2024:KER:18097

"C.R."

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

THURSDAY, THE 7TH DAY OF MARCH 2024 / 17TH PHALGUNA, 1945

CRL.APPEAL NO. 918 OF 2007

AGAINST THE JUDGMENT DATED 18.04.2007 IN SC NO.44 OF 2006

OF ADDITIONAL SESSIONS COURT (ADHOC)-II, KALPETTA

APPELLANT/ACCUSED:

SANTHOSH @ CHANDU
S/O.MUTHU, AGED 25 YEARS, ADLAIDE,
VELLARAMKUNNU, KALPETTA, WAYANAD.

BY SRI.REBIN VINCENT GRALAN, AMICUS CURIAE

RESPONDENT/COMPLAINANT:

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

BY SMT.SHEEBA THOMAS, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 23.02.2024, THE COURT ON 07.03.2024 DELIVERED THE FOLLOWING:

2024:KER:18097

P.G. AJITHKUMAR, J. "C.R."

Crl.Appeal No.918 of 2007

Dated this the 7th day of March, 2024

JUDGMENT

This is an appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973 (Code). The appellant was the sole accused in S.C.No.44 of 2006 before the Additional Sessions Judge (Adhoc)-II, Kalpetta. He was convicted and sentenced for the offences punishable under Sections 324, 354 and 448 of the Indian Penal Code, 1860 (IPC).

2. A final report was filed by the Sub Inspector of Police, Kalpetta in crime No.177 of 2005 of that Police Station alleging offences punishable under Section 308, 354 and 448 of IPC. The allegations were that on 02.05.2005 at about 3.00 a.m. the accused tried to outrage the modesty of PW2 by trespassing into her house which bears door No.XII/702(IV) of Kalpetta Municipality. Further, he stabbed PW1 with a knife at 5.30 p.m. on 03.05.2005 with the knowledge that his intended act would have caused the

death of PW1. Thus, the appellant had committed the above-mentioned offences.

3. Upon framing a charge and denying the same by the appellant, the prosecution has examined PWs.1 to 14 and proved Exts.P1 to P9. MOs.1 to 3 were identified. During examination under Section 313(1)(b) of the Code, the appellant denied incriminating circumstances. He further stated that the case was foisted by the relatives of PW2 knowing her relationship with the appellant. No defence evidence was let in.

4. The trial court, after considering the evidence found that on 02.05.2005 night the appellant trespassed into the house of PW2 and outraged her modesty by catching her hold of. It was also found that on 03.05.2005 at about 5.30 p.m. the appellant stabbed PW1 causing an injury to his left hand. The trial court took the view that the attack by the appellant on PW1 did not amount to an offence punishable under Section 308 of the IPC, but, that act amounted to an offence punishable under Section 324 of the IPC.

5. Heard the learned Amicus Curiae for the appellant and the learned Public Prosecutor.

6. The learned Amicus Curiae would submit that the conviction is bad since charges relating to two distinct offences were joined and a single trial was held, which is illegal and against the provisions in Section 218 of the Code. It is submitted that such a misjoinder of charges caused prejudice to the appellant and therefore the conviction is liable to be set aside. The further submission of the learned Amicus Curiae is that the evidence in regard to both the incidents is too scanty to enable a conviction. From the evidence, it is quite obvious that PW3 is an interested witness. Evidence of PW 1 therefore remains uncorroborated. Similarly, the evidence available regarding the incident said to have occurred at 3 O'clock in the night of 02.05.2005 is the interested testimony of PW2 alone and therefore the charge concerning that incident also is not proved.

7. The learned Public Prosecutor would submit that the two incidents were closely related inasmuch as the first

incident was the causation for the second incident, and hence joinder of both the charges and a joint trial is permitted under Section 220(1) of the Code. It is submitted, if at all there is misjoinder of charges, no prejudice occurred to the accused and therefore the conviction is valid. In regard to the reliability of the witnesses, it is submitted by the learned Public Prosecutor that PWs.1 to 3 and 12 are turned out to be credible witnesses. It is accordingly contended that there is no infirmity to the findings of the trial court leading to the conviction of the appellant.

