

present Appellant under Sections 3(a) and 4(a)(i) of the Explosive Substances Act, 1908 and Section 27(1) of the Arms Act, 1958 while confirming the conviction of the present Appellant under Sections 302, 307, 143, 147, 148, 324, 326, 427 and 449 read with Section 149 of the Indian Penal Code, 1860 (“IPC” for short) as recorded by the learned Additional Sessions Judge, Ernakulam (hereinafter referred to as the ‘trial court’) in Sessions Case No.465 of 2008. The High Court also reduced the sentence of the present Appellant awarded under Section 307 read with Section 149 of the IPC from life imprisonment to rigorous imprisonment for 10 years along with a fine of Rs. 10,000 and further modified the amount of fine payable for the commitment of the offence punishable under Section 302 read with Section 149 of the IPC as awarded by the trial court from Rs. 01 lakhs to Rs.10,000. Insofar sentences for the offences punishable under the remaining Sections were concerned, the High Court upheld the order passed by the trial court.

3. Shorn of details, the facts leading to the present appeal is as follows:

3.1 On 06th March, 2006, at about 10:55 a.m., the Control Room, Ernakulam received information about an unlawful assembly that had broken into a video shop run by Ajeesh (PW-2) with the common object of murdering him and had thereafter proceeded to cause grievous injuries to PW-2 and his friend Kapil (hereinafter referred to as 'the deceased') with deadly weapons, before hurling country-made bombs into the said video shop and an adjacent grocery store, run by PW-2's father, and had subsequently fled from the scene. On receiving the said information, the ASI (PW-6) along with a flying squad reached the spot of the incident, where they found the deceased in an injured state and took him to RCM Hospital, Tripunithura, where he was declared dead upon medical examination. In the meanwhile, Jaimon (PW-1) who was an eyewitness to the incident, received information about the death of the deceased while he was at

Medical Centre, Ernakulam where the injured PW-2 was being treated. Thereafter, PW-1 went to Hill Palace Police Station, Tripunithura and furnished a statement (Ext. P1 F.I.) on the basis of which a First Information Report (“FIR” for short) being Case Crime No. 137 of 2006 was registered against the members of the unlawful assembly. Subsequently, the post mortem of the deceased was conducted wherein it was concluded that his death had been caused by a stab injury involving the aorta.

3.2 The prosecution case is that Ajeesh (PW-2) and his father Rajappan were close to the family of one Vidyadharan who had been kidnapped and murdered by a group led by Jaison (Accused No.1) on account of prior enmity between them, since Vidyadharan had opposed the drug trade which was led by Jaison (Accused No.1). In the investigation and trial that followed, PW-2 and his father lent their assistance to the prosecution case therein, which instigated Jaison (Accused No.1) and 10 of his other associates, including the present Appellant,

to hatch a criminal conspiracy to commit the murder of PW-2. Pursuant to the same, on 06th March, 2006 at about 10:45 a.m., the 11 accused persons formed an unlawful assembly with the common object of murdering PW-2, and set out in a silver Qualis car towards the video shop run by PW-2 under the name of 'Kalaya Videos', which was situated in a building bearing No.7/274 of Udayamperoor Panchayat, near Kochupally Junction. The car bore a fake registration plate and had been rented from Ajith (PW-9) by Jaison (Accused No.1) after the deposit of a signed blank cheque and his driving license. On the day of the incident, PW-2 had opened the said video shop at about 10:00 a.m. after which the deceased had reached the shop to invite PW-2 for the obsequies of his father who had passed away a few days earlier. While they were chatting inside the shop, Jaimon (PW-1), their common friend, also reached the shop and they were subsequently joined by another friend, Siju (not examined).

3.3 At about 10:45 a.m., the accused persons who were armed with deadly weapons like swords, koduwal, choppers and iron pipes, and were carrying country-made bombs, smashed the glass door of the video shop and trespassed into the same. Thereafter they pushed the deceased, PW-1 and Siju out of the way and proceeded to attack PW-2 with the said weapons. When the deceased tried to intervene, Jaison (Accused No.1) directed the other accused persons to kill the deceased which instigated Accused No. 2 to stab the deceased in his abdomen with a dagger, who ran out of the shop and went into the house of PW-2's father where he collapsed on the floor. Thereafter, the accused persons inflicted several injuries on PW-2 who also ran out of the video shop in his injured state but was chased by the accused persons who inflicted further injuries on him, which resulted in him falling down underneath a guava tree. Subsequently, the accused persons hurled country-made bombs into the video shop and the grocery store run by PW-2's father and thereafter, they fled the

scene in their silver Qualis. Subsequently, PW-2's neighbour Girish (PW-26), a police constable who was on leave on the day of the incident, reached the video shop of PW-2 after hearing the sound of the bombs exploding, where he found PW-2 in an injured state. Thereafter, PW-2's father and PW-26 took him to Medical Centre, Ernakulam. However, given the severity of his condition, he was referred to Specialist Hospital, Ernakulam where he was admitted as an in-patient and treated for his injuries.

