Raghunathan Vs State of Kerala

Court: High Court Of Kerala

Date of Decision: Oct. 12, 2001

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 145, 161
Evidence Act, 1872 â€" Section 27
Juvenile Justice (Care and Protection of Children) Act, 2000 â€" Section 14, 3
Penal Code, 1860 (IPC) â€" Section 302, 304, 307, 324, 34
Probation of Offenders Act, 1958 â€" Section 4, 6

Hon'ble Judges: K. Padmanabhan Nair, J; J.B. Koshy, J

Bench: Division Bench

Advocate: P. Vijaya Bhanu, for the Appellant; P.V. Madhavan Nambiar, Director General of Prosecutions, for the Respondent

Judgement

J.B.Koshy, J.
Appellants in Crl.Appeal No.161/97 were accused in Sessions Case No.48/93 on the file of the 1st Addl.Sessions Court,

Palakkad. They were charge-sheeted for offences punishable under Sections 307 and 302 read with Section 34 of the Indian Penal Code. After

trial, first accused was convicted and sentenced to undergo rigorous imprisonment for a period of four years u/s 304 Part II IPC. Second accused

was convicted and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs. 10,000/- and in default of payment of fine to

undergo rigorous imprisonment for a further period of six months u/s 324 of IPC. Challenging the conviction and sentence passed in the case,

accused filed Crl. Appeal No. 161/97. Not satisfied with the conviction and sentence, State filed Crl. Appeal No. 404/98. Father and mother of

the deceased, PWs. 2 and 3, filed Crl.R.P.No. 795/97.

2. First accused is the son of the second accused. PW1 and the deceased Vijayakumaran are the children of PWs. 2 and 3. Second accused is the

brother of PW3. There was a dispute between the deceased Vijaykumaran and the second accused, his maternal uncle in respect of the right and

possession over 30 cents of land known as "Pillathodi Paramba". Proceedings u/s 145 of the Code of Criminal Procedure were pending before

the Sub Divisional Magistrate, ottapalam in respect of the said property apart from civil case. There were several other cases also between the

parties in respect of the same property. The case of the prosecution is that on 20.4.1992 at about 8.45 a.m., accused 1 and 2 trespassed into the

disputed property and started doing some agricultural work. On seeing this PW1 Sukumaran and deceased Vijayakumaran went to the disputed

property and questioned the accused. It resulted in a quarrel between the father and son (A1 and A2) on the one side and PW1 and the deceased

Vijayakumaran, brothers, on the other side. Then second accused beat PW1 with a pic axe (MO1). But, that blow was not successful as he

avoided the hitting. Then, the second accused directed his son, first accused, to kill Vijayakumaran and then first accused after removing the blade

from the spade beat Vijakumaran on his head with the handle of the spade. As a result of the blow with the handle of the spade, Vijayakumaran

sustained fatal injuries. Then, the second accused beat PW1 with the pick axe (MO1). Second accused against hit PW1 with MO1 pick axe and

thereby PW1 sustained injuries. On seeing the accused attempting to attack PW1 again, he ran away from the scene of occurrence and on hearing

his cry, his parents PWs. 2 and 3, came out of their house. On getting the information regarding the injuries sustained by Vijayakumaran, they came

to the scene of occurrence alongwith PW1 and they saw Vijaykumaran lying unconscious. PW3 lifted the head of the deceased and placed on her

lap and PWs. 1 and 2 left the place for getting a jeep and also for getting assistance of some people for taking the injured Vijayakumaran to the

hospital. PW2 informed PW4 Kuttan Nair for getting assistance of some people for taking Vijaykumaran from the scene of occurrence. he also

telephoned to Vaniamkulam and Ottapalam for getting a jeep. PWs. 4 and 5 and two other persons came to the house of PW2 and with the

assistance of PW5 and two others, Vijayakumaran was taken from the scene of occurrence to his house. Later, PW4 went to Kolapulli and

brought a jeep and injured PW1 and Vijayakumaran were taken to the Government Hospital, Ottapalam. The Doctor at the Government Hospital,

Ottappalam, on examination, declared that Vijayakumaran was dead. PW1 was treated as an out-patient. On getting intimation from the

Government Hospital, Ottapalam, police came to the hospital and recorded Ext. P1 First Information Statement given by PW1 and on the basis of

that FI statement Ext. P35 transfer FIR was registered by the Ottampalm police and that FIR was transferred to Cheruplulassery police station

since the place of incident was within the Cherupluassery police station. On getting the transfer F.I.R., the Cherupulassery police registered

Ext.P38 FIR. PW.25, Circle Inspector of Police, Ottapalam conducted the investigation. Prosecution examined PWs. 1 and 25 and marked Exts.

