

(2024) 01 KL CK 0026

In the High Court Of Kerala

Case No : Criminal Appeal No.681 Of 2020??Criminal Appeal No.681 Of 2020

Ashraf @ Alappante Ashraf

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 04-01-2024

Acts Referred:

Code of Criminal Procedure, 1973 — Section 232, 313
Indian Penal Code, 1860 — Section 302, 304
Evidence Act, — Section 106

Citation : (2024) 01 KL CK 0026

Hon'ble Judges : P.B.Suresh Kumar, J;Johnson John, J

Bench : Division Bench

Advocate : Aditya Shenoy A.G., Alex M. Thombra

Final Decision : Dismissed

Judgement

P.B.Suresh Kumar, J.

1. The sole accused in SC No.845 of 2016 on the files of the Court of Session, Manjeri who stands convicted and sentenced for the offence punishable under Section 302 of the Indian Penal Code (IPC) challenges in this appeal, his conviction and sentence in the said case.

2. The accused was a friend of the deceased Azeez. On 05.07.2016, at about 7.30 p.m., Azeez along with the accused checked in a lodge located at Kuttipuram and after some time, by about 11.30 p.m. on the same day, the accused left the lodge. By about 12.45 a.m. on the following day, when a staff of the lodge went to the room adjacent to that of Azeez, he heard a sound from the room occupied by Azeez and when he opened the room, he found Azeez lying down on his chest with his face down. The staff also noticed blood on his clothes. On receiving information from the staff, the Manager of the lodge rushed to the lodge and took Azeez to the nearby hospital, after informing the matter to the police. As the condition of Azeez was found to be serious, he was referred to a higher medical centre from the hospital he was taken to, and accordingly, the

Manager of the lodge took Azeez to the Medical College Hospital, Kozhikode. The victim passed away on the way to the Medical College Hospital.

3. A case was registered in connection with the occurrence by Kuttippuram Police at 5.35 a.m. on 06.07.2016 as Crime No.270 of 2016 on the basis of the information furnished by one Riyas, a staff of the lodge and the case was investigated by the then Circle Inspector of Police, Valancherry. After investigation, final report has been filed against the accused alleging commission of the offence punishable under Section 302 of the Indian Penal Code (IPC). The case set out against the accused in the final report is that on account of the enmity of the accused towards the deceased for having required the accused to return the amounts borrowed from the deceased, and to avoid repayment of the said borrowed amounts, at about 11 p.m. on 05.07.2016, the accused attacked the deceased in the room of the lodge which was being occupied by the deceased, inflicted injuries on him, strangled him and also suffocated him by pressing a pillow on his face and left the scene believing that the victim was no more.

4. As the accused denied the charge framed and read over to him by the Court of Session when committed for trial, the prosecution examined 27 witnesses as PWs 1 to 27 and proved through them Exts.P1 to P34 series documents. MOs 1 to 8 are the material objects identified by the witnesses. As the Court of Session did not find the case to be one fit for acquittal under Section 232 of the Code, although the accused was called upon to enter on his defence, the accused chose not to adduce any evidence. The Court of Session, thereupon, on an appraisal of the materials on record including the explanation offered by the accused to the incriminating circumstances brought on record in the prosecution evidence against him, found the accused guilty of the offence, convicted him and sentenced him to undergo imprisonment for life and to pay fine. The appellant is aggrieved by the decision of the Court of Session.

5. Heard the learned counsel for the accused as also the learned Public Prosecutor.

6. The learned counsel for the accused submitted that there is no direct evidence in the case to prove the occurrence and the prosecution is relying only on circumstances to prove the guilt of the accused. According to the learned counsel, the circumstances proved in the case do not establish the guilt of the accused beyond reasonable doubt. It was also argued by the learned counsel alternatively that even assuming that the circumstances proved in the case are sufficient to establish that it is the accused who inflicted injuries on the deceased in the manner alleged by the prosecution, inasmuch as the accused did not cause the death of the victim by the act committed by him, the accused cannot be convicted for the offence punishable under Section 302 IPC. It was also the submission of the learned counsel that even assuming that the death of the victim was caused by reason of the act committed by him, the accused cannot be convicted for the offence of murder punishable under Section 302 IPC and that at

the most, he could be punished only for the offence punishable under Section 304 IPC.

