Kerala High Court
Mohanan vs State Of Kerala on 16 December, 2009

IN THE HIGH COURT OF KERALA AT ERNAKULAM

CRL.A.No. 1585 of 2005()

1. MOHANAN, S/O.KARITHIKEYAN,
... Petitioner

Vs

1. STATE OF KERALA,
... Respondent

For Petitioner :SRI.C.K.SAJEEV

For Respondent :PUBLIC PROSECUTOR

The Hon'ble MR. Justice K.BALAKRISHNAN NAIR
The Hon'ble MR. Justice P.S.GOPINATHAN

Dated :16/12/2009

O R D E R
K.BALAKRISHNAN NAIR & P.S.GOPINATHAN, JJ.

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Crl.Appeal No.1585 of 2005
&
R.C.No. 1 of 2005.
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Dated this the 16th day of December, 2009.

J U D G M E N T

Gopinathan, J.

The appellant in the criminal appeal, who is the respondent in the revision case, was convicted by the Additional Sessions Judge (Ad-hoc)-I, Kollam for offences under Sections 302 and 307 I.P.C. and was sentenced to rigorous imprisonment for a period of ten years for offence under Section 302

I.P.C. and rigorous imprisonment for a period of five years under Section 307 I.P.C. Assailing the above conviction and sentence, this appeal was preferred.

2. When the appeal came up for admission, noticing the illegality in awarding sentence for offence under Section 302, a suo motu revision was registered against the appellant and notice was given.

3. The Circle Inspector of Police, Kundara police station in Crime No.108 of 1999 of Anchalamood police Crl.Appeal No.1585/05 & R.C.No.1/05.

station filed the charge sheet against the appellant before the Judicial Magistrate of the First Class, Kollam alleging the above said offences. The learned Magistrate took cognizance and proceeded as C.P.23 of 2004. Having found that the offences alleged were triable by a Court of Session, after complying with the requisite procedures, by order dated 18/7/2004, committed the case to the Court of Session, Kollam. From there, it was made over to the Additional Sessions Judge, Ad-hoc-I.

4. The prosecution case in brief is that P.W.1 Madhu and his wife, late Beena jointly acquired a property with a house bearing Door No.7/68, which was named 'Madhuvilasam'. P.W.1 was employed as a Supervisor in a cashew factory at Kuzhithara in Tamil Nadu and was residing there. The mother of P.W.1, who was examined as D.W.1 was residing in the Madhuvilasam house. The appellant, who is the brother of P.W.1, was residing away with his family. Later, the relationship between the appellant and his wife got strained. Therefore, he shifted Crl.Appeal No.1585/05 & R.C.No.1/05.

his residence to the Madhuvilasam house and had been residing along with the mother. In the meanwhile, P.W.1 and late Beena proposed to sell the property. To facilitate the sale, the appellant and mother were requested to shift their residence and to give vacant possession. The appellant was not amenable. P.W.1 and late Beena went to Anchalamoodu police station and made an oral complaint. It did not yield any result. On 26.3.1999, Ext.P2 complaint was lodged against the appellant before the Sub Inspector of Police, who was examined as P.W.17. P.W.16, a police constable, was deputed by P.W.17 to serve a copy of Ext.P2 and to direct the appellant to appear before Pw17. P.W.16 went to Madhuvilasam house and the appellant was informed. At about 11 a.m., P.W.1 and late Beena went to Madhuvilasam house. Seeing P.W.1 and Beena, the appellant got angry. He took a knife and stabbed P.W.1, uttering that he and his wife filed a complaint against him and they would not be spared. Seeing P.W.1 being stabbed, Beena rushed to rescue him. The appellant, immediately, Crl.Appeal No.1585/05 & R.C.No.1/05.

with the same knife stabbed at the front side of the buttock of Beena. Beena got scared and ran towards the southern side of the courtyard. The appellant, then followed and kicked her. As a result she fell down. Hearing the cry, P.W.3, a neighbour, then a B.Ed. student rushed to the spot. He bandaged the wounds of P.W.1 and Beena and they were rushed to the Government Hospital, Kollam. After first aid, they were referred to the Medical College Hospital, Thiruvananthapuram. While undergoing treatment at Medical College Hospital, at 4.30 p.m., on the same day, Beena succumbed to the injuries.

5. On getting information, P.W.17 rushed to the Medical College Hospital, Thiruvananthapuram and at 5.30 p.m. recorded the First Information Statement given by P.W.1, who was admitted in Ward No.18. Returning to the police station, a case as Crime No.108 of 1999 was registered by P.W.17 for offence under Sec.302 and 307 IPC. Ext.P11 is the First Information Report.

