged incident. The alleged incident was on 25/08/1999 at 5.15 p.m. and the FIS was given on the same day at 6.15 p.m. But the FIS and the FIR registered were received by the Magistrate only on 28/08/1999, after the expiry of three clear days, for which no explanation was forwarded by the prosecution as to how the delay had occasioned. So the very time in which the FIR was registered stated to be at 6.15 p.m. on the very same day i.e. within one hour from the alleged incident cannot be relied on and no evidence was adduced to show its correctness. On the other hand, since there is a clear gap of three days in sending the FIR to the concerned Magistrate would sufficiently take away the reliability and credibility of the FIR registered and the FIS as well and it will fall under the shadow of reasonable doubt. Further, the FIS was given by PW2, the wife of victim whose

presence in the occurrence place is highly doubtful and is under the shadow of doubt, hence, no reliance can be placed on either the FIS or the FIR.

9. Admittedly, the statement of the victim was not taken by the investigating officer for a long period of twenty one days. During that period, he was undergoing treatment in IC unit. At first, he was taken to Co-operative Hospital, Thalassery, from there he was shifted to Specialists' Hospital, Ernakulam. PW11, the doctor, who attended the patient and drawn Ext.P6 had certified that the victim was conscious and oriented at that time. Further, there is no evidence to show that his mental capacity was subsequently impaired or altered. It is not sufficiently explained by the prosecution as to why his statement was not taken for a long period of 21 days. He is not the person, who had given the FIS. The identification made by the victim PW1 while in the box hence cannot be acted upon unless stands corroborated by other evidence especially in a case of political enmity and attack by a mob.

10. The recovery of alleged weapon used in the commission of offence will not give any corroboration as to the involvement of accused No.1 and 3 to 9 simply on the reason that recovery was effected through accused No.2 and not through any other accused. As discussed earlier, the oral testimony of PW2 to PW6 cannot be relied on for the reasons stated above and hence the very case advanced by the victim in the box especially pertaining to an attack by a politically motivated mob requires the standard of proof pointing towards the guilt of each and every accused and their involvement. Mere suspicion cannot be substituted in the place of proof. Hence, benefit of doubt goes to accused No.1 and 3 to 9. In short, there is failure on the part of the prosecution to show and prove the involvement of accused No.1 and 3 to 9 in the alleged commission of offence.

11. Pertaining to accused No.2, the prosecution mainly relied on the recovery of incriminating object, MO1 to MO4 under a disclosure statement alleged to have been given by accused No.2 i.e. two billhooks and two swords. The

doctor – PW11, who attended the victim and drawn Ext.P6 wound certificate had given his opinion as to the origination of the abovesaid injuries and opined that it could be possible by the use of the abovesaid weapons. But, he has not specified its origination in relation to each and every injuries in reference to the weapon used. There is only a general statement given by the doctor, PW11 that all these injuries could be possible by the use of MO1 to MO4. But the nature of weapons are quite different. The injury that could be possible or that can be inflicted by the abovesaid weapons may have its own specific nature. MO1 and MO2 are two billhooks and MO3 and MO4 are two swords. The opinion given by PW11, the doctor, suffers to that extent since there is no direct evidence in reference to the weapon used for the origination of each and every injury noted in Ext.P6 wound certificate. Some of the injuries – six in numbers are chopped wounds and others are incised wounds besides other injuries.

12. The recovery of the abovesaid weapons, MO1 to MO4 in furtherance to the disclosure statement alleged to have

been given by the accused No.2 may operate against him, if it satisfies the requirements, which would constitute the admissibility of a disclosure statement under Section 27 of the Evidence Act. It cannot be used against other accused persons and cannot be brought under the purview of Section 27 of the Evidence Act against co-accused persons. The recovery was not relied on by the trial court mainly on the ground that PW9 witness to the recovery turned hostile, but the trial court failed to consider the evidentiary value of the abovesaid recovery of four weapons based on the disclosure statement alleged to have been given by one among the accused, the accused No.2. It is not clear whether it includes the weapon used for the commission of offence by accused No.2. That weapon was not specifically identified by any of the witnesses. An object which can be brought under the purview of Section 27 of the Evidence Act must always be related to the person on whose disclosure the alleged object or discovery was detected and it should have a nexus with the commission of offence and must be an incriminating object. On medical examination, all these

