
(2014) 08 KL CK 0047

High Court Of Kerala

Case No: Criminal Appeal No. 1880 of 2011

Narayana

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision: Aug. 13, 2014

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 302

Citation: (2014) 3 KHC 553

Hon'ble Judges: T.B. Radhakrishnan, J; P.B. Suresh Kumar, J

Bench: Division Bench

Advocate: S. Sachithananda Pai, Advocate for the Appellant; K.K. Rajeev, Public Prosecutor, Advocate for the Respondent

Judgement

P.B. Suresh Kumar, J.

The sole accused in S.C. No. 449 of 2010 on the file of the Sessions Court, Thalassery, is the appellant. He has been found guilty and convicted for the offence punishable under Section 302 of the Indian Penal Code, hereinafter, referred to as "the IPC", for short.

2. The accused, a native of Dakshin Karnataka, was an employee in a fishing boat, operated from Azhikkal Harbour. On 19.4.2001, a co-worker of the accused Sankara was found dead at a place near the Harbour. The case of the prosecution is that between 9 p.m. on 18.4.2001 and 2 a.m. on 19.4.2001, the accused had committed the murder of Sankara by stabbing him on his chest with a knife.

3. PW 1, the brother-in-law of the deceased lodged Ext. P1 First Information statement concerning the death of the deceased and a case has been registered by the Valapatanam Police based on the said statement. Initially, PW 12 was the officer-in-charge of the investigation. He prepared Ext. P2 scene mahazar, seized Nos. 1 to 5 and 9 from the scene of occurrence and recorded the statements of the witnesses.

Later, the investigation was continued by Pws. 14 to 16 and among them, PW 16 completed the investigation and submitted the final report against the accused, alleging commission of offence punishable under Section 302 of the IPC.

4. On appearance, the accused pleaded not guilty. The prosecution thereupon examined 16 witnesses as PW 1 to PW 16, marked 9 documents as Exts. P1 to P9 and caused identification of 10 material objects as Mos. 1 to 10, to establish the guilt of the accused. After the evidence of the prosecution, when the accused was questioned under Section 313 of the Code of Criminal Procedure concerning the incriminating circumstances appearing against him, he denied those circumstances and pleaded that he has no connection whatsoever with the occurrence. Since this was not a case of no evidence for the prosecution, the accused was though called upon to enter on his defence, he chose not to adduce any evidence.

5. The Court of Session, on an appraisal of the materials on record, found that the accused caused the death of the deceased and he is guilty of the offence punishable under Section 302 of the IPC.

6. We have heard the learned counsel for the appellant and the learned Public Prosecutor for the State.

7. The point arises for consideration is whether the accused is guilty of the offence punishable under Section 302 of the IPC.

8. Injury Nos. 1 to 5 noted on the body of the deceased in Ext. P4 post mortem certificate read thus:

1) Wedge shaped incised penetrating wound 2.5 x 0.5 cm horizontal on the left side of chest, the inner end being 1.5 cm. below the nipple. There was a tailing, 6 cm long, starting from the inner end and directed inwards and slightly upwards. The wound entered the chest cavity through the 5th intercostal space and was directed downwards, backwards and to the right, to terminate by puncturing the apex of the heart (0.8 x 0.2 cm).

2) Incised wound 1x0.3 cm on the front of chest, 7 cm below the left nipple.

3) Incised wound 1x0.3 cm on the left side of trunk, 12 cm below the nipple.

4) Wedge shaped incised penetrating wound 2x0.5 cm, in the right flank, 6.5 cm to the right of midline and 10 cm below the costal margin. The wound directed backwards, downwards and to the left, terminated in the abdominal cavity without injuring any organs. Total minimum depth was 3 cm.

5) Two superficial cuts, 2 cm each in length, 1 cm apart on the right side of lower abdomen, 2.5 cm. above inj. no. 4.

It is opined in Ext. P4 that the death of Sankara was due to the stab injury on his chest, involving the heart. The doctor who conducted the post mortem was examined as PW 9. He has reiterated the findings in Ext. P4 post mortem certificate. In addition, he deposed that injury Nos. 1 to 5 could be inflicted with a weapon like MO1 and injury Nos. 1 and 4 are independently sufficient in the ordinary course of nature to cause death. He has also stated that the death of the deceased must have occurred between 9.35 p.m. on 18.4.2001 and 3.35 a.m. on 19.4.2001. On the basis of Ext. P4 post mortem certificate and the evidence of PW 9, the Court of Session came to the conclusion that the death of Sankara was a homicide. We do not find any reason to interfere with the said finding.

9. Now, the question to be decided is as to the complicity of the accused. There is no direct evidence for the overt acts attributed against the accused. The prosecution relies on circumstances to establish the guilt of the accused. Before we deal with the circumstances relied on by the prosecution, it is appropriate to refer to the relevant evidence on record.