3.4 Upon the conclusion of the investigation and after the Appellant was arrested in 2008, an additional chargesheet was filed against him before the Court of the Additional Chief Judicial Magistrate, Ernakulam wherein he was arrayed as Accused No.6 in the FIR being Case Crime No. 137 of 2006. Since the case was exclusively triable by the Sessions Court the same came to be committed to the Court of the learned Additional Sessions Judge.

3.5 Charges came to be framed by the trial court for the offences punishable under Sections 302, 307, 143, 147, 148, 120B, 201, 324, 326, 427, 449 read with Section 149 of the IPC and Section 27 of the Arms Act, 1959 and Sections 3 and 4 of the Explosive Substances Act, 1908 against the present Appellant. The present Appellant pleaded not guilty and claimed to be tried.

3.6 The prosecution examined 43 witnesses, marked 77 exhibits and identified 39 Material Objects to bring home the guilt of the accused persons, including the present Appellant. In his defence, the present Appellant stated that he had been arrested from Ettumanoor in 2008, two-years subsequent to the filing of the FIR, and that his name was Suresh Mohan and not Suresh. As such, the Appellant contended that he had been falsely implicated in the case.

3.7 At the conclusion of the trial, the trial court found that the prosecution had proved the case against the present Appellant and the other accused persons beyond reasonable doubt and

accordingly convicted him for the offences punishable under 302,307,143,147,148,324,326,427 and 449 read with Section 149 of the IPC and Section 27 of the Arms Act, 1958 and Sections 3 and 4 of the Explosive Substances Act, 1908 and sentenced him to undergo imprisonment for life along with a fine.

3.8 Being aggrieved thereby, the present Appellant preferred a Criminal Appeal before the High Court. The High Court by the impugned judgment partly allowed the Criminal Appeal in the aforementioned terms.

3.9 Being aggrieved thereby, the present appeal.

4. We have heard Shri A. Sirajudeen, learned Senior Counsel appearing for the appellant and Shri Alim Anvar, learned counsel appearing for the respondent-State of Kerala.

5. Shri A. Sirajudeen, learned Senior Counsel submitted that the present Appellant has been identified for the first time in Court by PW-1 and PW-2. He submitted that insofar as the other two eyewitnesses i.e., PW-12 and PW-14 are concerned, they do

not say anything about the role played by the present Appellant. It is submitted that the present Appellant was not known previously to any of above 4 witnesses. As such, identification for the first time in the Court without holding 'Test Identification Parade' creates a serious doubt as to whether these witnesses i.e., PW-1 and PW-2 have really seen the present Appellant taking part in the crime. It is further submitted that the present Appellant was initially described as 'Unni' in the first charge-sheet and in the second charge-sheet, he was described as 'Suresh alias Vadi Suresh'. He further submitted that, insofar as the motive is concerned, the motive is attributed to Accused No.1-Jaison and not to the present Appellant. He therefore submitted that the present appeal deserves to be allowed and the order of conviction and sentence be set aside.

6. Shri Alim Anvar, on the contrary, submitted that PW-2 is an injured eyewitness. It is submitted that if a witness is an injured witness, his evidentiary value would be of greater degree.

He submitted that PW-2 had seen the accused persons including the present Appellant assaulting him and therefore it is possible for him not to forget the faces of the assailants. Learned counsel further submitted that both the trial court as well as the High Court, on correct appreciation of the evidence, have concurrently found that the prosecution has proved beyond reasonable doubt that the present Appellant is guilty of the crime. It is therefore submitted that no interference is warranted in the present appeal.

7. With the assistance of the learned counsel for the parties, we have scrutinized the evidence on record. It is not disputed that the death of the deceased is homicidal and as such, it will not be necessary to refer to the medical evidence. The prosecution relied on the testimonies of PW-1, PW-2, PW-12 and PW-14.

8. A perusal of the testimonies of PW-12 and PW-14 would reveal that they do not say anything about the present Appellant.

As such, it will only be necessary to refer to the testimonies of PW-1 and PW-2.

9. It is relevant to note that the incident took place on 6th of March 2006. Whereas the testimonies of the witnesses were recorded in the month of August 2010 i.e., approximately four and half years after the date of the incident.

