

(2013) 03 KL CK 0132
High Court Of Kerala
Case No: Criminal A. No. 1019 of 2012

Sudheer Babu

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision: March 22, 2013

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 232, 428
- Penal Code, 1860 (IPC) - Section 302, 34, 37, 376, 397

Citation: (2013) 2 KLJ 229 : (2013) 2 KLT 168 : (2013) 2 RCR(Criminal) 869

Hon'ble Judges: T.R. Ramachandran Nair, J; A.V. Ramakrishna Pillai, J

Bench: Division Bench

Advocate: P. Vijaya Bhanu, M. Revikrishnan and M.A. Sheeba, for the Appellant; Praicy Joseph, Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

A.V. Ramakrishna Pillai, J.

The accused in S.C. No. 456 of 2006 on the file of the Additional Sessions Court-II, Palakkad, are the appellants. They faced trial on a charge sheet laid by the Circle Inspector of Police, Cheruplassery, for the offences punishable under Ss. 376, 302 and 397 r/w. 34 I.P.C. on the following allegations. The appellants are referred to, as they are arrayed in the impugned judgment.

At about 10.30 p.m. on 6.2.2004, the accused met the deceased Saraswathi behind Plaza Theatre at Cheruplassery with an intention to have sex with her. As she refused to entertain the accused, they, in furtherance of their common intention to commit rape on her, approached her and the second accused fell over her hitting with a stone on her head and carried her to a distance of 40 metres and laid her on the path and raped her brutally. To prevent her from crying, her mouth and nose were covered and her neck was throttled knowing that she would be killed in that attempt. Thus, she was murdered. Thereafter, the accused robbed her ear studs,

wrist watch and torch, thereby committing the offences as aforesaid.

PW 1, the son of the deceased, who received information regarding the death of his mother on the next morning, went to the place where he found his mother lying dead. Injuries were seen on the dead body. The body was found unclad with her saree pulled aside. PW 1 gave Ext. P1 F.I. Statement, on the basis of which, crime was registered for suspicious death.

PW 23, the Circle Inspector of Police, who undertook the investigation, reached the spot, conducted the inquest and gathered materials from the body and scene of occurrence with the help of a Scientific Assistant and Police Surgeon. PW 22, the District Police Surgeon, who conducted Autopsy on the body of the deceased, found that the deceased was killed by throttling and smothering. There were bodily injuries suggestive of sexual assault also. PW 23 proceeded with the investigation and recorded the statement of the witnesses. The accused were arrested on 11.2.2004. Personal belongings of the deceased like watch, torch etc., were recovered on the information given by the accused. PW 19 & 20, who succeeded, PW 23 continued the investigation and it was PW 20, who completed the investigation and laid charge against the accused.

The case was committed for trial by the Judicial First Class Magistrate, Ottappalam, in C.P. No. 95 of 2005 to the Sessions Court, Palakkad. From there, it was made over to the Additional Sessions Court for trial and disposal.

2. The accused were defended by the counsel of their choice. They pleaded not guilty to the charge levelled against them. Thereafter, at the trial, on the side of the prosecution, PWs. 1 to 24 were examined and Exts. P1 to P48 were marked. MOs. 1 to 30 were identified. Though, after completion of the prosecution, the accused were called upon to enter on defence and tender evidence, if any, under S. 232 Cr.P.C., they did not tender any evidence.

3. The Trial Court, after considering the evidence on record, found the accused guilty under Ss. 376, 302 and 397 r/w. 37 I.P.C. They were convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs. 5,000/- each and in default of payment of fine, to undergo imprisonment for six months under S. 376 IPC. They were further sentenced to undergo imprisonment for life and to pay a fine of Rs. 5,000/- each and in default, to undergo imprisonment for six months under S. 302 IPC, with a rider that they shall not be released from prison for a period of 20 years. They were further sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs. 2,000/- each and in default of payment of fine, to undergo imprisonment for three months under S. 397 IPC. There was a direction that the sentence of imprisonment under S. 397 IPC shall run concurrently with the other terms of sentences awarded under Ss. 376 and 302 I.P.C. Set off was also allowed under S. 428 Cr.P.C. Thus, this appeal.

4. We heard Sri. P. Vijayabhanu, the learned Senior Counsel appearing for the appellants and Smt. Praicy Joseph, the learned Public Prosecutor. The impugned judgment and the lower court records were perused.