6. P.W.18, the then Circle Inspector of Police, Crl.Appeal No.1585/05 & R.C.No.1/05.

Kundara took over the investigation. He rushed to the Medical College Hospital, Thiruvananthapuram and prepared Ext.P5 inquest report wherein P.W.8 is an attestor. At the time of preparation of Ext.P5, clothes found on the body of the deceased were seized. After making arrangements for post-mortem examination, P.W.18 proceeded to the spot of occurrence and prepared Ext.P3 scene mahazar wherein P.W.6 is an attestor. From the spot of occurrence, a plastic chappal and a rubber slipper which were marked as M.Os.3 and 4 were seized. P.W.18 had also seized M.O.1 shirt worn by P.W.1 and M.O.2 Churidar worn by the deceased at the time of occurrence. The appellant absconded. Hence, he could not be apprehended. P.W.18 made a search of the house. But, the weapon could not be found out. Ext.P14 is the search memo.

7. On 27.5.2002, P.W.18 was succeeded by P.W.19. He took over the investigation on 1.6.2002. On 5.8.2003, the appellant was arrested. Thereafter, Pw19 filed Ext.P16 report showing the correct name and address of the Crl.Appeal No.1585/05 & R.C.No.1/05.

appellant. On interrogation, it was revealed that the knife used by the appellant to stab P.W.1 and Beena was thrown into Pulikuzhi kayal flowing through the side of his house. P.W.19, with the aid of P.W.11, a diver, made an attempt to recover the knife from the kayal. Inspite of the earnest efforts by P.W.11, the knife could not be recovered. The appellant was produced before the Magistrate concerned and got remanded to judicial custody. P.W.19 forwarded the material objects for chemical examination along with Ext.P17 forwarding note and obtained Exts.P18 and P20 reports. He completed the investigation and the charge- sheet was filed.

8. The Addl.Sessions Judge after hearing both sides, framed the charge. When read over and explained, the appellant pleaded not guilty to the charge. Hence he was sent for trial. On the side of the prosecution, Pws.1 to 19 were examined, Exts.P1 to P20 and Mos.1 to 6 were marked. After closing the evidence, when the appellant was questioned under Sec.313(1)(b) of the Crl.P.C., he denied Crl.Appeal No.1585/05 & R.C.No.1/05.

the incriminating evidence and further stated that at about 11 am. on 26th when he went to see his mother at Madhuvilasam House, Pw1 beat him at his head with a chair stating that he was asked to not enter there. Then Beena brought a knife and handed over to Pw1. Pw1 waved the knife against him. It fell at the left buttock of Beena. Then there was fight for weapon between Pw1 and the appellant. Some how or other, in the fight the knife hit at the back of Pw1.

9. Responding to the call to enter defence, the mother was examined as Dw1. Dw1 would depose that one week before the incident Beena and Pw1 started residence along with Dw1 and that Beena was very hostile and cruel to Dw1 and had even assaulted by her, for which, Beena was beaten by Pw1

and that at about 9.30 pm on the fateful day when the appellant came to the house, Pw1 beat him with a chair by stating that the appellant was asked not to go over there and there was scuffle between Pw1 and the appellant and during the scuffle, Beena assaulted the Crl.Appeal No.1585/05 & R.C.No.1/05.

appellant by beating at his back and then she went to the kitchen and brought a knife which was handed over to Pw1 asking to 'kill him'. Pw1 got the knife from Beena and stabbed the appellant. The stab fell at the buttock of Beena. When the appellant wrestled, the knife hit at the back of Pw1. Five minutes later, Beena and Pw1 ran towards the courtyard. Hearing the cries of Dw1, people gathered and the injured were taken to the hospital. On appraisal of the evidence, the trial court found in favour of the prosecution.

10. To support the evidence of Pw.1, Pw.2 and Pw.3 were also examined as occurrence witnesses. Pw2 is the brother-in-law of the appellant and Pw1. Pw2 turned totally hostile to the prosecution. Though he was cross-examined by the prosecution with the permission of the court no material was disclosed in support of the prosecution other than that he heard the incident and found Beena and Pw1 admitted in the District Hospital, Kollam from where they were referred to the Medical College Hospital, Crl.Appeal No.1585/05 & R.C.No.1/05.

Thiruvananthapuram.

11. Pw3, who is the neighbour also turned hostile to the prosecution as regards the occurrence. He had deposed that he was a student of B.Ed course as on the date of the occurrence and while he preparing for the examination he heard cries from Madhuvilasam house. He rushed to the house and found that Pw1 and Beena were lying at the southern courtyard with bleeding injuries. He alerted the neighbours and with their help, Pw1 and deceased Beena were lifted to the District Hospital, Kollam after bandaging the wounds.