10. PW 1 deposed that the deceased, the accused, PW 2 and PW 7 were working together in the fishing boat of PW 13 and he found MO1 knife, MO2 piece of shirt, MO3 pan parag packet, MO4 currency note and MO5 series beedi packets, near the dead body of the deceased. PW 2, a co-worker of the deceased, deposed that on 18.4.2001, at about 9 p.m., after the work, the deceased and the accused went together to the house of PW 4, who is managing the boat. According to him, at about 2 a.m. on the next day, the accused came to the room where he was sleeping and told him that he had quarrelled with the deceased and requested for some money for leaving to his native place. PW 2 has identified MO1 knife as the knife of the accused and MO2 as the torn off piece of the shirt of the accused. PW 2 has identified MO3 pan parag packet, MO4 currency note and MO5 series beedi packets as the objects found near the dead body of the deceased. In cross-examination, PW 2 has stated that the owner of the boat used to entrust knives for the use of the workers in the boat; that MO1 is one of the knives entrusted to the workers of the boat; that after the work, the knives are retained by the workers in the boat itself; that he did not see the accused keeping any knife with him when he went out along with the deceased and that he identified MO1 knife as the knife of the accused on the assumption that the accused must have taken the knife from the boat. PW 2 has though deposed in chief examination that the accused was in the habit of using pan parag, in cross examination, he stated that he has never seen the accused using pan parag.

11. PW 3 is the brother of PW 4. He deposed that on the previous day of the occurrence, at about 10 p.m., the deceased came to his house in search of PW 4 and after some time, he found somebody quarrelling with the deceased a little away from his house and he does not know the person with whom the deceased had quarrelled on that day. PW 4 deposed that the deceased was short tempered, he used to drink liquor regularly and that he used to pick up quarrel with others. PW 7, another co-worker of the deceased, also deposed that on the previous day of the occurrence, both the accused and the deceased went together to the house of PW 4. PW 7 has also identified MO2 as torn off portion of

the shirt of the accused. PW 7 has deposed that after the death of the deceased, the accused is seen by him for the first time, only in court. In cross examination, PW 7 has stated that the accused is not a person who is in the habit of picking up quarrel with others and that the accused and deceased were on friendly terms when they left the boat to meet PW 4. PW 7 has also stated in cross examination that all the knives used by the workers in the boat were available in the boat itself. PW 8, an employee of another fishing boat, deposed that on a particular day morning by about 5.25 a.m., the accused came to his boat and requested him to drop him at a place called Mattoor and he dropped the accused at Mattoor in his boat. PW 8 has also stated that thereafter, he has seen the accused for the first time only in court. PW 13 is the owner of the fishing boat in which the accused and the deceased were working. He deposed the said fact in court. He has also deposed that after the death of the deceased, the accused is seen for the first time only in court.

12. Now we shall deal with the circumstances relied on by the prosecution to establish the guilt of the accused. The learned Public Prosecutor has pointed out that the following circumstances established in the evidence would bring home the guilt of the accused. The circumstances pointed are the following: (1) The accused was last seen in the company of the deceased by Pws. 2 and 7. (2) The accused sought money from PW 2 and PW 8 for leaving to his native place after the occurrence. (3) The presence of MO1 knife, MO2 torn off portion of the shirt and MO3 pan para packet of the accused near the dead body of the deceased. (4) The absence of the accused in the locality after the occurrence. (5) The possibility of causing the injuries found on the body of the deceased with MO1 knife as spoken to by PW 9 doctor.

13. The evidence tendered by PW 2 that on the relevant day, by about 2.30 a.m., the accused came to the room where he was sleeping and informed him that he picked up quarrel with the deceased and sought money to leave the place, is not inspiring confidence. If the accused were to be the person who caused the death of the deceased and he had decided to leave the place, there is no reason why he should come to a person known to the deceased and tell him that he picked up quarrelled with the deceased and therefore leaving the place. It is true that PW 2 has also stated that the accused had requested for some money from him for leaving to his native place to justify his approach to him after the occurrence. But, it has come out in evidence that such a statement was not given by PW 2 to the police. Likewise, PW 8, who has stated that the accused sought money from him did not inform the police that the accused sought money from him. Further, PW 8 did not even mention the time when the accused allegedly approached him for favour and money. The evidence of PW 8 was only that the accused came to his boat one day, early in the morning and sought money. We are of the firm view that the evidence tendered by Pws. 2 and 8 that after the occurrence, the accused approached them and sought money cannot be believed.