5. While the learned Senior Counsel appearing for the appellants argued that the impugned judgment, conviction and sentence imposed by the court below are against the law, facts, evidence and circumstances of the case, the learned Public Prosecutor supported the impugned judgment and argued that the conviction and sentence passed by the Trial Court on the appellants, do not call for an interference.

6. Following are the main arguments advanced by the learned Senior Counsel for the appellants:-

(i) PW 2, on whose testimony the learned Sessions Judge has placed much reliance for finding the appellants guilty of the offences charged with, stands on the footing of an accomplice and his evidence is unworthy of any credit.

(ii) A close scrutiny of F.I. Statement and inquest report would reveal that the so-called recoveries are concoctions of the investigating agency.

(iii) The Trial Court went wrong in placing reliance on the chemical analysis report as such analysis is not an exact science and it is only a conclusive piece of evidence against the accused.

(iv) The court below ought to have found that there was no evidence on record to prove that the accused had committed rape on the deceased.

(v) The trial court went wrong in finding that Ext. P18 chemical analysis report and the blood seen on MO 25 shirt and MO 28 pants connect the accused with the crime.

(vi) The sentence imposed is too harsh, illegal and is liable to be altered.

7. In this case, as there is no direct evidence to prove the guilt of the accused, the prosecution relies on circumstantial evidence. Direct evidence is that piece of evidence from which the existence of a given thing or fact is proved either by its actual production, or by the testimony or admissible declaration by someone, who has perceived it. [Phipson on Evidence. 16th Edition, by Sweet and Maxwell London Paragraphs (1) to (13) at Page 5].

8. In the case of circumstantial evidence, certain facts are proved from which the existence of a given fact is inferred. The two forms are equally admissible. "Superiority of the former is that whilst it contains the fallibility of assertion and perception as source of error the later has in addition fallibility of inference." (Ibid 1-3 Page 5C). "Circumstantial evidence must always be direct, i.e. the facts from which the existence of fact in issue is to be inferred must be proved by direct evidence." (Sir James Stephan Introduction on the India Evidence Act Ss. 51 at Page 293 : 295 Quoted in Woodroffe and Amir Ali, Law of Evidence at Page 241).

9. It is settled law that circumstantial evidence can form the basis of conviction, only if it satisfies the following three tests:-

(a) The circumstances should be cogently and firmly established.

(b) The circumstances should form a chain so complete unerringly, pointing to the guilt of the accused.

(c) The circumstances relied on should lead to an irresistible inference of guilt of the accused and they should be wholly inconsistent with the innocence of the accused.

10. In the case on hand, the prosecution mainly relies on the testimony of PW 2, Chandran who is a resident of Cheruplassery. He, who identified both the accused at the time of trial, stated that he had come to know about the death of Saraswathy in February, 2004, and on the previous day he had met both the accused in a toddy shop at about 6 p.m. According to him, he, who reached the toddy shop in Cheruplassery town at about 6 p.m. bought a bottle of toddy and consumed the same. At that time, both the accused came to the toddy shop and they also ordered toddy. The accused seeing PW 2 in the toddy shop, ordered a bottle for PW 2 also. They consumed the same with a side dish which was supplied on order and the first accused paid the bill. According to PW 2, thereafter, the second accused wanted to take brandy and accordingly, they went to Deepa Bar from where, they bought a half bottle of brandy. From that, PW 2 was offered a peg and he took it. The balance was consumed by the accused. Thereafter, PW 2 and the accused moved towards the way behind the Plaza Theatre. Then, the accused told that they would go and meet the deceased Saraswathy. They saw Saraswathy engaged in conversation with another person. When the accused approached her, she told them to come after two hours. Thereafter, PW 2 and the accused went to the bus stand and waited there for some time. Then, the second accused told that he wanted to take another half bottle of brandy and thus, they together went to the Deepa Bar again and bought a half bottle of brandy. That was at about 9.45 p.m. As it was the closing time, they did not consume the brandy there and went back to the road behind the Plaza Theatre again to meet Saraswathy. She was standing there. Both the accused approached her. PW 2 did not go near her. The accused picked up a quarrel with her and they caught her by neck and pulled her up. PW 2 tried to dissuade them. However, ignoring the objections of the deceased, she was carried by them. As PW 2 got frightened, he went home. According to PW 2, he could see the sequences of the events that had taken place, in the moon light. According to PW 2, the first accused was wearing a pant and second accused was wearing a lungi and a shirt at the relevant time.

