(1993) 09 KL CK 0028

High Court Of Kerala

Case No: Criminal Appeal No. 136 of 1990

Antony		APPELLANT
	Vs	
State of Kerala		RESPONDENT

Date of Decision: Sept. 17, 1993

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 157, 313
- Evidence Act, 1872 - Section 27
- Penal Code, 1860 (IPC) - Section 299, 302, 324

Citation: (1993) 2 KLJ 1096

Hon'ble Judges: P.A. Mohammed, J; L. Manoharan, J

Bench: Division Bench

Advocate: Sali Thomas, for the Appellant; M. Retna Singh, Director General of Prosecution, for the Respondent

Final Decision: Dismissed

Judgement

P.A. Mohammed, J.
The accused in Sessions Case No. 147 of 1989 on the file of the Sessions Court, Thiruvananthapuram is the Appellant. He was convicted under Sections 302 and 324 I.P.C. and hence he was sentenced to undergo imprisonment for life for offence u/s 302 I.P.C. and rigorous imprisonment for six months for offence u/s 324 I.P.C. The said conviction and sentence are being challenged by the accused in the present appeal.

2. The prosecution case can be summarised thus: On 14th February, 1989 at about 7.30 a.m. P.W. 1 Subhadra and her niece P.W. 2 Ambika went near the side of a canal in front of their house. While P.W. 1 was brushing her teeth, the accused hurled a tirade of abuses at her from outside his house which was located on the other side of the canal. P.W. 1 aptly retorted. Raju (deceased) who was then coming from western side of the canal, hearing the filthy words, asked the accused to stop

hurling of abuses at P.W. 1. This was resented to by the accused. Then he rushed to his house and came out with M.O. 1 iron rod. Accused then walked along the bund and came near to Raju and hit him a with the iron rod causing injury on his head. Seeing this P.Ws. 1 and 2 rushed near to Raju and the accused thereupon beat P.W. 1 also with iron rod causing injury on her head. He also beat P.W. 2 though she craved him with folded arms not to harm them. P.W.2 had sustained bleeding injury. P.W. 3 and Ors. made arrangements to remove the injured Raju, P.W. 1 and P.W. 2. They were taken to Vithura Police station. P.W. 8 Head Constable recorded Ext. P-1 F.I. statement from P.W. 1, on the basis of which Ext. P-1 (d) F.I.R. was registered. All the three injured were sent to local hospital with Ext. P-6 requisition. They were attended to by P.W. 5 doctor, who issued Exhibits P-3 to P-5 wound certificates. Raju and P.W. 1 were then referred to Medical College hospital. P.W. 10 doctor treated Raju, but he could not be saved though proper treatment was given. Finally the tragic end had come abruptly; Raju died on 16th February, 1989. P.W. 9 Sub Inspector of Police went to Medical College hospital prior to the death of Raju and recorded his statement. P.W. 6 conducted autopsy and issued Ext. P-7 certificate. P.W. 9 conducted investigation initially and after the death of Raju, investigation was taken over by P.W. 11, Circle Inspector of Police. He arrested the accused on 3rd March, 1989. Pursuant to the information supplied by the accused M.O. 1 iron rod was recovered from the place where it was concealed, as per Ext. P-9 recovery mahazar. P.W. 12, after completing the investigation, laid the charge against the accused before the Magistrate''s Court. Then the case was committed to the Sessions Court, Thiruvananthapuram.

3. The defence case as brought out in the examination of accused u/s 313 Code of Criminal Procedure can be stated thus: P.Ws. 1 and 2 and their relatives came to the house of the accused and hurled abuses. Then the accused asked them to go away and at that time Raju came to the scene and shotted at the accused and went into the house of the accused. Then there was ''push and pull'' between Raju, P.W. 1 and P.W. 2 on the one side and the accused on the other. P.W. 1, deceased Raju and accused fell into the canal and all of them thus sustained injuries. Accused got up and went away to his place of work. What happened thereafter the accused did not know.

4. The prosecution primarily relied on the evidence of P.Ws. 1 and 2 to prove the prosecution case. Reliance was also placed on the evidence of P.W. 3 by the prosecution. P.W. 1 and P.W. 2 were there at the scene at the time of occurrence. P.W. 1 has deposed that she had seen the accused coming with an iron-rod from his house and beating the deceased. When she went forward to save the deceased the accused beat her too on her head. She added that on seeing this P.W. 3 Ambika came to the scene and the accused beat her with M.O. 1, on her hands. P.W. 2 Ambika deposed that she had witnessed the accused beating the deceased with an iron rod while she was standing near the canal along with P.W. 1. When P.W. 1 rashed near the accused she was also hit by the accused with M.O. 1 iron rod on her

head. P.W. 2 further adds that on seeing this cruel attacks she also rushed to the side of the deceased. When she craved for not to kill them, accused beat on her hands.