P1 to P15. MOs. 1 to 8 were also marked on the side of the prosecution. Defence examined DWs. 1 to 7 and marked Exts. D1 to D18.

3. As far as the evidence is concerned, most important witness is PW.1. He was not only the brother of the deceased who was present at the

scene of occurrence, he was also an injured witness and it is he who gave the first information statement Ext.P1. He deposed that on 20.4.1992,

while he was standing at the gate of their courtyard alongwith his brother, he saw accused 1 and 2 on the disputed property with pick axe and

spade (MOs. 1 and 2), that on seeing them on the disputed property, he alongwith his brother went there and asked why they entered into the

disputed property. That ensued a quarrel. Then second accused hit PW1 with a pick axe and when the hit was avoided, at the instigation of the

second accused, a blow was given by the first accused on the head of Vijayakumaran with the handle of the spade and thereby Vijaykumaran

sustained fatal injuries and he fell down. According to PW.1, first accused beat Vijaykumaran with the handle of the spade and thereby

Vijayakumaran sustained fatal injuries and he fell down. According to PW.1, first accused beat Vijaykumaran with the handle of the spade after

removing the blade. Thereafter, Vijakumaran was beaten by a pick axe on the right side of this head and he sustained injury. Thereafter, he ran

away from the scene of occurrence seeing the attempt of the accused to attack him again. PW1 further deposed that accused followed him upto

the pump house of their property. He informed his parents, PWs. 2 and 3, about the incident and returned to the scene of occurrence with PWs.2

and 3 to attend on Vijaykumaran who was lying unconscious at the scene of occurrence with the injuries sustained on his head. He also deposed

that on his way to the place of occurrence with PWs. 2 and 3, accused obstructed them and said that they will kill PW3 also. Only after the

accused left the place, they could reach the place of occurrence where Vijayakumaran was lying unconscious. PW3 mother asked PW1 to bring

water and PW2 father went to call a jeep and doctor. PW3 lifted the head of Vijayakumaran and placed it on her lap. When water was brought,

PW3 tried to give water to Vijayakumaran. But, the attempt was not successful. PW1 also deposed regarding the removal of Vijayakumaran from

the scene of occurrence to their house with the assistance of PW3 and two other. PW4 Kuttan Nair brought a Jeep and PW6, his another brother,

also came in the jeep. There was undue delay in getting a Jeep. Even though PW1 was an eye witness, there was lot of contradiction in his

deposition with the first information statement given to the police. In cross-examination also, he differed from the deposition in chief. In chief

examination, he was very positive. After he came back with his father and mother he brought water as requested by his mother. But, thereafter he

was sent away to bring a jeep. In cross-examination, he deposed that ""Jeep

In Ext. P1 first information statement, he has stated that on hearing his cry, father and mother, PWs.2 and 3, ran towards the place of occurrence.

Seeing this, the accused left the place with the pick axe handle of the spade and this incident was seen by many persons. In Ext. P1 first

information statement it is recorded as follows:

If this is correct, the deposition that the accused abused PW3 and obstructed them on their way to the place of occurrence etc. cannot be correct.

PW1 went to the house and informed about the incident to the father and mother, PWs. 2 and 3, etc. also cannot be true. It appears that the story

that while coming to the place of occurrence, accused obstructed them was made out only to get A1 and A2 identified by PWs. 2 and 3 also. As

per Ext. P1 Kakkulath Marakkar and several other persons had seen the incident. Those independent witnesses were not examined. PWs. 2 and

3 came there only on hearing the cry of PW1 probably after the incident. Apart from Ex. D1 portion marked, there are many omissions also in Ext.

P1 statement compared to the deposition given before the Court. Those were also brought out in cross-examination.

4. PW2 father of the deceased deposed more or less in the same fashion as PW1 deposed. He also stated when he alongwith his wife was coming

to the place of occurrence, accused obstructed them and they saw A1 with spade and A2 with pick axe. He also stated that the deceased had

obtained an order from the RDO that nobody should enter into the disputed property. But, he stated that he was not aware that the above order

was stayed by the High Court. According to him, as per the partition deed, disputed 30 cents of land belonged to his wife"s sister. But, he was not

able to say how the deceased got it. He deposed that the property was in the possession of the deceased and an order was obtained by A2 in

O.P. No. 1057/91. He denied the suggestion that accused obstructed them and threatened PW3 etc on their way to the place of occurrence was

subsequently developed. He was positive that his son never took toddy. PW3, mother of the deceased, also deposed more or less similarly and

also stated that accused threatened her while he was with the victim. PW3 is the wife of PW2 and mother of PW1 and the deceased Vijaykmaran.