12. Such being the evidence of Pws.2 and 3, in support of the prosecution case, the evidence available is the solitary evidence of Pw1.

13. Pw1 had deposed that he was employed as a Supervisor in a Cashew Factory at Kuzhithura and he was on leave for about two months and during that time he along with his wife Beena and children were residing in the house of Pw2 and that Beena and Pw1 jointly owned 12 Crl.Appeal No.1585/05 & R.C.No.1/05.

cents of property with the house and that since Pw1 was employed at Kuzhithura, his mother was residing there. The appellant, who was residing away, locked horns with the wife and started residence along with the mother. As a result, when Pw1 came back on leave he was forced to reside at the house of Pw2. Pw1 had intension to sell the said property and to purchase a property at the place of his employment. Hence the appellant was asked to vacate the house. Then he demanded that five cents of property should be assigned to the mother, but Pw1 was not amenable. A week back, Pw1 orally complained before the police requesting to take steps to get the mother and the appellant evicted from the house. Since there was no development, on 26.3.1999 Pw1 filed Ext.P2

complaint against the appellant at Anchalummoodu Police Station and thereafter he along with Beena had been to the house. Noticing Pw1 and Beena at the courtyard, the appellant came out and stabbed Pw1 by stating that he and his wife had filed complaint against him and that none of them Crl.Appeal No.1585/05 & R.C.No.1/05.

would be spared. The stab fell at the back left side and was bleeding. Seeing that, Beena rushed to rescue him. By the time the appellant stabbed Beena and it fell at her buttock. Beena ran towards the southern courtyard. The appellant chased her and kicked, following which Beena fell down. When Pw1 rushed to Beena, the appellant took to his heels with the knife. The neighbours gathered and Pw1 and Beena were taken to the District Hospital, Kollam, from where they were referred to the Medical College Hospital, Thiruvananthapuram. While undergoing treatment, at 4.30 pm. Beena succumbed to the injuries. It was further deposed that being motivated because of the filing of Ext.P2 complaint, Pw1 and Beena were stabbed by the appellant with the intention to commit murder. Pw1 identified Ext.P1 and the clothes.

14. Pw4 is a friend of Pw5, the brother of deceased Beena. Pw4 and 5 are painting workers. According to Pw4, in February, 1999 while he was to the house of Pw5, the appellant and Beena were there at the house of Pw5. The Crl.Appeal No.1585/05 & R.C.No.1/05.

appellant stated to Beena that the appellant was a rowdy and that unless Pw1 was taken away from Kollam he would be murdered.

15. Pw5 had deposed that at 7.30 pm on 16.2.1999 the appellant came to his house while Beena was in his house. The appellant picked up quarrel with Beena and stated to Beena that he was a goonda and that unless Pw1 was taken from Kollam the appellant would not spare Pw1 and that later he came to know that Beena and Pw1 filed a complaint against the appellant and he heard that Beena and Pw1 were attacked by the appellant and they were taken to the Medical College Hospital. He rushed to the Medical College Hospital and found that Beena was dead. Pw5 is also an attester to the inquest report.

16. Pw6 is an attester to Ext.P3 scene mahazar. He had further deposed that a rubber chappel and a plastic chappel were seized by the police from the place of occurrence and those materials were marked as MO4 series and MO3 series. Pw7 is a Head Constable attached to Crl.Appeal No.1585/05 & R.C.No.1/05.

Anchalummoodu Police Station. He is an attester to Ext.P4, a mahazar dated 28.3.1999 prepared for the seizure of Ext.P2 petition filed by Pw1 and Beena against the appellant on the date of the occurrence. Pw9 is the paternal uncle of Beena. He would depose that he had got back the dead body of Beena from the Medical College Hospital after the postmortem examination.

17. Pw10 is a police constable residing at Kayankeri. He would depose that in June, 2003 the appellant worked as a mason for the construction of his house and he was staying at the worksite. The evidence of this witness was relied upon by the prosecution to bring on record that after the incident the appellant had been absconding.

18. Pw13 would depose that he was Assistant Surgeon at District Hospital, Kollam and that at 12.20 pm. on 26.3.1999 he examined Beena aged 25 years, who was brought to the hospital with a stab injury and that Beena had an incised wound 2x0.5x4 cms. on the upper inner quadrant of right buttock and she was referred to the Crl.Appeal No.1585/05 & R.C.No.1/05.

Medical College Hospital, Thiruvananthapuram. It was further deposed that at 12.30 pm. he examined Pw1 who had an incised penetrated wound 2x0.5x7 cms. on the back left side of the trunk 5 cms. outer to midline. The injury was alleged to have been sustained by stabbing with a knife and that if the injury had penetrated into the internal organ, it would have become fatal and that Ext.P8 and Ext.P7 respectively are the wound certificates issued by him.