14. Even though, PW 2, a co-worker of the accused, had stated in chief examination that MO1 is the knife used by the accused, the evidence given by him in his

cross-examination would show that the said evidence was only an assumption made by him and not a statement made with reference to any identification mark or marks of the knife. The said fact is fortified by the evidence tendered by PW 7 that the knives used in the boat were available in the boat itself. As far as the presence of pan parag packet is concerned, even though PW 2 has stated in chief examination that the accused was in the habit of using pan parag, he has stated in cross examination that he has never seen the accused using pan parag at all. It is true that both PW 2 and PW 7 had identified MO2 as a torn off portion of the shirt of the accused. Ext. P2 mahazar would indicate that MO2 is the cloth used as pocket of a shirt. The said evidence of PW 2 and PW 7 is not inspiring confidence at all as we do not think that any one would be able to identify a person with reference to a torn off portion of the cloth used as pocket of a shirt. It is thus obvious that there is no legally acceptable evidence to show that MO1 knife, MO2 torn off portion of shirt and MO3 pan parag packet belonged to the accused.

15. The act of absconding is no doubt a relevant piece of evidence to be considered along with other evidence, but its value would always depend on the circumstances of each case. Mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime. Normally the courts are disinclined to attach much importance to the act of absconding as it can scarcely be held as a determining link in completing the chain of circumstantial evidence, which must admit of no other reasonable hypothesis than that of the guilt of the accused. [See [Matru alias Girish Chandra Vs. The State of Uttar Pradesh](#), . It is not disputed that the accused is a native of Dakshin Karnataka and he had come to Azhikkal as the fishing boat in which he was working was operated from Azhikkal harbour at the relevant time. PW 16 the investigating officer deposed that the investigation revealed that the accused left his family about 7 years prior to the occurrence. The evidence of PW 16 would indicate that the accused does not retain any connection with his family. It is beyond dispute that Azhikkal was only the place of the accused. In the light of the principles stated above, the absence of the accused from his place of work and family cannot lead to the inference that the same was with a guilty mind, as the possibility of the accused leaving for some other destination for work or settlement cannot be ruled out.

16. Ext. P2 mahazar indicates that a blood stained knife was seized by the police from the scene of occurrence. Ext. P8 is the forwarding note prepared for sending the material objects for chemical examination. The material object listed as item No. 5 in Ext. P8 is the knife produced by the police before the Jurisdictional Magistrate as seized from the scene of occurrence. Ext. P9 is the report of the Chemical Examiner in respect of the material objects forwarded to him as per Ext. P8. Ext. P9 report indicates that blood was not seen at all on the knife listed in Ext. P8 as item No. 5. The inference possible from Ext. P9 report is either that the weapon sent for examination is not the weapon recovered from the scene or that the weapon examined by the Chemical Examiner is not the weapon recovered from the scene. Further, as it was not established by cogent evidence that

MO1 was the knife of the accused, it is not safe to rely on the evidence of PW 9 doctor as a circumstance to consider the question as to the complicity of the accused.

17. It is now settled law that before a case against an accused can be set to be fully established by circumstances, it has to be shown that the circumstances from which the conclusion of the guilt are to be drawn are fully established; that the facts so established should be consistent only with the hypothesis of the guilt of the accused; that the circumstances should be conclusive in nature; that they should exclude every possible hypothesis except the one to be proved and that there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been committed by the accused. [See the decision of the Apex Court in [Sharad Birdhichand Sarda Vs. State of Maharashtra](#), .

18. Coming to the facts of the case, the only circumstance established in evidence is that the accused was seen with the deceased a few hours prior to the occurrence. The question is whether the guilt of the accused can be held to be established from the said fact alone. It is true that the last scene theory is definitely a tool in the hands of the prosecution to establish the guilt of the accused. However, in a case where the only circumstantial evidence established by the prosecution is that the accused and the deceased were last seen together, it may raise suspicion, but it is not independently sufficient to lead to a finding of guilt of the accused. The reason is that in such a case, it cannot be held that the said fact is consistent only with the hypothesis of the guilt of the accused. In other words, the said fact by itself would not exclude every possible hypothesis except the guilt of the accused. Thus, it can be seen that though the last seen theory is an important circumstance that would point to the guilt of the accused with some certainty, the theory can be applied only keeping in mind the circumstances that proceeded and followed the point of being last seen. (See the decisions of the Apex Court in [Arjun Marik and Others Vs. State of Bihar](#), , [State of Karnataka Vs. M.V. Mahesh](#), and [Sahadevan and another Vs. State of Tamil Nadu](#), . The last seen theory, in the circumstances, has no application to the facts of the present case.

19. For all the aforesaid reasons, we feel that this is a case where the accused is entitled to the benefit of doubt.

In the result, this Criminal Appeal is allowed. The conviction of the appellant and the sentence imposed on him by the Court of Session are set aside and the appellant is acquitted. He shall be set at liberty forthwith and released from custody, if his continued presence is not required in connection with any other case. The Registry is directed to send the gist of this judgment forthwith to the concerned prison, where the appellant is undergoing incarceration.