weapons were found to be stained with human blood of the group of PW1 and it would be an incriminating circumstances attached to the weapons MO1 to MO4. As discussed earlier, the weapon used for commission of the offence by accused No.2 on whose disclosure it was recovered was not specifically mentioned or referred by any of the witnesses. Even PW1 and PW2 and other three witnesses, PW3, PW4 and PW5 had given statement to the effect that these are the weapons used by the accused person without specifying or identifying separately the weapon used by them either as MO1, MO2, MO3 or MO4. The prosecution case is that accused No.1 and 2 were carrying two billhooks and accused No.4 and 5 were carrying two swords. MO1 and MO2 are billhooks and MO3 and MO4 are two swords. Among the two swords recovered, it was not detected which is the one used for the commission of offence by accused No.2. But both swords were found to be stained by human blood of the group of the victim, PW1. Certainly, it would be an incriminating object pointing towards the guilt of accused No.2 pertaining to the commission of the offence and it gives sufficient

corroboration to the oral testimony of the victim, besides medical evidence. It is well settled that non-disclosure of authorship may not make the discovery unreliable, but can be accepted in view of the application of Section 106 of the Evidence Act, since the person who possesses special knowledge is bound to disclose and reveal it if it is kept by somebody else. The doctor who had drawn Ext.P6 wound certificate had given evidence to the effect that these injuries would be sufficient in its ordinary course to cause death. Hence, there is no reason not to concur with the conviction as against accused No.2 for the offence punishable under Sections 452, 436, 326 and 307 IPC. In the said circumstances, the acquittal of accused No.6, 8 and 9 can only be confirmed. The conviction against accused No.1, 3, 4, 5 and 7 will stand set aside and they are acquitted against all charges and set at liberty. The bail bond, if any executed will stand cancelled. Accused No.2 is found guilty of the offence punishable under Sections 452, 436, 326 and 307 IPC. No conviction can be rendered for the offence under Section 143, 147, 148 against accused No.2

unless there is evidence to show the involvement of atleast five persons and as such, he is found not guilty of the said offences and acquitted. For the offence under Section 452, 436, 326 and 307 IPC, the sentence ordered by the trial court is the maximum substantive sentence by ordering ten years rigorous imprisonment for the offence under Section 307 IPC, ten years rigorous imprisonment for the offence under Section 326 IPC, five years rigorous imprisonment for the offence under Section 436 IPC and five years rigorous imprisonment for the offence under Section 452 IPC. It is too exorbitant and does not reflect proper balance. Hence, the substantive sentence will stand reduced to simple imprisonment for one year and a compensation of Rs.5,00,000/- (Rupees Five Lakhs only) to PW1, in default, to undergo simple imprisonment for one year for the offence under Section 307 IPC and six months simple imprisonment and a fine of Rs.1,00,000/- (Rupees One Lakh only) in default, to undergo simple imprisonment for six months for the offence under Section 326 IPC and three months simple imprisonment for the offence under Section 436 IPC and

another three months simple imprisonment for the offence under Section 452 IPC. The substantive sentence shall run concurrently. On recovery of the fine amount, the same shall be released to PW1 under Section 351(1)(b) Cr.P.C. Accused No.2 shall appear before the trial court to receive the sentence within two months from today. He is also entitled to set off of the period of detention already undergone.

In the result, Crl.Appeal No.1968/2007 will stand dismissed. Crl.Appeal No.1187/2007 will stand allowed and Crl.Appeal No.1190/2007 will stand allowed in part. Accused No.2 is found guilty of the offences punishable under Section 452, 436, 326, 307 IPC. He is acquitted of the offences punishable under Section 143, 147 and 148 IPC. All other accused are found not guilty of any of the charges, hence acquitted.

Sd/-

P.SOMARAJAN
JUDGE

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