According to her, when PW1 went for bringing water and PW2 for bringing a jeep etc., the accused threatened her and she saw the pick axe and

spade with the accused.

If depositions of PWs. 1 and 2 are correct, version of PW3 that after they arrived, when PWs. 1 and 2 left the place for bringing water and jeep,

accused were there threatening her with weapons etc. is not possible. It is difficult to believe that PW2 her husband and PW1 her son left the place

leaving her alone at the place when accused were threatening PW3 with dangerous weapons. PW3 also spoke about the partition of the properties

and produced original of Ext. P2 partition deed and spoke regarding ownership and possession of land with the deceased. PWs. 4 and 5 are not

eye witnesses. PW4 came to the house of PW2 sizure mahazar prepared for the seizure MO3 dothi which was handed over to the police by

PW1. He also explained the delay in getting a jeep and according to him he went to Kolappulli and brought a jeep and the injured persons were

taken to the hospital in that jeep. PW5 came alongwith PW4 for taking the injured to their house from the scene of occurrence.

5. PW5 is the younger brother of the deceased Vijayakumaran. This witness is an advocate by profession. According to him, he got information

about the incident from his father and on getting information he came to his house in a jeep an on the way he could see his father and brothers in a

jeep proceedings to hospital and he also accompanied them. Then, he proved Exts. P4 and P7 documents to prove that deceased was the real

owner of the property in dispute. He also proved the petition filed before the RDO by the deceased and it was marked as Ext. P9. According to

the defence, PW6, who is an advocate by profession, has manipulated the entire records and interfered with the matter in recording the cause of

injury in the wound certificate and in the first information statement etc. In Ext. P9 filed by the deceased before the RDO, the deceased had stated

as follows:

Under this circumstances, this petitioner earnestly submits before this Hon''ble Court that the petitioner is pressurised to deal with the criminal

actions of the respondent, in his own. I have gathered people at the site to resist any criminal acts of possession from the part of the respondent,

including any attempt to remove the valuable improvements which have been cut and lying in the property. With all earnestness and with great

respect this petitioner submits before this Hon''ble Court that there is every possibility of a high intensity breach of peace in the locality today, but

for the immediate intervention of this Hon''ble Court exercising its powers u/s 145 of the Criminal Procedure Code. By the intervention of the

Hon''ble Court the situation will get defused and the possibility of a clash between the parties leading to breach of peace in the locality diminished.

6. PW7 was a witness examined to prove Ext. P19 seizure mahazar prepared for the seizure of MO2 spade. According to him, he took the spade

from the Well. But, he deposed that none of the accused were present at the time of recovery of MO2 spade from the Well situated in the

disputed property. He was not declared hostile. Therefore, recovery of MO2 cannot be accepted as evidence u/s 27 of the Evidence Act as

accused was not present at all at the time of recovery. MO2 was recovered from the disputed property itself, namely, the place of occurrence.

MO2 was recovered from the disputed property itself, namely, the place of occurrence. MO2 produced is a spade. According to PW25, MO2

was recovered in the presence of A1. The recovery was effected only after six months of the incident. Before going into the other details of this

case, we may at this junction itself consider the recovery of MO2 which was said to have been used by A1. According to PW1 who is the actual

eye witness, A1 removed the blade and then only hit Vijayakumaran by its handle. He was very categoric with regard to that incident. He also

stated that when he was coming with PWs. 2 and 3, accused obstructed and A1 had the handle of the spade with him and A2 had the pick axe

with him. But, according to PWs. 2 and 3, A1 was having the spade itself and not mere the handle. Further, recovery was effected from a Well in

the disputed property where the incident happened. What is recovered is a full spade and not merely the handle. We have also seen MO2

produced int he case. It is a full spade and not merely a handle and it is seen that blade is fixed with the handle very strongly with two iron rings

around the handle. It is not easy to remove or fix the same in seconds. It cannot be believed, in the ordinary course, that in the sudden quarrel

ensured when PW1 and the deceased to obstruct A1 and A2 while working in the disputed property. A1 took time to remove the spade and then

after hitting, again refixed the blade on the spade before throwing out in the Well. Further, PW1 says that, after the incident, when he came back

with PWs. 2 and 3, A1 was having only the handle of the spade with him and PWs. 2 and 3 deposed that they saw A1 and A2 going away from

the spot with spade and pick axe respectively. The mahazar witness PW7 is categoric that A1 was not present at the time of recovery even though

he deposed that he took MO2 spade from the Well as directed by the police and signed the mahazar. Totality of evidence would show that

information received from A1 regarding MO2 recovery cannot be accepted as evidence u/s 27 of the Evidence Act.