19. Pw14, the Professor of Surgery at Medical College Hospital, Thiruvananthapuram, would depose that on 26.3.1999 Pw1 was admitted in Ward No.18 and was treated by him and that Pw1 had a stab injury on the left lumbar region and he was discharged on 3.4.1999 and that Ext.P9 is the discharge certificate issued by him.

20. Pw15 would depose that on 27.3.1999 he was the Medical Officer-in-charge of the Forensic Medicine, Medical College Hospital, Thiruvananthapuram and that he conducted autopsy on the body of Beena and that Ext.P10 is the postmortem certificate issued by him and that Beena Crl.Appeal No.1585/05 & R.C.No.1/05.

had a penetrating injury sustained to abdomen involving internal iliac artery. The injury was on the vital part of the body and was sufficient to cause death in the ordinary course of nature and that the death was due to that injury and Ext.P10 is the postmortem certificate issued by him. The cause of death deposed by Pw15 was not at all challenged.

21. The evidence of Pw1 coupled with the evidence of Pws.3, 13, 14 and 15 supported by Exts.P8 and P10 along with other attendant circumstances would establish that Pw1 had sustained a stab injury at his back and he had undergone treatment at the District Hospital, Kollam and the Medical College Hospital, Thiruvananthapuram. Beena had also sustained stab injury and she was treated at District Hospital, Kollam and referred to the Medical College Hospital, Thiruvananthapuram. While undergoing treatment at Medical College Hospital, she succumbed to the injuries. The evidence of Pw15 would convincingly establish that the death of Beena is a homicide. Crl.Appeal No.1585/05 & R.C.No.1/05.

22. The fact that Pw1 and Beena sustained injury was not disputed by the defence. Whereas the defence version supported by Dw1 is that Pw1 and Beena were the aggressors. According to the defence, when the appellant went to see Dw1 at the house of Pw1 and Beena, the appellant was beaten by Pw1 with a chair. However, there is no case that the appellant sustained any injury or that he had taken any treatment from any hospital for the injury he sustained when beaten with the chair. It is the further case of the appellant that while Pw1 was beating the appellant, Beena brought a knife from the kitchen and handed it over to Pw1, which he waved against the appellant and then the stab stuck at the buttock of Beena. Thereafter, there was fight for the weapon and during the fight it somehow or other struck at Pw1 and thus he sustained injury. The evidence of Pw3, who was

the first man to rush to the spot of occurrence, would show that Beena and Pw1 were lying at the southern courtyard with bleeding injuries. Ext.P3 scene mahazar, wherein Pw3 is an attester, would show Crl.Appeal No.1585/05 & R.C.No.1/05.

that the southern courtyard was stained with blood. On the other hand, there was no blood stain inside the house. The very specific case of Pw1 is that himself and Beena didn't enter the house and they were assaulted by the appellant when they reached the courtyard and that when stabbed, Beena ran to the southern courtyard. That evidence of Pw1 appears to be true. The evidence of Pw3 and the presence of blood stain support the evidence of Pw1 on that aspect. At the same time, the absence of blood stain inside the house and absence of injury on the appellant belie the defence version. The defence version itself would show that the stab to Beena was with force. But Pw1 sustained injury accidentally while fighting for the weapon. The injury found on Pw1 and certified in Ext.P7 which is corroborated with the evidence of Pw13 would show that the injury sustained to Pw1 had a depth of 7 cms. Pw13 had opined that the injury was alleged to have been caused by stabbing with a knife and it could be caused as alleged. There is no suggestion in cross-examination that the injury sustained to Crl.Appeal No.1585/05 & R.C.No.1/05.

Pw1 could be accidentally caused while fighting for weapon. The cause of injury spoken by Pw13 remain unchallenged. So, the medical evidence didn't support the defence version. At the same time it supports the prosecution case.

23. The defence theory being neither believable nor probable, we find that the evidence of Pw1, though not supported by any other independent witness, regarding the injuries sustained, is believable. It is also pertinent to note that the appellant had absconded and despite the investigation made by the investigating officer, he could not be found out and he could be arrested only on 5.8.2003. If Pw1 and Beena were the aggressors and they sustained injuries in the manner stated by the appellant, in the normal course, the appellant who is the brother of Pw1 would not have absconded from the scene. Moreover, he would have provided aid to take Pw1 and deceased Beena to the hospital. He should have attended funeral. The evidence of Pw10 to some extent support the case of the prosecution that the appellant had been absconding. The evidence of Crl.Appeal No.1585/05 & R.C.No.1/05.