11. To corroborate the testimony of PW 2 that the accused consumed toddy from the shop of Cheruplassery town, PW 8, Ramakrishnan, who was a sales man in the toddy shop, was examined. He told that he could remember that the accused used to come to the toddy shop and they had come to the shop even on the eve of the

day on which the deceased was found dead. But, it is relevant to note that this witness does not say anything regarding the presence of PW 2 in the toddy shop.

12. There is no direct evidence as to what had happened after PW 2 is said to have vanished from the scene of occurrence. PW 1, the son of the deceased, upon whose statement, the crime was lodged, got information in the morning on 7.2.2004 that his mother was found lying dead behind the Plaza Theatre compound at Cheruplassery. He went there and confirmed the same. He had also identified certain personal belongings of the deceased.

13. The attempt of the prosecution in examining PW 2 was to show that the deceased was last scene with the appellants on the previous night. Regarding the cause of death of the deceased, there is no dispute because, Ext. P21 post-mortem report prepared by PW 22 Police Surgeon would reveal that the deceased died on account of suffocation due to throttling and smothering. However, we notice that the Autopsy report remains silent regarding the proximate time of death of the deceased. Admittedly, the deceased was found lying dead only on the next morning, i.e. on 7.4.2004. We cannot say that the deceased hadn't had any contact with any other person after 9.45 p.m. i.e., after PW 2 is said to have retreated from the scene of occurrence.

14. The learned Senior Counsel appearing for the appellants made a frontal attack against the reliability of PW 2. It was pointed out that admittedly, the accused were arrested on 11.2.2004. PW 2 was questioned only on 13.2.2004. As per Ext. P47 remand report prepared by the Investigating Officer, he came to know about the involvement of the deceased on questioning one Mohammed and Sabeer. It is relevant to note that neither Mohammed nor Sabeer was examined before the court below. The name of PW 2 is conspicuously absent in Ext. P47 remand report. In this context, the learned Senior Counsel would argue that no explanation is forthcoming as to how the Investigating Officer came upon PW 2, who is presented by the prosecution as a chance witness to prove the main link of circumstantial evidence. It was argued by the learned Senior Counsel that in a case based on circumstantial evidence, the importance of such a question cannot be undermined. It is also relevant to note that none of the other witnesses relied on by the prosecution has anything to say regarding the culpability of the accused.

15. The learned Sessions Judge mainly relied on the testimony of PW 1, Ext. P18 chemical analysis report issued by PW 24, the Assistant Chemical Examiner regarding the hair collected from the scene of occurrence and the recovery of two items i.e., one torch and watch belonging to the deceased on the basis of the information said to have been given by the accused to find the accused guilty of the offences charged with.

16. It is true that PW 23 with the aid of PW 18, the Scientific Assistant and PW 22, the Police Surgeon, gathered the fallen hair found on the body of the deceased at the

time of inquest. Samples of scalp hairs and pubic hairs of the accused were also collected after their arrest. The hair strands and sample hairs collected from the body of the deceased were sent for scientific examination and comparison. It was PW 24, the Assistant Chemical Examiner, who effected the comparison and issued Ext. P18 report which is to the effect that some of the fallen hair strands found on the body of the deceased were similar to the scalp hairs collected from the accused. Item No. 1 in Ext. P18 was the hair strands gathered from the chest of the deceased. Item No. 5 was the scalp hair gathered from the first accused and item No. 8 was the scalp hair gathered from the second accused. Though examination of hair is having some importance in identification, even by careful comparison, one cannot say that a hair came from a particular individual. At the most, it can be said that it could have come from him. Therefore, it may not be proper to find an accused guilty on the sole basis of a report that the hair samples collected from the scene of the crime have resemblance with the hair samples collected from him, though the same may have relevance for consideration along with the other incriminating circumstances against the accused. In this context, the learned Senior Counsel invited our attention to Ext. P48 series, which are the certified copies of the relevant work book/lab records of Regional Chemical Examination Laboratory, Ernakulam. It could be seen from Ext. P48 series that certain corrections were made regarding the number of items indicated therein. At the last portion of the work book, what was originally written was that, no definite information could be given as to the source of hair item Nos. 1, 2, 3 and hair samples under item Nos. 5, 6, 7, 8, 9 and 10, since they are different in characteristics. However, the numbers 5 and 8 are seen scored of later to make it appear that item No. 1 is similar in observable characteristics with those scalp hair samples under item No. 5 and 8. While PW 24 was examined, she admitted that she had made those corrections. But no explanation is forthcoming from her as to how and why those corrections were made. This creates a genuine shadow of doubt against Ext. P18 report which is based on the entries in Ext. P48 register. So in our definite view, the scientific evidence relied on by the court below to prove the guilt of the accused looses its very leg to stand upon. The presence of hair strands on the dead body of victim, which are dissimilar in characteristics with that of the hair strands of the accused, gives an indication that some other person was involved in the crime.

