

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 216 OF 2005

Moidenkutty ...Appellant

Versus

State of Kerala ...Respondent

O R D E R

This appeal is directed against the judgment and order dated 23.9.2004 passed by a Division Bench of the High Court of Kerala in CrI.A.No. 974/2004 whereby and whereunder the appeal preferred by the appellant herein from the judgment of conviction and sentence dated 11.6.2004 passed by the Additional Sessions Court (Fast Track Court No.1), Manjeri in S.C.No.23/2000 was allowed in part.

The deceased is the brother of the appellant herein. They were living with their parents and sister in the 'tharavad' house. It appears that the accused and the appellant were living in different premises only at a little distance. The house of the accused-appellant is closer to their family house than the house of the deceased.

The incident appears to have taken place at about 9 p.m. on 19.7.1998. The motive therefor is said to be not only a property dispute between the brothers but also discovery by the appellant that the deceased-Hussain peeped into the bathroom where the daughter-in-law of the accused-appellant was taking bath. It is also alleged in the First Information Report that in regard to the said incident the

wife of the appellant had quarrelled with the deceased. The appellant had asked the deceased not to enter into his house resulting in an altercation. However, they were separated at that time by their father.

It appears from the records that for serving dinner to his parents he came late on that date with some sweets and placed the same on the doorsteps of the house. The deceased again started quarrelling with the accused asking as to why he was asked not to enter his house. He caught hold of the collar of the accused and made attempts to assault him with a stick, which was concealed under his shirt. Allegedly, at that point of time, the appellant stabbed him twice resulting in his death.

The father of the appellant died during pendency of the matter before the trial Court. The mother(P.W.1) of the appellant, who was examined by the prosecution was declared hostile. The sister of the appellant appears to have lost her mental balance.

Although, the mother of the appellant was declared hostile and despite the fact that no other person had witnessed the occurrence, a judgment of conviction and sentence for commission of an offence under Section 302 I.P.C. was recorded by the Addl.District & Sessions Judge(Fast Track Court), Manjeri.

The High Court, however, in an appeal preferred by the appellant opined that from the materials on record it was evident that the deceased had been waiting with a stick in the 'tharavad' house for the accused to come and when he came, he wanted to assault him and as the incident had happened at that point of time, the appellant committed an offence under Section 304 Part 1 I.P.C. On that finding

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conviction and sentence under Section 302 I.P.C. was set aside. The High Court sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 5,000/-.

Although, the State has not preferred any appeal against the judgment of the High Court, we have been taken through the materials on record and keeping in view the facts and circumstances of this case, we do not find any reason to differ with the view of the High Court.

The only question which arises for consideration is the quantum of sentence.

It is stated at the Bar that the appellant has been in custody for about five years. We, therefore, are of the opinion that the interest of justice would be subserved if the appeal is allowed in part modifying the sentence to the period already undergone by the appellant. It is directed accordingly. If the appellant is in custody, he may be released forthwith unless wanted in connection with any other case.

.....J.

[S.B. SINHA]

.....J

[CYRIAC JOSEPH]

New Delhi,
August 28, 2008.