10. A perusal of the testimonies of PW-1 and PW-2 would reveal that it is only the Accused No.1-Jaison, who is known to them, and the other accused persons were not known to them.

11. PW-1 in his evidence stated that, while he was chatting with PW-2, the Accused No.1-Jaison and other 4-5 people jointly broke the front glass of the shop and entered into the shop. He stated that a fair and fat man pulled and dragged the deceased Kapil out of the shop. A man with a bag in his hand had dragged him also out of the shop. PW-2-Ajeesh was standing inside the cabin of the shop. Accused No.1-Jaison entered the shop and attacked PW-2-Ajeesh with a sword. He further submitted that

when the deceased Kapil tried to enter into the shop, Accused No.1-Jaison shouted from the shop that, 'kill him'. After hearing this, a fat and fair man took a tool from the box and pierced it into the deceased Kapil's stomach. It is stated that PW-2-Ajeesh was attacked by Accused No.1-Jaison and his fellow men inside the cabin. PW-2-Ajeesh jumped out of the cabin and came out of the shop. He tried to run away but fell down near one house under a guava tree. However, again PW-2-Ajeesh was attacked with sickle, sword and iron pipes on his legs and hands. It is stated that thereafter PW-2-Ajeesh was taken into an auto-rikshaw by his father Rajappan and a neighbour Girish (PW-26) to the Medical Centre. He stated that deceased Kapil was hospitalized by the Police. PW-1 further stated that when he went to the hospital, he came to know that deceased Kapil had died. It is stated that thereafter he went to the Hill Palace Police Station and gave information regarding the incident. He further identified the present Appellant saying that another man involved

in the incident is present now and pointed towards the present Appellant.

12. In his cross-examination, PW-1 clearly admitted that he does not know the accused persons except Accused No.1-Jaison. He has also admitted in his cross-examination that after the present Appellant's arrest, Police had shown the present Appellant to him in the Police Station.

13. Insofar as PW-2-Ajeesh is concerned, no doubt that he is an injured eyewitness. In his evidence, he had made similar narration as that of PW-1. From the perusal of his evidence, it would reveal that he knew only Accused No.1-Jaison. He identified the present Appellant as one of the persons who was accompanying Accused No.1-Jaison. In his cross-examination, he clearly admitted that he had not identified the present Appellant or the weapons before the Magistrate. He had also admitted that the identification parade was not done so the present Appellant was not identified. He further stated in his

evidence that till the Police had brought the accused/present Appellant to home, the name of the present Appellant was not known to him. He further stated in his evidence that he did not know whether the accused called Suresh i.e., present Appellant was in the accused list.

14. It is to be noted that though the incident is of the year 2006, the present Appellant was arrested in the year 2008. It is further to be seen that apart from the identification parade not being held, the accused/present Appellant was shown to the witnesses by the Police. As such, we are of the considered view that conviction only on the basis of identification of the accused in the Court for the first time after four and half years of the incident would not be sufficient for maintaining the same.

15. Insofar as the motive is concerned, the motive is attributed only to Accused No.1-Jaison and not to the present Appellant.

16. The prosecution also relied on the recovery of iron rod allegedly on the memorandum of the present Appellant under

Section 27 of the Indian Evidence Act, 1872. However, it is to be noted that the incident took place on 6th March 2006, whereas the recovery was made on 11th May 2008 i.e., after about 2 years and 2 months. According to the prosecution, the said iron rod also had blood stains. It is difficult to believe as to how the blood stains still remained on the said iron rod which was recovered from an open place after about 2 years and 2 months and when in the intervening period two monsoons had passed. As such, no credence could be given to the said recovery.

17. The possibility of mistaken identity also cannot be ruled out. In the first charge-sheet, the present Appellant was described as 'Unni', whereas in the second charge-sheet, he was described as 'Suresh alias Vadi Suresh'.

18. In that view of the matter, we find that the prosecution has failed to prove the case beyond reasonable doubt.

19. In the result, the appeal is allowed. The judgment and order dated 30th March 2011 passed by the Additional Sessions Judge,

Ernakulam in Sessions Case No. 465 of 2008 and the judgment and order dated 6th December 2012 passed by the High Court of Kerala at Ernakulam in Criminal Appeal No.871 of 2011 are quashed and set aside. The present appellant is acquitted of all the charges charged with. He is directed to be set at liberty forthwith, if not required in any other case.

.....J.
[B.R. GAVAI]

.....J.
[SANDEEP MEHTA]

**NEW DELHI;
APRIL 30, 2024**