Pw10 would show that though under the shade of employment, the appellant was remaining far away from the place and the police could not trace him. So, the fact that the appellant absconded from the scene, that too for a long period indicates the complicity of the appellant with the crime alleged.

24. The evidence of Pw3 would show that from the spot of occurrence Pws.1 and Beena were lifted to the hospital. There is little chance for them to remove the weapon. On the very next day itself, Pw18 went to the spot of occurrence and prepared Ext.P7 scene mahazar. The knife with which Beena and Pw1 were inflicted injury was not found anywhere in the scene. According to Pw19, the appellant stated to him that the knife was thrown into the back water near his house. Though Pw19 made attempts to recover the knife it could not be traced. The evidence of Pw1 would show that when the neighbours rushed to the spot the appellant took to his heels with the knife. That evidence could not

be shaken in cross examination. If the Crl.Appeal No.1585/05 & R.C.No.1/05.

defence story is true, the knife would have been found at the spot of occurrence, because evidently neither Beena nor Pw1 had occasion to remove the knife. Therefore, the evidence of Pw1 that the appellant ran away with the knife appears to be true. The fact that the appellant ran away with the knife soon after the incident also persuades us to find against the appellant.

25. The evidence of Pw19 would show that after the apprehension of the appellant he was interrogated and on the basis of the information given by the appellant that he had thrown away the knife into the 'kayal' (back waters) near his house, Pw19 made attempt to recover the knife. Pw11 was engaged to dive and search. The earnest efforts to recover the knife were in vain. The prosecution had sufficiently explained the reason for its failure to find out the weapon used for the crime. The explanation given by the prosecution appears to be convincing. In the above circumstance, the failure of the prosecution to procure the weapon used for the offence can in no way affect the Crl.Appeal No.1585/05 & R.C.No.1/05.

prosecution case.

26. We had carefully and critically scrutinized the evidence of Pw1 and the evidence of Dw1 as well as defence version, we find that the evidence of Pw1 is credible. Whereas the defence version as well as the evidence of Dw1 especially in the circumstances stated earlier is not at all convincing. Neither it is probable.

27. The prosecution had also established the motive alleged against the appellant. The appellant had been occupying the house owned by Pw1 and late Beena. Though the appellant was requested to vacate the house, the appellant didn't heed. So, Pw1 had first orally complained to the police. But, there was no action. Hence, on the date of occurrence, Ext.P2 complaint was filed. The evidence of Pws.16 & 17 would show that Pw1 had given Ext.P2 complaint to Pw17 and that Pw16 was authorised to enquire and to inform the appellant to report before the police station. The evidence of Pw1, 16 and 17 on that aspect is believable. The evidence of Pw1 would further show that Crl.Appeal No.1585/05 & R.C.No.1/05.

Pw1 and Beena had been to the house soon after the appellant was informed by Pw16 about Ext.P2 complaint. The appellant got angry and that is evident by his uttering before inflicting injuries and the consequent action causing injuries to Pw1 and Beena. The motive is very well established.

28. Pw5, who is the brother of the deceased and his friend Pw4 had deposed that on 16.2.1999 the appellant had been to the house of Pw5 when Beena was there. The appellant told Beena that he was a goonda and Beena was asked to take Pw1 from Kollam. It was also threatened that otherwise the appellant would finish Pw1. The above conduct of the appellant would show that the appellant was badly motivated against Pw1 though not against the deceased Beena.

29. The nature of the injuries sustained to Pw1 would show it was inflicted at a vital part. The weapon pierced into the body to a depth of 7 cms. In the light of the evidence of Pws.4 and 5

regarding the uttering of the Crl.Appeal No.1585/05 & R.C.No.1/05.

appellant a few days before the inflicting of injuries, we fail to find anything lesser than the intention to commit murder of Pw1. The available evidence would show that in fact, Pw1 and Beena were unarmed. They had been seeking recourse through the police to get the house vacated. It is evidenced by the testimony of Pws.16 and 17 supported by Ext.P2. The case of the appellant that he was not in the house and that when he came to the house, Pw1 and Beena, who were inside, attacked the appellant is belied by the evidence of Pws.16 and 17 and by Ext.P2. Even according to the appellant, Pw1 got the knife only after Pw1 started beating the appellant with a chair. That story is also not at all believable. So, we are persuaded to conclude that Pw1 and Beena were unarmed and other than the persistent requests to the appellant to vacate the house and the attempt to evict with the aid of the police, there was no intention on the part of Pw1 and Beena to get the premises vacated by force or assaulting the appellant.