8. PW1 is the de facto complainant. It was on the basis of his statement, Ext.P1, crime was registered. PW10 reached Leo Hospital, Kalpetta, on 04.05.2005 on receipt of Ext.P7 intimation that PW1 was undergoing treatment in that hospital. He has recorded Ext.P1 statement from PW1 and based on that statement, the crime was registered by PW11. The version of PW1 is that at about 5.30 p.m. on 03.05.2005 on his way to Thurki Bazar Kalpetta, he saw the appellant and questioned him in connection with the incident that occurred

on the previous night. The incident was that the appellant, at about 3 O'clock in the night of 02.05.2005, knocked at the door of PW2's house. At that time, PW2 alone was there and when she opened the door, the appellant caught her hold of. On her making a hue and cry the persons from the neighbourhood started coming in and the appellant escaped.

9. PW2 is the younger sister of PW1's aunt. The appellant got infuriated on PW1 questioning him. Hence he took out a knife from his loin and stabbed PW1. It is the version of PW1 that when the appellant brandished the knife, aiming at his chest, he warded off and it resulted in an injury at his left hand.

10. PW3 claimed that he saw the appellant stabbing PW1. The stab resulted in a cut injury on the hand of PW1 and immediately he intervened. PW3 further deposed that the appellant then refrained and took on his heels carrying the knife. It was PW3 who took PW1 in an autorickshaw to Leo Hospital. Both PWs.1 and 2 identified MO1 as the weapon of offence used by the appellant.

11. PW9 is a doctor attached to Leo Hospital, Kalpetta. Ext.P6 is the wound certificate issued by him. PW9 deposed that he had examined PW1 on 03.05.2005 and issued Ext.P6 certificate. PW1 had a lacerated wound 12x3x1 cms at his hand. He also stated that he sent Ext.P7 intimation to the police station. He opined that the injury sustained by PW1 could be caused using MO1. With the aid of the aforementioned evidence, the prosecution tried to prove the incident of inflicting injury to PW1.

12. Although PWs.1 and 3 were cross-examined in detail, nothing to discredit their veracity has come out. Regarding the assault by the appellant, there is absolutely no inconsistency in the evidence. The version in Ext.P1 also tallies with their evidence. PW1 was soon taken to the hospital. The injury PW1 sustained also corresponds to his version before the court. Of course, PW3 is a friend of PW1. In the absence of anything to find that his testimony before the court is unreliable, his friendship to the injured is not a reason to discard his evidence.

13. MO1 was recovered by PW13, who conducted the investigation. He stated before the court that following his arrest, the appellant gave a statement that he could show the knife, which he had placed at a place. Based on that statement and as shown by the appellant, MO1 knife was recovered from a place adjacent to his house. Ext.P2 is the mahazar under which the knife, MO1 was recovered. Ext.P8 is the statement of the appellant leading to the recovery. PW3 as well as PW4 are witnesses to Ext.P2 mahazar. Both of them deposed before the court having seen recovery of MO1 by the police as shown by the appellant. Their evidence, which does not contain any inconsistency, proved that MO1 was recovered as shown by the appellant while in the custody of PW13.

14. The learned Amicus Curiae for the appellant submitted that the knife was recovered from an open space and therefore the same cannot be an evidence of recovery under Section 27 of the Evidence Act, 1872. The evidence that came on record is trustworthy to the fact that only on account of the statement given by the appellant, PW13 could recover

MO1. It was from a place adjacent to the house of the appellant. It is not a public place. Although the knife was not kept hidden, it was at a place the public had no access. From the aforementioned facts and circumstances authorship of concealment of MO1 can certainly be attributed to the appellant.

15. In **Ibrahim Musa Chauhan @ Baba Chauhan and others v. State of Maharashtra [(2013) 13 SCC 1]**, the Apex Court held that there is nothing in Section 27 of the Evidence Act, which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is open or accessible to others. It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27. It was further held that the crucial question is not whether the place was accessible to others or not, but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others. Viewed so, the

contention of the learned Amicus Curiae cannot be accepted.

16. From what are stated above, it can be said that the prosecution succeeded in proving beyond doubt that the appellant stabbed PW1 causing an injury at his left hand. As stated, the reason for such an attack was PW1's questioning the appellant regarding the incident on the previous night. PW2 deposed in detail about the said incident. Her elder sister was residing in a nearby house. On hearing the noise she enquired, who it was and believing that it was the son of his sister, she opened the door. But, the appellant was the person who knocked the door. It is her version that immediately on opening the door the appellant caught her hold of. She asserted that when she made a hue and cry, the appellant left the scene and people from the neighborhood started coming to her house.