7. PW8 is a resident of the locality where the alleged incident happened. According to him, he saw accused coming alongwith the Panchayat road

with a spade and pic axe and after some time he heard a cry. PW9 is a witness to the inquest report and PW10 is a witness to the scene mahazar

to Ext. P23. PW11 is the Headmaster of A.M.U.P.School and Ext.P26 extract of the admission register of the school was marked. Date of birth

of the first accused is 24.5.1974. This document was produced by the prosecution to disprove the case of the first accused that he is entitled to the

benefit of the Juvenile Justice Act. The defence had a case that A1 was attending class in typewriting in Pratheeksha Commericail Institute at the

time of the incident. PW12, owner of that institute was examined to prove that the above story of alibi is not correct and the time allotted to the

first accused in the Institute was between 11 a.m. and 2 p.m. and not from 8.30 a.m. to 10.30a.m. and she also deposed that A1 was typing int he

Institute during that time on the date of the incident and she supported the defence.

8. Now, before dealing with the other contentions, we may consider the injuries sustained by the deceased as well as PW1. PW22, Professor of

Forensic Medicines and Police Surgeon, conducted post-mortem and Ext. P36 is the post-mortem certificate. PW22 noted the following ante-

mortem injuries:

1. Irregular lacerated wound 3.5 x 0.3 c.m. on the centre of head (longitudinally) placed with a horizontal extension at the front and 1 x 0.5 c.m.

to the left, scalp showed contusion 13.5 c.m. around. Skull showed fissured fracture with separation on the entire coronal suture on the left side

and separation of sagittal suture for a length of 12 c.m. and 11.6 c.m. respectively. There was diffuse contusion on the outer aspect of left temporal

pole (6x 4.3 c.m.) and on the under surface of left temporal pole (4.5 x 4 c.m.) confined to the superficial layers only.

2. Abraded contusion 9.5 x 0.5 c.m. vertical on the back of left arm 5 c.m. above elbow.

3. Abraded contusion 1 x 2 c.m. vertical on the front of right side of abdomen 3.5 cm outer to aid 9.5 c.m. above the level of umbilicus.

4. Abraded contusion 1 x 0.5 c.m. on the midline 22 c.m. above the level of hip bones.

5. Air passages were congested. Lungs were congested. Heart was normal. Stomach with contents weighed 250 gms. and contained 180 ml. fluid

with smell of toddy. Its mucose was congested. Urinary bladder contained 50 ml. clear urine. All other organs were found normal.

PW22 has also given his opinion as to the cause of death of deceased ijayakumaran. According to him, Vijayakumaran died of head injury. Thus,

the evidence of PW22 and Ext. P36 postmotem certificate would show that deceased Vijayakumaran sustained a head injury and as a result of

that head injury he died on 20.4.1992.

9. PW 18 is the Doctor who attended Vijayakumaran when he was removed to the hospital. Ext. P32 is wound certificate issued by PW18. It

shows that Vijayakumaran was brought to the Government Hospital, Ottapalam at 12.05 p.m. and he was brought dead. Ext. P33 is the wound

certificate issued to PW1. It shows that only minor injures were sustained by PW1 and he was not treated as an inpatient. Ext. P21 is the inquest

report and Ext. P22 is the scene mahazar. The scene mahazar would show that two sticks ( ) (MO8) were seen at the place of occurrence.

Prosecution was not able to explain how came into the scene of occurrence. No light is thrown regarding the existence of MO8 sticks at the place

of occurrence. However, those sticks were produced and marked as MO8 even though blood stained stone etc. mentioned in the seizure mahazar

were not produced in Court.

10. With regad to the evidence adduced by defence, DWs 3, 4 and 6 were examined to prove that accused were not there at the time of incident.