30. While critically analyzing the evidence of Pw1 and Crl.Appeal No.1585/05 & R.C.No.1/05.

searching for the probability of the evidence of Dw1, we balanced the evidence of Pw1 and Dw1 on the golden scale. All circumstances revealed by the evidence on record only support the evidence of Pw1. At the same time, the evidence of Dw1 looks odd. She, being the mother of the appellant and Pw1, was in between devil and sea. She, who hadn't cared to give any statement before the investigating officer, had come up with a new story. If what she deposed is true or probable, Pw1 and Beena were taking law in their hands to vacate the appellant from the house. That theory is belied by Ext.P2 and the evidence of Pw16 and 17. Thus the basic foundation of the evidence of Dw1 itself is collapsed. The other circumstances, which we had discussed earlier, also improbabilise the defence theory. Absconding from the scene with the weapon for pretty long time is a very strong circumstance against the appellant. We find that the court below had rightly rejected the defence theory. We are persuaded by evidence on record to conclude that Pw1 was stabbed by the appellant with Crl.Appeal No.1585/05 & R.C.No.1/05.

intention to commit murder. Attempt to commit murder of Pw1 is proved beyond doubt.

31. The question which then arises is whether there was intention to commit murder of Beena. We had earlier found that the death of Beena was a homicide and the injury leading to the cause of death was caused by the appellant. According to the learned counsel, the appellant had no intention to commit murder of Beena and that the injury was not at all on a vital part and that some how or other, the injury became fatal. It was also submitted that had Beena been given proper treatment in time, the death would not have occurred. The contention that if Beena had been given proper treatment in time, death would not have occurred is devoid of any merit because there is little material on record to come to a conclusion that there was any medical negligence to cause death of Beena. Beena was first taken to the District Hospital, Kollam and from there she was referred to Medical College Hospital, Thiruvananthapuram. The time lag for lifting the injured Crl.Appeal No.1585/05 & R.C.No.1/05.

from one hospital to another can no way be avoided. Other than that time lag, there is nothing on record for the delay in providing the medical aid. So, the contention that Beena could have been saved if timely and proper treatment was given is devoid of merit. Adding to that, in the light of the evidence of Pw15 that the injury was at a vital part and sufficient enough to cause death in the ordinary nature of course, it cannot be heard from the appellant that had timely proper treatment was given, death wouldn't have occurred. According to the learned counsel, if a surgical intervention was done at Kollam, instead of referring to the Medical College, Thiruvananthapuram, life should have been saved. That argument is also devoid of merit.

32. Pw1 was first stabbed by the appellant. When Beena came to rescue she was also stabbed. The intention at the time of infliction of injury to Beena is within the knowledge of the appellant alone. The evidence of Pws.4 and 5 would show that though there was threat against Pw1 the appellant had no intention to commit murder of Beena. Crl.Appeal No.1585/05 & R.C.No.1/05.

33. With the available materials, irrespective of the intention of the appellant as to whether Beena would be murdered or not, there is sufficient material to conclude that Beena was stabbed by the appellant with the intention to inflict injury. The evidence of Pw15 would show that the injury was fatal and it was sufficient to cause death in the ordinary course of nature. According to the learned Public Prosecutor, such being the materials available on record regarding the occurrence, the homicide would come within the third clause of Sec.300 IPC and it would amount to murder punishable under Sec.302 IPC. On the other hand, the learned counsel for the appellant would argue that there was no intention for the appellant to commit murder of Beena and that the inflicting of injury was not premeditated, but inflicted in a sudden heat of passion, and hence it would come within the third exemption of Sec.300 IPC and is liable to be punished only under Part II of Sec.304 IPC.

34. The learned Public Prosecutor canvased our attention to the decisions reported in Virsa Singh v. State of Crl.Appeal No.1585/05 & R.C.No.1/05.

Punjab (AIR 1958 SC 465); Rajwant Singh v. State of Kerala (AIR 1966 SC 1874; Jagrup Singh v. State of Haryana (AIR 1981(3) SCC 616). On the other hand, the learned counsel for the appellant canvased our attention to the decisions reported in Harjinder Singh v. Delhi Administration (AIR 1968 SC 867); Laxman Kalu v. State of Maharashtra (AIR 1968 SC 1390); Guljar Hussain v. State of UP (1992 Crl.L.J. 3659; Sebastian @ Kunju v. State (1992(2) KLJ 295), Parusuraman v. State of Tamil Nadu (1992 Crl.L.J. 3939), Bhera v. State of Rajastan (2000(10) SCC 225 and Lakshminath v. State of Chhatisgarh (2009(3) SCC 519).