5. Thus the evidence of P.Ws. 1 and 2 sufficiently corroborates each other in all material particulars regarding the incident. Their evidence has been made, subject to careful and cautious scrutiny in all respects and after doing so this Court finds that there is no reason to disbelieve them in any manner. They are natural and reliable witnesses whi have narrated the entire incident in which they themselves have suffered injuries. It is no doubt true that P.Ws. 1 and 2 are related to the deceased. When the witnesses are otherwise found to be reliable there is no justification for discrediting their evidence on the ground that they are related to the deceased. What all that is necessary is that evidence of interested or related witnesses should be subjected to a Very careful scrutiny with extreme care and caution as observed by the Supreme Court in State of U.P. Vs. Vinod Kumar (Dead) and Udai Bhan Singh, . P.W. 3 very sufficiently witnessed the entire incident where the deceased, P.W. 1 and P.W. 2 were beaten up by the accused with M.O. 1 iron rod. This is a marvellous piece of evidence which corroborates the testimony of P.Ws. 1 and 2. P.W. 3 is said to be a relative of accused who have no axe to grind against him. He is an independent witness who has narrated the true version of the incident.

6. The statements contained in Ext. P-1 sufficiently corroborates the testimony of P.Ws. 1 to 3. Ext. P-1 was lodged at 8 a.m. on 14th February 1989, that is to say, within half an hour of the incident. It was no doubt made ''eo instanti'' leaving no space for manipulation or embelishment. of course, it reached the Magistrate''s court only on the third day in the regular course of official transaction. The accused has no case that Ext. P-1 was concocted. It is pertinent to note that the investigation in this case was commenced on the basis of Ext. P-1 statement. The genuineness of Ext. P-1 cannot be scrupled in view of the testimony of P.W. 5 doctor that she had examined the deceased, P.W. 1 and P.W. 2 on 14th February 1989 at 8.30 a.m. when they were sent to the hospital with Ext. P-6 requisition issued by the police on the same day. Ext. P-3 to P-6 bear the crime number also. Nevertheless it was contendeathat the entire investigation was tainted inasmuch as there was delay in receipt of Ext. P-1 by the Magistrate. We do not find our way to agree with this submission. It is a settled law that the first information report is not substantive evidence which is ''fait accompli''. But its corroborative value cannot be minimised. "It can be used only to contradict the maker thereof or for corroborating his evidence and also to show that the implication of the accused was not an afterthought". This is what the Supreme Court said in Malkiat Singh and Others Vs. State of Punjab, . The oral evidence of P.Ws. 1 to 3 is a forte for prosecution; that itself will be sufficient to prove the guilt of the assailant which it is surpassingly proved. of course, the report contemplated u/s 157 of the Code of Criminal Procedure shall be sent forthwith by the police officer to the Magistrate empowered

to take congnizance of the offence. The purpose of this swift action is intended to keep the Magistrate well informed of the various stages of the investigation of such cognizable offence so that effective control can be exercised on the investigating agencies. This is what the Supreme Court said in Pala Singh and Another Vs. State of Punjab, But when, there is extreme promptness in lodging the F.I.R. and investigation itself commences on the basis of the said report it cannot be said that the delay in the receipt of the F.I.R. by the Magistrate is in any way fatal to the prosecution case. In the decision last hereinbefore referred to, the apex court further said;

But when we find in this case that the F.I.R. was actually recorded without delay and the investigation started on the basis of that F.I.R. and there is no other infirmity brought to our notice, then, however improper or objectionable the delayed receipt of the report of the Magistrate concerned it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable.

7. The ocular evidence of P.Ws. 1 to 3 in this case would convincingly establish that this is a case of homicide. It is further proved that the Appellant had inflicted injuries on the body of the deceased with M.O. 1 iron rod. Then the next question that falls for consideration is whether the death of Raju was caused as a result of the injuries inflicted by the Appellant with M.O. 1. It is the paramount duty of the prosecution to establish that the injuries inflicted by the accused are sufficient in the ordinary course of nature to cause death or likely to cause death inasmuch as the intention or knowledge of the person is to be gathered only from the nature of the injuries. This requirement cannot under any circumstances be dispensed with for the reason that an offence of culpable homicide u/s 299 I.P.C. would be attracted only when a person causes death by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death. In the present case Ext. P-7 is the post-mortem certificate issued by P.W. 6 doctor. The injury No. 1 described therein is this:

Contusion 13x9x0.7 involving the scalp on the left side of head 6 cm. to the left of midline and just above the ear. Temporalis muscle was contused. Comminuted fracture 9.5x5 c.m. involving the left parietal and adjacent temporal bones which showed a depression of 0.5 cm. at its posterior back end. Extradural blood clot 15x8.5x1 cm. seen under the fracture site extending to the frontal region with corresponding. indentation of dura and brain. Laceration 2.5x2x0.5 cm. involving the tip of frontal lobe of brain on the left side. Pons showed an area of haemorrhage measuring 1.5x0.3 cm. Brain (1500 gm) showed signs of raised intracranial tension.