DW1 was examined to prove that the property belonged to accused No.2. Ext.D11 assignment deed and Ext. D10 purchase certificate obtained

from the Land Tribunal, Ottapalam were produced by him. He also produced Exts. D13 and D15 letters issued by PW3 to show that the property

in question was not in the possession of DW3 or her son Vijayakumaran. According to DW2 who was working in the Palakkad District Co-

operative Bank, deceased Vijayakumaran was brought to Valluvanadu hospital on 20.4.1992 and the body was taken from there in an ambulance.

he saw Vijayakumaran in the hospital as his mother was admitted as an inpatient there. DW3 desposed that on 20.4.1992 at about 8.45 a.m. he

saw two persons working in the disputed property while he was going along the Panchayat road near the above property for taking measurement

of a gate as he was doing welding work and he had also seen Vijayakumaran and some others coming with sticks in their hands and he saw push

and pull at the scene of occurrence. Soon after he heard hue and cry from the place of occurrence. He also saw second accused coming from the

opposite direction alongwith the Panchayat road. DW4 deposed that he had worked in the property earlier as directed by DW1 Ramankutty Nair

who sold the land to deceased. Ext. D17 is the time schedule of Pratheeksha Commercial Institute marked through DW6 who was a student of the

Institute to show that time of the accused for typewriting was between 8.30 and 9.30 a.m. Ext. D18 ambulance register was marked through DW7

who was an ambulance driver of Valluvanad Hospital. According to him, the dead body of Vijayakumaran was taken from Valluvanad Hospital to

the Government Hospital, Ottapalam in their ambulance on 20.4.1992 at 12.30 p.m. When PW25, Circle Inspector of Police, was examined, he

denied the suggestion given by the defence that PW6 who was an advocate and brother of the accused has manipulated the records to suit the

prosecution case. DW4 says that he had seen A1 boarding a bus in the morning at 8.00 a.m. when he was taking tea from a tea shop near the bus

stop. The tea shop was on his way to the work site. DW5 who was a witness to the recovery mahazar had stated that he saw MO1 and MO2 as

well as MO8 in the police jeep and he had never seen it earlier or later.

11. According to the defence, there is delay in lodging the FI statement. The incident happened on 20.4.1992 at 8.45a.m. FI statement was

recorded only at 12.30 p.m. and the delay was not delay was not satisfactorily explained. A version of the incident after discussion was given in the

FI statement. It was contended that there is no evidence to show that A1 is involved in the incident. it is suggested by the defence that A1 was

falsely implicated intentionally that he should at least suffer imprisonment as son of PWs. 2 and 3 died. It was also argued that there was no motive

on the part of A1 and thee was no incident connecting A1 with the disputed property. It none of the petitions, no complaint was made against A1,

son of A2. The dispute etc. was only with A2 and prosecution was not able to establish that the incident happened in the manner in which it is

described by the prosecution in the charge sheet. Recovery of MO2 is not admissible and they are not guilty of the offence. Prosecution was not

able to explain the presence of two sticks in the incident and evidence of PW1 cannot be believed with regard to the presence of A1 etc. as he is

interested and long pending disputes and enmity with the two families. It was further argued that the alibi pleaded by A1 should have been

accepted by the Court and in any event there is no evidence to connect A1 with the incident. It was also pleaded that A1 is entitled to the benefit

of Juvenile Justice Act, 1986, Juvenile Justice (Care and Protection of Children) Act, 2000 and Probation of Offenders Act, 1958.

12. According to the prosecution as well as the revision petitioners even though there was only a single blow, it was a calculated intended blow

with such a force and hence A1 should have been convicted u/s 302 of the Indian Penal Code. The fact that blade was removed from the spade

before hitting, so as to avoid severe injuries, that there was sudden quarrel when PWs. 1 and 2 came and abused the accused, that whether the

accused were carrying on agricultural operations in the disputed property, that only agricultural implements were there with the accused and that

only one blow was inflicted even though there was opportunity for A1 and A2 to inflict further blows on the deceased etc. should not have

mitigated the conviction of the first accused u/s 304 Part II of IPC as it will come under thirdly of Section 300 and he should have been punished

u/s 302 IPC. According to the prosecution, A1 gave the fatal hit only as directed and instigated by A2. A2 also hit PW1 with such force with a

dangerous weapon like MO1 pick axe even though he escaped with minor injuries. Therefore, A2 also should be convicted u/s 302 read with

Section 34 of the India Penal Code in murdering the deceased and u/s 307 for attempting to kill PW1.