35. In Virsa Singh's case, the accused thrust a spear into the abdomen of the deceased with such force that it penetrated the bowels and the coils of the intestine came out of the wound and that digested food oozed out from cuts in three places. It was held that it is a case coming under Clause 3 of Sec.300 and that the essentials to be proved for the application to Sec.300 are; (i) it must establish, quite objectively, that a bodily injury is present; (ii) the nature of Crl.Appeal No.1585/05 & R.C.No.1/05.

the injury must be proved; (iii) it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended. Once these three elements are proved, lastly it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. Once these four elements are established by the prosecution, the offence is murder under "thirdly" of Sec.300 IPC and it does not matter that there was no intention to cause death or that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature.

36. In Rajwant Singh's case, referring to the ratio of the decision in Virsa Singh's case, it was held that it must be established objectively as to what the nature of that injury in the ordinary course of nature is? If the injury is found to be sufficient to cause death one test is satisfied. Then it must be proved that there was an intention to inflict Crl.Appeal No.1585/05 & R.C.No.1/05.

that very injury and not some other injury and that it was not accidental or unintentional. If this is also held against the offender the offence of murder is established. According to the learned Public Prosecutor, the prosecution had proved the above essentials and it is a clear case of murder punishable under Sec.302 IPC.

37. In Harjinder Singh's case, it was held that if the intention of the accused to inflict the particular injury on the particular place was not proved, Sec.300 'thirdly' could not be applied. In Laxman Kalu's case, there was only one injury and it was found that there was no intention to cause death, though the accused had knowledge that the act was likely to cause death. Hence it was held that thirdly of Sec.300 of the Indian Penal Code does not cover and it could not be said that the death was intended and that it would come within the third part of Sec.299 IPC and would be punishable under the second part of Sec.304 and not under Sec.302 IPC.

38. In Jagrup Singh's case, a single blow was inflicted Crl.Appeal No.1585/05 & R.C.No.1/05.

by the accused, in the heat of moment in a sudden fight with blunt side of gandhala on the head of the deceased causing his death - injury sufficient in the ordinary course of nature to cause death, but the intention to cause such injury not clearly made out - held - clause 'thirdly' of Sec.300 was not applicable and the offence was held to fall under Exemption 4 of Sec.300 IPC. Conviction under Sec.302 IPC was altered to one under Sec.304 Part II.

39. In Gujar Hussain's case, there was only one fatal blow, accused did not repeat the blow, though nothing stopped him. In the circumstances, conviction under Sec.302 was altered to Section 304 Part I. In Sebastian's case, the accused brandished knife at the victim causing fatal injuries. It was held that clause 'thirdly' of Sec.300 is not attracted, offence under Sec.304 IPC was made out.

40. Parusuraman's case, participation of accused persons in occurrence resulting in the death of victim was proved. Most of the injuries however, found on body of deceased were external and on lower legs and arms. It was Crl.Appeal No.1585/05 & R.C.No.1/05.

held, intention of accused was to cause grievous hurt and not murder. Conviction altered from 302 IPC to Sec.304, Part I.

41. In Bhera's case, accused and deceased while quarrelling, accused in anger suddenly took out a knife and gave blow on the chest of the deceased which resulted in his death. Held, it cannot be said that the accused gave the knife blow with the requisite intention of causing murder of the deceased. Hence, offence would be one under Sec.304 Part II and not under Sec.302 IPC. In Laxminath's case, death of deceased was due to shot of an arrow by appellant- accused. It was held that there was no intention to cause death. The conviction was altered to Sec.304 IPC Part I.

42. In the instant case, the appellant inflicted a stab injury on Pw1. Seeing that Pw1 was being hurt, Beena came to rescue. In the heat of passion, Beena was also stabbed. It fell at the buttock. Beena ran. The appellant followed her and kicked her. As a result, she fell down. Though the appellant could stab her again, he didn't. The Crl.Appeal No.1585/05 & R.C.No.1/05.

stab cut iliac artery, caused bleeding which resulted in the death. Injury was neither intended nor inflicted targeting a vital part. But, it struck at the buttock. The injury was sufficient to cause death in the ordinary course of nature and the victim succumbed to the injuries. Our considered view is that there was no intention to cause death, but the intention was only to inflict injuries to Beena. Therefore, no offence under Sec.302 IPC was established, but only an offence under Sec.304 IPC, Part II was established. Conviction under Sec.302 IPC is liable to be altered to Sec.304 IPC, Part II. We do so.

43. Having due regard to the facts and circumstances of the case, we find that a sentence of rigorous imprisonment for a period of ten years for offence under Sec.304 Part II with a fine of Rs.One lakh would meet the ends of justice. In default of payment of fine, the appellant shall under go simple imprisonment for a further period of two years. The sentence awarded by the lower court for offence under Sec.307 IPC for attempting to commit murder Crl.Appeal No.1585/05 & R.C.No.1/05.

of Pw1 is just and reasonable and requires no modification.