17. The remaining piece of evidence is the alleged recovery of a torch and a watch of the deceased, on the strength of the information given by the accused. According to PW 23, the Investigating Officer, the first accused while in custody gave information which led to the recovery of MO 2 watch from the house bearing door No. 16/114 at Kundoorkara, which was seized as per Ext. P14 mahazar prepared by PW 23. Ext. P14(a) is the information said to have been given by the first accused, which led to the recovery of MO 2 watch. His further case is that on the basis of the information given by the second accused, he recovered MO 3 torch from the house bearing door No. XIX/373 at Moloor in Nellaya, which was recovered under Ext. P9 recovery

mahazar. Ext. P9(a) is the relevant portion of the statement said to have been tendered by the second accused while in custody. These pieces of evidence cannot be relied on to prove the guilt of the accused because, according to PW 5, who is the attestor to Ext. P4 scene mahazar, MO 3 torch was seized from the scene of occurrence. Moreover, PW 1 admitted in cross examination that he was not sure whether MO 3 belonged to his mother. Hence, the testimony of PW 5 would cut at the very root of the prosecution case, regarding the recovery of MO 3 torch.

18. MO 2 watch said to have been recovered under Ext. P14 mahazar is a "ZONA Quartz" ladies watch. PW 12 has been examined to prove the warranty card issued from his watch company regarding MO 2. However, PW 12 would admit that Ext. P5 does not reveal that the watch covered by the said warranty card was a ladies watch. According to PW 12, as per Ext. P8 card, a citizen ladies watch was also repaired in his shop. It is relevant to note that PW 16, who was sited to prove the recovery of MO 2, was not loyal to the prosecution. The discrepancies though appear to be minor, their ramification is profound. We are of the view that it is not safe to rely on the sole testimony of the Investigating Officer to fasten the first accused with the recovery of MO 2 watch.

19. Though the prosecution has a case that both the accused had committed rape on the deceased, absolutely no evidence is forthcoming to prove that the deceased was subjected to rape. The evidence of PW 22, the Police Surgeon, who conducted the Autopsy, is to the effect that certain contusions and abrasions were found on the body and the state of dress seen on the body could be suggestive of sexual assault. Though vaginal swab was collected from the dead body, no spermatozoa was detected in the vaginal swab, in chemical examination. Though the learned Sessions Judge had opined that it was due to the use of condoms that spermatozoa was not detected in the vaginal swab, it is surprising to note that even in the contents of the used condoms, collected from the scene of occurrence, spermatozoa was absent as per the chemical analysis report.

20. Most of the external injuries were seen on the upper part of the body. No injury was seen on the private parts. Though the death was due to throttling and smothering, she had sustained a head injury prior to death; according to the Autopsy report. Though the prosecution has a case that MO 29 stone was used by the accused in the commission of the crime, neither the Autopsy report nor the testimony of PW 22 say that any of the ante-mortem injuries was possible with MO 29.

21. The learned Public Prosecutor argued strenuously that the evidence on record is sufficient to arrive at the conclusion that the accused committed the offences alleged. We are not impressed by the said argument. The circumstances relied on by the prosecution do not satisfy the three tests made mention of at paragraph (9) above. On a totality of the circumstances now placed on record, we are of the definite view that the prosecution has miserably failed in proving the guilt of the

accused beyond any reasonable doubt. Therefore, the appellants are entitled to the benefit of doubt and are to be acquitted.

In the result, we allow the appeal. The findings of guilt, the consequential conviction and sentence imposed by the Additional Sessions Judge on the accused are hereby set aside and they are acquitted and set at liberty. They shall be released forthwith, if they are not required in any other case.