13. With regard to the first contention that there was delay in lodging the F.I.R., that is, about four hours of the incident. IT has to be noted that

from the scene of occurrence body was taken to the Government Hospital, Ottapalam by 12-05 noon. Intimation was given from there

immediately. The incident happened within the jurisdiction of another police station and therefore transfer FIR was prepared. FT statement was

taken from PW1 and the delay is explained. In any event, mere delay in taking the FI statement is not fatal to the prosecution when it is explained.

14. It is true that the defence has got a case that the incident happened not in the manner as narrated by the prosecution and the body was brought

to the Valluvanad Hospital and from there the body was taken to the Government Hospital, Ottapalam in the ambulance of Valluvanad hospital.

Ext. D18 is the ambulance register. It shows that dead body of Vijayakumaran was brought to Ottapalam and DW7 was also examined to prove

that case. It is the case of the defence that by the time the body reached Ottapalam, with the aid of PW6 who is an advocate and brother of the

deceased, a case has been set up which is not in the manner as really happened. Undue delay in getting the jeep or vehicle to carry the body to the

hospital eventhough PWs. 1 and 2 telephoned several persons, cast a shadow of doubt in this regard. Defence also suggested to the prosecution

witness availability of jeep near the house of the accused. All these issues have to be taken note of while analysing the evidence. But, merely

because F.I.R. is delayed, it cannot be stated that the entire prosecution case can be quashed. The F.I.R. is only an information and starting point

of the investigation. Another important aspect argued by the defence is that A1 was not present at the scene of occurrence and alibi was pleaded.

DW4 had stated that he has seen A1 boarding a bus at 8 a.m. on the date of the incident while he was taking tea from a tea shop near the bus stop

on the way to his work site for taking measurement of a agate. According to the defence, A1 was studying in Typewriting Institute and time allotted

to him for typing was 8.30 to 10.00 a.m. To disprove that contention PW12 was examined by the prosecution. PW12 is the proprietrix to

Pratheeksha Commercial Institute. According to the statement given to the police, time allotted to A1 for typing was 11 a.m. to 2.00 p.m. But, in

Ext. P24, Police stated that PW12, owner of the Institute, stated that A1 came to the institute after 9 a.m. PW12 denied such statement having

given before the Police. But, during evidence she stated that time allotted for A1 was 8.30 to 10.00 a.m. and Pw12 has stated that on that day A1

came and typed from 8.30 a.m. onwards as usual. She also stated that there is no attendance register in the institute. However, there is a charge

showing time schedule which was marked as Ext. D17 by the defence. If that is correct, A1 was in the typewriting institute at the time of the

incident. With regard to the plea of alibi, it is true that defence tried to prove that A1 was attending class in Pratheeksha Commercial Institute

which was conducted by Pw12 at the time when the incident happened. PW12 herself has stated that A1 was doing typing between 8.30 a.m. and

10.00 a.m. She was declared hostile as her evidence is contrary to the statement given before the police u/s 161 Cr.P.C. Further, even if A1 went

to the typewriting institute by boarding into the bus as stated by DW4, it is not a very distant place. Plea of albi should be established by the person

who is pleading it as held by the Supreme Court in Rajesh Kumar v. Dharamvir and Ors. 1997 SCC (Cri.)591. Strict proof of albi is necessary

and plea of alibi should be proved with absolute certainty completely excluding the possibility of the accused at the time and place of occurrence.

Pollibility of accused absent at the place of occurrence to the total exclusion should be proved as held by the Supreme Court in Binay Kumar

Singh v. State of Bihar 1997 SCC (Cri.)333 and State of Maharashtra Vs. Narsingrao Gangaram Pimple, . In this case, we are of the opinion that

absolute certainty of alibi was not proved by the defence. But at the same time, merely because defence was not able to prove alibi with absolute

certainty will not make the accused liable for conviction unless prosecution is able to prove that he is guilty of the crime as alleged beyond

reasonable doubt. Therefore, the question to be considered is whether prosecution was able to prove that A1 was involved in the crime and

whether prosecution was able to prove that the crime was committed in the manner as narrated in the charge.