This injury on the head of the deceased is fatal and had caused damage to the brain resulting in raised intracranial tension. P.W. 6 doctor is definite in her opinion that the deceased died of blunt injury sustained to the head (injury No. 1). While in witness box P.W. 6 reiterated this opinion and further added that injury No. 1 is

sufficient in the ordinary course of nature to cause death She has also deposed that hitting with a weapon like M.O. 1 can cause injury No. 1. The evidence of P.W. 5 and P.W. 10 also supports the opinion given by P.W. 6. Thus we are of the firm view that the prosecution has succeeded in establishing the nature of the injuries from which alone the intention of the accused can be gathered The inevitable conclusion is that the Appellant had caused the death of the deceased by inflicting bodily injury which is sufficient in the ordinary course of nature to cause death. The cumulative result is that the offence in this case is culpable homicide amounting, to murder attracting punishment u/s 302 I.P.C.

8. However, it was argued that injury No. 1 caused on the left side of the head of the deceased was not explained by P.Ws. 1 to 3 and therefore their evidence is to be discarded It is arduous for this Court to accept this argument advanced by learned Counsel for the Appellant Injury No. 1 is a contusion 13x9x7 cm. on the left side of the head and 6 cms. to the left of the midline and just above the ear. P.Ws. 1 to 3 in their evidence pointed out that the deceased was beaten up on his left side of the face by the accused with M.O. 1 iron rod Injury No. 1 is found just above the left ear. Witnesses are watching the incident with a perplexed mind at a short distance away from the actual scene of occurrence All the witnesses are certain and definite that the hitting was on the left side; may be on the face or ear or head The beating by the accused is sufficiently witnessed by all the eye witnesses in the case. Even if there is any minor discrepancy or omission in the narration of the incident by the witnesses, it cannot be said to be fatal to the prosecution case.

The Division Bench of this Court in Rajayyan Samuvel v. State of Kerala 1992 (2) KLT 234, where one of us was a member (P.A. Mohammed, J.) held:

There will naturally be discrepancies, or omissions while narrating the facts of the whole story. Even in the case of a single incident, when witnesses give narration, discrepancies and omissions usually occur. It all depends on how the mind of each witness absorbed the incident and how he can recollect and reproduce it. Naturally we have to give some allowance for human frailities while evaluating the evidence of witnesses.

9. From the statement of the Appellant u/s 313, it would evince that a plea of self defence was attempted to be raised. When such a plea is urged by the accused in some form or other it cannot be simply brused aside however feeble the plea may be. The reason is obvious that even if an accused does not plead self-defence it is always open to the court to consider such plea if the same arises from the material on record. of course, the burden of discharging that plea is on the accused and it is a settled position that it can be discharged by showing preponderance of probabilities in favour of that plea from the entire evidence available in the case. The circumstances that could be seen in this regard in the statement u/s 313 are that P.Ws. 1 and 2 and their relatives went to the house of the accused and hurled abuses and that deceased Raju and accused fell into the canal in consequence of

push and pull between them. The oral evidence available in this case does not support these circumstances at all. The accused has no case that the deceased and P.Ws. 1 and 2 went to his house armed with weapons. No medical evidence is available to show that the deceased had sustained injuries due to falling into the canal. Though the accused stated that he had also b sustained injuries due to the falling into the canal, no evidence in this regard was made available. The Division fcnch of this Court in Sankar Rai v. State of Kerala ILR 1992 Ker 529 where one of us was a member (L. Manoharan, J.) held:

Though the burden on the accused in pleading self defence is not that high as prosecution''s burden to establish its case against the accused, it is nevertheless important and cannot be based on mere surmises or stray suggestions.

In the present case too there are certain stray suggestions to build up a case of self-defence. That by itself will be insufficient. Even by testing the plea on the basis of preponderance of probabilities it would be difficult for this Court to countenance the argument based on that plea.

10. of course, learned Counsel for the Appellant raised certain criticism against the manner of recovery of M.O. 1. Even though the recovery of M.O. 1 u/s 27 of the Evidence Act as such cannot be relied on, inasmuch as there is no authorship of the concealment its evidentiary value cannot be totally ruled out. The medical evidence in this regard is very relevant. P.Ws. 5 and 6 doctors deposed that beating with M.O. 1 could have caused the injuries found, on the person of the deceased. This is also supported by ocular evidence of P.Ws. 1 to 3.

11. We do not propose to rely on the dying declaration available in this case. Ext. P-2 is said to be a statement of the deceased narrated to P.W. 9. Deceased had sustained head injury with fracture of the skull bone. It would reveal that P.W. 9 had questioned the deceased without ascertaining from the doctor whether the deceased was capable to give a declaration in that stage of having grievous injuries.

12. In view of what is stated above, the ineluctable conclusion is that the accused with an intention to cause death inflicted the injuries on the deceased with M.O. 1, which injuries in the ordinary course of nature, were sufficient to cause death. Therefore, we confirm the conviction and sentence passed against the accused. The appeal is accordingly dismissed.