44. In the result, the appeal is allowed in part. While altering conviction under Section 302 IPC to one under Sec.304 Part II, the conviction and sentence under Sec.307 IPC are confirmed. The appellant is sentenced to pay a fine of Rs.One lakh and rigorous imprisonment for ten years under Sec.304 Part II IPC. In default of payment of fine, the appellant shall undergo simple imprisonment for a further period of two years. Substantive sentences shall run concurrently. Appellant shall surrender before the trial court forthwith for execution. Lower court shall see the execution and report compliance.

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45. Section 302 IPC provides only two mode of sentences, one, the maximum - death, the other, the minimum - imprisonment for life. It does not prescribe any other mode of sentence. The sentence of rigorous imprisonment for ten years awarded by the learned Addl.Sessions Judge for offence under

Sec.302 IPC is not Crl.Appeal No.1585/05 & R.C.No.1/05.

the one provided by the Penal Code. It is illegal and not sustainable. The learned Addl.Sessions Judge ought to have born in mind that punishment is a sanction imposed on an offender for the infringement of law committed by him. Once a person is found guilty it is the duty of the Court to impose such sentence as is prescribed by law. Every Judge must be conscious and mindful of proportion between an offence committed and penalty imposed. So also, its impact on the society and the victim of the crime in particular. Once an assailant is found guilty, due sentence shall be given according to the law. Undeserving sympathy would give disastrous results. It will make the system ridiculous.

46. The object of punishment has been succinctly stated in Halsbury's Laws of England (4th Edition; Vol.II; para.482) thus:

> "The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims.

The retributive element is intended to show public revulsion to the offence and to punish Crl.Appeal No.1585/05 & R.C.No.1/05.

the offender for his wrong conduct. The concept of justice as an aim of punishment means both that the punishment should fit the offence and also that like offences should receive similar punishments. An increasingly important aspect of punishment is deterrence and sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law. The importance of reformation of the offender is shown by the growing emphasis laid upon it by much modern legislation, but judicial opinion towards this particular aim is varied and rehabilitation will not usually be accorded precedence over deterrence. The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary consideration when sentences are being decided."

In B.G.Goswami v. Delhi Administration, [(1974) 3 SCC 85 : AIR 1973 SC 1457], the Apex Court stated thus:

> "Now the question of sentence is always a difficult question, requiring as it does, proper adjustment and balancing of various considerations which weigh with a judicial mind in determining its appropriate quantum in a given case. The main purpose of the sentence broadly stated is that the accused must realise that he has committed an act which is not only harmful to the society of which he forms an integral part but is also harmful to his own future, both as an Crl.Appeal No.1585/05 & R.C.No.1/05.
>
> individual and as a member of the society. Punishment is designed to protect society by deterring potential offenders as also by preventing the guilty party from repeating

> the offence; it is also designed to reform the offender and re-claim him as a law abiding citizen for the good of the society as a whole. Reformatory, deterrent and punitive aspects of punishment thus play their due part in judicial thinking while determining this question. In modern civilized societies, however, reformatory aspect is being given somewhat greater importance. Too lenient as well as too harsh sentences both lose their efficaciousness. One does not deter and the other may frustrate thereby making the offender a hardened criminal."

In Dinesh v. State of Rajasthan [(2006) 3 SCC 771 : AIR 2006 SCW 1123], it is held:

"An undeserved indulgence or liberal attitude in not awarding adequate sentence in such cases would amount to allowing or even to encouraging 'potential criminals'. The society can no longer endure under such serious threats. Courts must hear the loud cry for justice by society in cases of heinous crime of rape and impose adequate sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court."

In this case, the learned Addl.Sessions Judge forgot the necessity of awarding due sentence. He had shown undue Crl.Appeal No.1585/05 & R.C.No.1/05.

leniency in awarding a sentence lesser than the minimum sentence, that too, after finding that the appellant deserved no leniency and liable to be punished deterrently. He had assigned no reason to award a lesser sentence. The sentence awarded for offence under Sec.302 IPC is illegal. But in view of our finding in appeal that the conviction under Sec.302 is to be altered to one Sec.304 Part II and we having been found that a sentence of rigorous imprisonment for ten years with fine would meet the ends of justice, no separate order is warranted in this Revision Case. Accordingly, the Revision Case is disposed of. We hope that the learned Addl.Sessions Judge would take lessons.

K.BALAKRISHNAN NAIR, JUDGE P.S.GOPINATHAN, JUDGE Kvs/-