15. In this case, occurrence witness is PW1 who is also an injured witness. It is well settled law that merely because a person is a relative, his

evidence cannot be discarded especially when he is an injured person. Possibility of naming other persons as accused enabling the real accused to

get away from the clutches of law is remote. But, at the same time, when interested witnesses are examined, court has to be satisfied that he is

telling the truth. Long-standing enmity and dispute regarding property etc. cannot be lost sight of. Apart from the contradictions already mentioned

in his deposition, it cannot be stated that he was telling complete truth even though his evidence cannot be totally rejected. It is added with

exaggerations and additions. There are even dying declarations which cannot invoke the confidence of the Court. In this case, PW1 is an eye

witness and he cannot be disbelieved altogether. The court has to sift the evidence to find truth after excluding the exaggerations and

embellishments. (See: Sukhdev Yadav and Ors. v. State of Bihar- JT 2001 (7) SCC 597 and Appabhai and Anr. v. State of Gujarat - 1998

(Supp.) SCC 241. In this case, totality of evidence will make it clear that PW1 and deceased saw somebody doing agricultural work in the

disputed property which is adjacent to their property. There were several disputes pending between the parties regarding the property in question.

Seeing that somebody was working in that disputed property, PW1 and the deceased went there and a quarrel ensued. Postmortem report shows

that even at 8.30 a.m. the time of occurrence, stomach of the deceased contained 180ml. of fluid with smell of toddy. In the quarrel, because of the

blow sustained on the head of Vijaykumaran, he died and PW1 sustained injuries because of the hit by MO.1 pick axe. There is no dispute that

A2 was there at the time of incident. We agree with what is stated by PW1 that he was injured by A1. Presence and roll of A2 cannot be denied

because the pick axe was also found out on the basis of the information furnished by A2. Defence was not able to point out any defect in the

recovery and, therefore, that evidence is clearly admissible as against A2 in view of Section 27 of the Evidence Act. But, the real question to be

considered in this case is whether A1 has inflicted fatal injury and whether A1 was present at all. As already stated, PWs.2 and 3 came only after

hearing the cry and after the incident. The story that they met the accused with weapons on their way cannot be true. Totality of the evidence

would show that there is possibility that A1 was implicated only out of imaginations or intentionally due to the enmity towards the deceased and his

family.

16 PW1 Ext. P1 statement has stated that:

Therefore, many persons have seen the incident. They are independent witnesses. They were not examined. We cannot just ignore the evidence of

the ambulance driver DW7 who said that the body of Vijayakumaran was brought from Valluvanad Hospital to the Government Hospital,

Ottapalam. In any event, we find it extremely difficult to believe that the incident happened in the manner as narrated by the prosecution especially

with regard to the involvement of A1. In the earlier complaints made by the deceased, no allegations were levelled against A1. Two sticks were

recovered from the scene of occurrence and marked as MO.8. Presence of MO8 was not sufficiently explained by the prosecution. In Ext. P21,

deceased himself had made it clear that he had made arrangements to obstruct any persons who are coming to do agricultural operations and,

therefore, RDO should interfere. DW3 also stated that he saw some people come with sticks etc. to the place of occurrence cannot be ignored

especially considering the recovery of MO8 sticks from the place of occurrence after recording mahazar. We have already stated in paragraph 6

of the judgment that recovery of Mo2 spade on the alleged information furnished by A1 is not admissible on evidence. Mo2 was found out from

the well at the disputed property near the place of occurrence. According to Pw1, A1 removed the blade of the spade and he hit with the handle

of the spade and only one hit was there. Therefore, when deceased and Pw1 went and obstructed the agricultural work carried by A1 and A2, it is

difficult to believe that as soon as A2 asked to kill the deceased, A1 removed the blade from the spade with much effort and time, and hit the

deceased. Further, according to PW1, the accused went away with the pick axe and handle of spade. But, what is recovered is a spade with

handle and blade and that is the one which is produced before court and marked as MO2. The mahazar witness has also stated that the accused

was not there when it was recovered. This evidence would show that prosecution was not able to prove that MO2 was the weapon used and A1

has committed the offence as narrated by the prosecution in the charge sheet. In any event, we are of the opinion that it cannot be stated that

reasonable certainty that A1 has committed the offence as alleged by the prosecution. Therefore, his conviction and sentence are liable to be set

aside.

17. Before closing the matter, we may just mention some of the arguments put forward by the counsel for the accused regarding A1. It is

contended that A1 is entitled to the benefit of Juvenile Justice Act, 1986. The above contention is not accepted. As per Ext. P26 extract of

admission register, the date of birth of A1 is 24.5.1974 and on the date of commission of the offence itself he has completed the age of 16 and he

is not entitled to the benefit of Juvenile Justice Act. It is argued that under the Juvenile Justice (Care and Protection of Children) Act, 2000

''juvenile'' is defined as follows:

2(k). ''juvenile'' or ''child'' means a person who has not completed eighteenth year of age.