7. Per contra, the learned Public Prosecutor asserted that the circumstances proved in the case would not only establish that it is the accused who caused the death of the victim, but also that the accused had the intention to cause the death of the victim. According to the learned Public Prosecutor, in the circumstances, the conviction of the accused under Section 302 IPC is perfectly in order.

8. The points that arise for consideration are (i) whether the prosecution has established beyond reasonable doubt that it was the accused who caused the death of the victim and (ii) if so, the offence, if any, committed by him.

9. Points: Before dealing with the points, it is necessary to consider whether the death of the victim was a homicide. There is no dispute to the fact that both the accused and deceased were friends and they checked in together at the lodge at about 7.30 p.m. on 05.07.2016. PW6 is the doctor who examined the victim at about 2.30 a.m. on 06.07.2016 in the nearby hospital where the deceased was taken first. PW6 deposed that at the relevant time, the deceased was unconscious and was in a gasping stage and it is on account of the said reason that he was immediately referred to a higher medical centre. As already noticed, by the time the deceased was taken to the Medical College Hospital, Kozhikode, he died. PW7 is the doctor who conducted the post-mortem examination on the body of the deceased. PW7 deposed that the deceased died of asphyxia due to compressive force on the mouth, nose and neck. Ext.P10 is the post-mortem certificate issued by PW7. There was no serious challenge to the evidence tendered by PW7 as regards the cause of death of the victim. The evidence aforesaid would conclusively establish that the death of the victim was a homicide, and the finding rendered by the Court of Session in this regard is in order.

10. PW1 was the receptionist of the lodge where the deceased along with the accused had checked-in on the date of the occurrence. PW1 identified the accused in court. PW1 deposed that it was he who completed the formalities for their check-in at the lodge. It was the evidence of PW1 that it is the deceased who gave his voters identity card for the said purpose and they were allotted Room No.110. PW1 deposed that after some time, the accused and the deceased required him to provide water in the room, and by about 9 p.m., he gave water to them. PW1 deposed that he then noticed that one tooth each of the accused on the front upper and lower rows were missing and when he went to the room for giving them water, the deceased entrusted to PW1 his passbook and ID card, after keeping the same in a red cover. PW1 deposed that by about 11.30 p.m., the accused came down to the reception and informed him that he is going out for food and kept the key of the room on the counter stating that the deceased is sleeping. PW1 deposed that by about 12.45 a.m. on the following day, one Reji came to the lodge for a room and he was allotted Room No.101. PW1 deposed

that after some time, when he went to the room allotted to Reji to provide him a mosquito repellent, he heard a sound from the room occupied by the deceased and when he opened the room with the key entrusted to him by the accused earlier at the counter, he found that the deceased was lying on the floor on his chest with his face down. PW1 deposed that he also observed then that there was blood on the dhoti worn by the deceased and also that the position of the cot in the room was changed disorderly. PW1 deposed that he immediately informed the matter to the Manager of the lodge, who came about an hour later along with another person and took the victim to the hospital, after informing the matter to the police. PW1 deposed that when the victim was taken to the hospital, he was in a bad state of health. PW1 deposed that after sometime he was informed by the Manager that Azeez died at about 5 a.m. PW1 is the person who gave Ext.P1 First Information Statement, on the basis of which the case was registered and PW1 identified his signature in Ext.P1 statement.

11. PW2 was the Manager of the lodge. PW2 gave evidence more or less on the same lines of the evidence tendered by PW1. In addition, PW2 deposed that it is he who took Azeez in an ambulance to Nadakkavu Hospital first and then to the Medical College Hospital, Kozhikode and that Azeez died on the way to the Medical College Hospital, Kozhikode. PW4 is the friend of the deceased. PW4 deposed that he found the deceased along with the accused on the afternoon of the day previous to the date of occurrence at Ponnai. PW5 is the Manager of another lodge. PW5 deposed that the accused and the deceased came to the lodge where he was working for a room at about 6.30 p.m. on 05.07.2016 and that he did not give them a room as he found their conduct to be suspicious. PW5 also deposed that he particularly noticed them as they abused him for not providing them a room. PW5 also deposed that the police verified the CCTV footage in his lodge.

