CASE NO.:
Appeal (crl.) 1535 of 2007

PETITIONER:
Thankachan & Anr

RESPONDENT:
State of Kerala

DATE OF JUDGMENT: 13/11/2007

BENCH:
Dr. ARIJIT PASAYAT & P. SATHASIVAM

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NO. 1535 OF 2007
(Arising out of SLP (Crl.) No.3646 of 2006)

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the order passed by a Division Bench of the Kerala High Court, dismissing the appeal filed by the appellants who were described as A2 and A3 indicating their position before the trial court, while allowing the appeals filed by the two other accused persons (A1 and A4).

3. The conviction of the appellants for offence punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC') and sentence of imprisonment for life and a fine of Rs.20,000/- with default stipulation was upheld.

4. The prosecution version in a nutshell is as follows:

On 7.2.1997 at or about 6.45 p.m. at Ayamkudy Kara in Muttuchira Village of Vaikom Taluk in Kotayam District, the 4th accused came driving his goods autorickshaw (pick-u-auto) along with A1 to A3 in the said goods carrier and pulled up in front of Marangattil House of Sathyadevan @ Sahadevan @ Sahadi (hereinafter referred to as the 'deceased'). The deceased was the driver of a mini lorry. A2 straight away went over to the deceased who was sitting along with PW2 in the varanda of his house. A2 caught hold of the deceased by the tuck of his dhoti and dragged him on to the Ezhumanthuruthi Kapoola road in front. The deceased picked up a soda bottle from the parapet of his house. Seeing this A2 went and picked a soda bottle from the adjacent grocery shop run by Rajamma (PW 7), the wife of the deceased and came on to the road. From the southern mud road (road margin) in front of the aforesaid grocery shop, A2 struck the deceased on the head with the soda bottle. Then the deceased also hit A2 on the head with the soda bottle in his hand and inflicted an injury. Seeing this A2 sprinkled chilly powder on the eyes of the deceased. The chilly powder got into the eyes of the deceased who stood there with both hands held against his face and rubbing his eyes. A1 then exhorted his companions to cut Sahadevan to death. Thereupon A2 drew a chopper from inside his shirt and cut the deceased on his head inflicting injuries. A3 stabbed the deceased on his right arm with a knife inflicting injury. A4

then cut the deceased on the back of his head with a chopper. The deceased fell on the road and was taken by PWs.1, 2 and 8 to the Kottayam Medical College Hospital. The deceased who had become unconscious on account of the injuries sustained by him succumbed to the same at about 2.10 p.m. on 8.2.1997. Since the aforesaid acts were done by A1 to A4 in prosecution of their common intention to do so, the accused persons were charged for having committed the offence of murder punishable under Section 302 read with Section 34 IPC.

On the accused pleading not guilty to the charge framed against them by the court below for the aforementioned offence, the prosecution was permitted to adduce evidence in support of its case. The prosecution examined 16 witnesses as PWs 1 to 16 and got marked 17 documents as Exts. P1 to P17 and 8 material objects as Mos. 1 to 8.

After the closure of the prosecution's evidence the accused were questioned under Section 313(1) of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') with regard to the incriminating circumstances appearing against them in the evidence for the prosecution. They denied those circumstances and maintained their innocence. They admitted that Exts. P16 and P17 are the wound certificates pertaining to A2 and A3 respectively.

When called upon to enter on their defence, the accused examined the Secretary of the Ayamkudy Branch of KPMS as DW1.

5. Placing reliance on the evidence of PWs 2, 3, 7 and 8 the trial Court recorded conviction. As noted above, appeal was preferred before the High Court by all the four accused persons, and the appeal filed by the present appellants was dismissed while that of co-accused was allowed.

6. In support of the appeal learned counsel for the appellant submitted even if prosecution version accepted in toto offence under Section 302 IPC is not made out. As a matter of fact it is the prosecution version that the deceased first assaulted appellant no.1 with a broken bottle and caused several injuries.

7. Learned counsel for the respondent on the other hand submitted that the trial Court and the High Court have rightly found the accused persons guilty of offence punishable under Section 302 IPC.

8. In essence the stand of learned counsel for the appellant is that Exception IV to Section 304 IPC would apply to the facts of the case.

9. For bringing in operation of Exception 4 to Section 300 IPC, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

10. The Fourth Exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution not covered by the First Exception, after which its place would have been more appropriate. The Exception is

founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two or mo re persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and that there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

11. The above position is highlighted in Sandhya Jadhav v. State of Maharashtra (2006) 4 SCC 653).

12. Considering the background facts, appropriate conviction would be under Section 304 Part I IPC and not Section 302 IPC. The conviction is accordingly altered. Custodial sentence of ten years would suffice. Fine amount is reduced to Rs.5,000/-. In case fine is not paid, default sentence would be two years.

13. Appeal is allowed to the aforesaid extent.