It is also state that earlier Act was repealed. Section 3 of the new Act provides for continuation of the inquiry on the basis of new Act. Section 3

reads as follows:

3. Continuation of inquiry in respect of juvenile who has ceased to be a juvenile - Where an inquiry has been initiated against a juvenile in conflict

with law or a child in need of care and protection during the course of such inquiry the juvenile or the child ceases to be such then notwithstanding

anything contained in this Act or in any other law for the time being in force, the inquiry may be continued and orders may be made in respect of

such person as if such person had continued to be a juvenile or a child.

Therefore, contention raised is that since at the time of commission of the offence, accused No.1 was a juvenile as he did not complete the age of

18 at that time and appeal is a continuation of the inquiry and benefit of the new provision has to be given to him. We note that when the new Act

was introduced he ceased to be a juvenile under that Act as he has completed the age of 18. Further, even going by Section 3, it provides as a

continuation of inquiry in respect of a juvenile and inquiry as per Section 14 starts only when the juvenile charge is produced before a Board.

Section 14 of the new Act reads as follows:

14. Inquiry by Board regarding Juvenile:- Where a juvenile having been charged with the offence is produced before a board, the Board shall hold

the inquiry in accordance with the provisions of this Act and may make such order in relation to the juvenile as it deems fit:

Provided that an inquiry under this section shall be completed, within a period of four months from the date of its commencement, unless the period

is extended by the Board having regard to the circumstances of the case and in special cases after recording the reasons in writing for such

extension.

In this case, he was apprehended on 29.10.1992. By that time, he had completed the age of 18 also. Apart from the above, it is contended that

crucial date is the date when offence was committed as held by the Supreme Court in Umesh Chandra Vs. State of Rajasthan, . But, Supreme

Court was considering a different Act. In Arnit Das Vs. State of Bihar, , the Supreme Court has held that it is the date of production that is

important under the Juvenile justice Act. The matter was referred to a larger Bench and in JT 2001 (7) SCC 157, that question was not answered.

But in 1986 Act, there is no corresponding provision as Section 14 of the new Act. However, in this case, the question has become academic as

we have already held that A1 is not guilty.

18. Next contention raised is that even otherwise, A1 is entitled to get the protection of the Probation of Offenders Act. Admittedly for getting the

benefit of the Probation of Offenders Act, the person has to be under the age of 21. Even though appellate court or revisional court can give the

benefit of Probation of Offenders Act, relevant date for the purpose of Section 6(1) is the date when the accused is found guilty as held by the

Supreme court in Ramji Missir and Another Vs. The State of Bihar, . In this case, when the accused was found guilty and convicted, he was above

the age of 21 and, therefore, he is not entitled to get the benefit of Section 6 of the Probation of Offenders Act as of right. it is argued that

considering the young age of the accused No.1 when the offence was committed, the benefit of Probation of Offenders Act can be granted

considering Section 4 of the Act as he was found guilty only u/s 304 Part II of the Indian Penal Code as held by the Supreme Court in Mohammad

v. State of Rajasthan ((200) 10 SCC 486). However, we are not going into the question as academic question need not be answered as we have

found that A1 is not guilty of the offence.

19. For these reasons, conviction and sentence on A1 is set aside as offence alleged against him was not proved beyond reasonable doubt. At the

same time, there is clear evidence to prove the involvement of A2 in this case apart from the evidence of PW1, motive, recovery of MO1 and

other materials to point out the guilt of accused No. 2 and he has to be convicted for the acts done by him. No serious injuries were inflicted on

PW1 and his intention was only to chase the accused away. Since there is no conclusive evidence to show who gave the fatal blow and

prosecution was not able to prove conclusively that the incident had taken place in the manner as narrated in the charges, it is not possible to

convict A2 u/s 302 of the Indian Penal Code and the offence proved against A2 is only for his individual act u/s 324 of the Indian Penal Code.

Hence we agree with conviction and sentence passed on A2 by the learned Sessions Judge. In the result, conviction and sentence passed against

A1 are set aside and he is acquitted. Conviction and sentence passed on A2 are confirmed Criminal Appeal No. 161/197 filed by the accused is

partly allowed. Criminal Appeal No. 404/98 filed by the State and Crl. R.P. No. 795/97 filed by PWs. 2 and 3 are dismissed.