12. PW8 was a doctor attached to the Taluk Headquarters Hospital, Malappuram. PW8 was examined by the prosecution to prove that he collected the blood sample of the accused and handed over the same to the police for forensic examination. PW9 is the Scientific Officer attached to the District Crime Records Bureau, Kozhikode, who deposed that she visited the place of occurrence and collected the various articles found therein and handed over the same to the police. PW11 was the Manager of the Town Branch of Ponnani Service Co-operative Bank where the deceased was maintaining an account. She deposed that on 05.07.2016, the deceased withdrew a sum of Rs.10,000/- from his account. PW14 is also a friend of the deceased and he deposed that on the previous day, he had tea with the deceased and the accused in the shop of one Kumaran located at Ponnani town. PW17 is a meat merchant at a place called Pulikkalkadavu. PW17 is also a person who is known to the deceased. PW17 deposed that on the previous day of the occurrence, when the deceased was standing in his shop, the accused came there and sought Rs.10,000/- from him, assuring that he will return the same in two days time.

13. PW26 is the police officer who commenced the investigation in the case and PW27 is the police officer who concluded the investigation in the case and submitted the final report. Ext.P32 series are the list of properties seized by the investigating officer during the investigation and Ext.P33 is the note submitted by the investigating officer for forwarding the seized objects for forensic examination. Ext.P34 is one of the reports of the forensic science laboratory. Ext.P32 series have been proved by PW26 and Exts.P33 and P34 have been proved by PW27.

14. The oral evidence of the witnesses referred to above would establish beyond reasonable doubt that it is the accused who accompanied the deceased to the lodge at about 7.30 p.m. on 05.07.2016 and stayed with the deceased till about 11.30 p.m. on that day. The accused does not dispute this fact. In the course of his examination under Section 313 of the Code, the accused has in fact admitted that he was very much with the deceased on the relevant day and that he left his company only at night. Of course, the accused did not state that he stayed with the deceased in the room from 7.30 p.m. to 11.30 p.m. Ext.P32 series property lists indicate that the objects collected from the scene include a butt of beedi. Sl.No.6 of Ext.P33 is the said beedi butt. Item No.6 of Ext.P34 report of the forensic science laboratory is the beedi butt referred to in Ext.P33. Item No.14(a) in Ext.P34 is the blood sample of the deceased and item No.16 in Ext.P34 is the blood sample of the accused. It is certified in Ext.P34 that item No.6 partly burnt beedi butt contains a mixture of the DNA profiles of the deceased extracted from item No.14(a) and the DNA profiles of the accused extracted from item No.16. Ext.P34 report rules out all doubts as regards the presence of the accused with the deceased in the room on the relevant day and reinforces that it was the accused who was present with the deceased in the room of the lodge. As noted, PW1 has categorically stated in his evidence that when the accused left the lodge by about 11.30 p.m. on that day, he informed PW1 that he is going out to eat food; that the deceased is sleeping and that the accused handed over the key of the room to PW1. There is absolutely no reason to suspect the veracity of the evidence tendered by PW1. In other words, there was no occasion for anybody else to enter the room after the accused left the room.

15. There cannot be any doubt to the proposition that the burden to prove the guilt of the accused beyond reasonable doubt is on the prosecution. Section 106 of the Indian Evidence Act, of course, provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. In the context of criminal trials, the Apex Court has observed in *Shambu Nath Mehra v. State of Ajmer*, 1956 SCC OnLine SC 27 that Section 106 is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. The relevant observation reads thus:

"This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that

duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience.

The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge."

No doubt, Section 106 would apply only to cases where the prosecution has succeeded in proving certain facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused, by virtue of the special knowledge regarding such facts, offers any explanation which might drive the court to draw a different inference. In the instant case, the prosecution has proved beyond reasonable doubt that the accused checked-in at the room of the lodge along with the deceased at about 7.30 p.m. on 05.07.2016; that he remained with the deceased in the room till about 11.30 p.m. and that he left the room after locking the same from outside in the pretext that the deceased was sleeping inside the room. As we have already found, there was no occasion for anybody else to enter the room after the accused left the room, especially since the key of the room was handed over to PW1 by the accused at the reception of the lodge. Inasmuch as PW1 found the deceased in the room almost within an hour after the accused had left the room in the state referred to by PW1 in his evidence, according to us, it can certainly be inferred that the accused is responsible for the state in which the deceased was found by PW1, applying Section 106 of the Indian Evidence Act.

16. As noted, the accused who was very much present with the deceased in the room of the lodge till about 11.30 p.m. on 05.07.2016, in the absence of any occasion for anybody else to enter the room after the accused left the room, is obliged under law to disclose to the court as to the cause of death of the victim or at least offer an explanation as to how the deceased suffered the various ante-mortem injuries deposed to have been noted by PW7 at the time of post-mortem examination. As already noticed, no explanation whatsoever has been given by the accused in this regard. In the circumstances, according to us, it can be safely concluded that it is the accused who caused the act/acts which resulted in the death of the victim.