17. PW2 maintained that although her house was not electrified, she could identify the appellant. PW1 maintained that he had acquaintance with the appellant and that fact has

been confirmed by his answers during 313 examination. Therefore, his identification of the appellant, despite that the incident was during night and no electric light was available, cannot be doubted.

18. PW12 deposed that he is a resident of nearby house and on hearing the cry of PW2, he reached her house. He was told by PW2 that the appellant tried to molest her. That statement, if true, is a *res gastae* relevant under Section 6 of the Evidence Act. Although it was urged that PW2 and PW12 deposed falsehood in court and PW2 created a story since her relatives did not like her relationship with the appellant, she categorically denied it. Other than a suggestion, there is absolutely nothing in evidence to probabilise that contention. In the said circumstances, the findings entered into by the trial court regarding conviction of the offence of trespass to the house of PW2 and molesting her can certainly be said to be true.

19. The incident of trespassing into the house of PW2 and molesting her at about 3 o'clock in the night of

02.05.2005 and the incident on the next day where the appellant attacked PW1 by stabbing using MO1 were tried at one trial. Of course, separate charges for each of the said offences were framed. The only relation between the offences is that the indictee is the same person. Unless both the charges can be joined under any of the provisions of Section 220 of the Code, it cannot be said that joinder of the said charges is legal.

20. Section 218 of the Code insists on separate trial for separate charges and that every distinct offence a person is accused of, shall be charged separately. Sub-section (1) of Section 220 enables trial of more offences than one, if such offences are so connected together as to form the same transaction, can be tried at one trial.

21. The offences charged against the appellant in this case were not so connected together as to form the same transaction. Therefore, there is misjoinder of charges. The question is whether on account of misjoinder of charges the conviction is vitiated. Section 218 of the Code reads,-

"218. Separate charges for distinct offences.- (1) For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately:

Provided that where the accused person, by an application in writing, so desires and the Magistrate is of opinion that such person is not likely to be prejudiced thereby the Magistrate may try together all or any number of the charges framed against such person.

(2) Nothing in Sub-Section (1) shall affect the operation of the provisions of sections 219, 220, 221 and 223."

Section 220(1) of the Code reads:

"220. Trial of more than one offence.- (1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

Section 464 of the Code reads:

"464. Effect of omission to frame, or absence of, or error in, charge.- (1) No finding sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charge, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been

occasioned, it may,-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge.

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit;

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

On a reading of sub-section (1) of Section 464 it is explicit that misjoinder of charges is an irregularity. It is explained that unless there occasioned failure of justice, an irregularity on account of misjoinder of charges does not invalidate a conviction.

22. This Court in **Krishnan Kutty v. State of Kerala [2023 SCC OnLine Ker.4233]** held that assuming that there was a legal impediment in clubbing of charges, in the light of the provision contained in Section 464, the trial cannot be vitiated on account of the same, provided, no failure of justice has occasioned on account of the same.

23. From the nature of evidence let in by the prosecution, which is adverted to above, it is quite clear that separate evidence was brought in concerning each head of the charges. No occasion resulting in miscarriage of justice or prejudice to the appellant is pointed out by the learned Amicus Curiae. On an anxious consideration of the evidence on record, I am convinced that there occurred no failure of justice on account of such a misjoinder of charge. The appellant obtained enough opportunity to challenge the evidence of each witness and there was no overlapping or mixing up of facts. In the circumstances, the conviction of the appellant is quite legal; in spite of such a misjoinder of charges. Hence, I find no reason to interfere with the judgment of conviction.

24. The terms of sentence imposed is commensurate to the offence committed by the appellant. The trial court ordered to run the sentence under Section 324 of the IPC after the sentence for the other offences. I am of the view that the circumstances of the case justify an order to run all

the terms of the substantive sentence concurrently. The appeal is allowed to the above extent of modifications in the sentence as aforementioned.

Sd/-

P.G. AJITHKUMAR, JUDGE

dkr