17. The next point is as to the offence committed by the accused. The evidence tendered by PW7 is that the victim died of asphyxia due to compressive force on the mouth, nose and neck. The various ante-mortem injuries deposed to have been noted by PW7 at the time of post-mortem examination are the following:

1. 'Stellate' shaped lacerated wound 3x2x0.3cm on right side of head, 6cm above top of ear over the parietal eminence. Scalp contusion 20x15x0.3cm on the right fronto temporo parietal region, underlying skull bone was intact.

2. Three small lacerated wounds over an area 2x2x0.3cm on the superior orbital margin of right eye, 9cm away from midline. Size of the wounds seen ranging

from 0.5x0.5x0.3cm to 1.5x0.5x0.3cm.

3. Lacerated wound 4x1x0.5cm, transversely placed on the superior orbital margin of left eye along the outer half of eyebrow. Subcutaneous tissue underneath the area showed blood infiltration for 7x5x0.3cm.

4. Contusion 1x1x0.5cm on the tip of nose.

5. Contusion of upper lip 4x4x0.5cm involving the inner aspect and its mucosa, incorporating a lacerated wound 1x1x0.5cm at the central region. Inner aspect of lower lip also contused over an area 4x3x0.5cm and incorporating a lacerated wound 0.5x0.5x0.5cm on the right side, 1.5cm away from midline. Multiple contusions seen on the gums of teeth. There was a contusion 1x1x0.5cm on the tip of tongue.

6. Contusion 15x9x1cm on the right side of face and neck including pinna of ear. Margins were illdefined. Lower margin was in continuity with a huge contusion 22x10x1cm on front of neck.

Flap dissection of neck was done under bloodless field, subcutaneous tissue and strap muscles underneath the contusion showed thick blood infiltration. Fracture of left greater horn of hyoid bone noted. Laryngeal oedema and contusion present. Air passages contained blood and froth.

7. Lacerated wound 2x0.5x0.2cm along the upper margin of the pinna of left ear, cartilage at this region was crushed and exposed.

8. Contusion 5x3x0.5cm on the outer aspect of right arm, 13cm below tip of shoulder.

9. Superficial skin contusion 3x1.5cm on the outer aspect of left arm, 11 cm below tip of shoulder.

10. Superficial skin contusion 10x2.5cm on the front of left side of chest over the collar bone.

11. Chest wall contusion 15x10x0.5cm on the back aspect on left side; extending from third to 6th inter costal space; 5cm away from midline. Ribs were intact.

PW7 also deposed that both lungs of the deceased were found congested and oedematous. Similarly, PW7 deposed that both kidneys of the deceased were congested. Even though PW7 did not depose as to how he arrived at his opinion as regards the cause of death of the victim in his chief-examination, in cross-examination, it was clarified by PW7 that facial congestion, oedema, congestion of all the internal organs, especially lungs are the characteristic findings of death due to asphyxia and it was on that basis that he came to the opinion as to the cause of death of the victim. We do not find any reason to doubt the veracity of the medical opinion given by PW7. If the medical opinion given by PW7 is accepted, it has to be found necessarily that the accused applied compressive force on the mouth, nose and neck of the deceased. The application of

compressive force on the neck of the deceased is evident from injury No.6 noted by PW7 also, especially the size of the contusion noted by PW7 in the said injury on the front neck of the deceased. Needless to say, it can be inferred from the opinion given by PW7 and the post-mortem certificate issued by him that the accused had the intention to cause the death of the victim, otherwise, there is absolutely no reason for him to apply compressive force of such a dimension on the neck of the victim. It has come out from the evidence of PW1 that after assaulting the deceased, the accused casually closed the door of the room from outside and left the scene, which would also indicate that the accused spared the deceased only after ensuring that he is no more, as alleged by the prosecution. The said subsequent conduct of the accused also fortifies our stand that the accused had the necessary intention to cause the death of the victim. If the accused had the intention to cause the death, and when the act was one performed by him with the said intention, there cannot be any doubt that the offence made out is the offence punishable under Section 302 IPC.

In the circumstances, there is no merit in the appeal and the same is accordingly, dismissed.