

(2011) 07 KL CK 0051
In the High Court Of Kerala
Case No : Criminal A. No. 197 of 2007

Baby @ Shaji

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 08-07-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 174, 313(1), 332, 374(2)
Penal Code, 1860 (IPC) — Section 302, 323, 324, 34, 341

Citation : (2011) 07 KL CK 0051

Hon'ble Judges : V. Ramkumar, J;P.Q. Barkath Ali, J

Bench : Division Bench

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

Final Decision : Allowed

Judgement

V. Ramkumar, J.—In this appeal filed u/s 374(2) Code of Criminal Procedure the first accused in Sessions Case No. 49 of 2006 on the file of the Addl. Sessions Court , Adhoc - I, Kottayam challenges his conviction under Sections 341 and 302 I.P.C.

2. The case of the prosecution can be summarised as follows:

On 23-08-2005 at about 12 midnight at Nagampadam bus stand in Kottayam town the deceased namely Aniyappan @ Padayappa aged 40 years peeled the saree worn by A2 (Rajamma) who is the wife of A1 and got hold of her with the intention of outraging her modesty from a place situated to the north of the tea shop of P.W.1 by name "Lubina Coolbar" belonging to P.W.1 , A3 and A4 wrongfully restrained the deceased. A2 demanded the deceased to return her saree. A1 and A2 beat the deceased with bare hands. A3 engaged himself in a scuffle with the deceased and both of them rolled on the ground and A3 then hit the deceased with a piece of brick (MO1 series) on the back of his head. Exhorting his companions to kill the deceased , A1 hit him with MO4 granite stone on the left forehead. The deceased who had sustained bleeding injuries on

the head and other parts of the body, succumbed to the injuries. A1 to A4 have thereby committed offences punishable under Sections 341, 323, 324 and 302 read with Section 34 I.P.C.

3. On A1 to A4 pleading not guilty to the charge framed against them by the court below, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 13 witnesses as P. Ws 1 to 13 and got marked 20 documents as P1 to P20 and 12 material objects as Mos 1 to 12.

4. After the close of the prosecution evidence, the accused were questioned u/s 313(1)(b) Code of Criminal Procedure with regard to the incriminating circumstances appearing against them in the evidence for the prosecution. They denied those circumstances and maintained their innocence.

5. Since this was not a case of no evidence, the accused were not acquitted u/s 332 Code of Criminal Procedure. They were, therefore, called upon to enter on their evidence and to adduce any evidence which they might have in support thereof.

6. They did not adduce any evidence. The learned Addl. Sessions Judge, after trial, as per judgment dated 5-10-2006 found A1 to A4 guilty of offence punishable u/s 341 I.P.C. and A1 guilty of the offence punishable u/s 302 I.P.C. At the time of posting of the case for hearing the accused on the question of sentence, A3 was found absconding and the learned Sessions Judge, therefore, heard A1, A2 and A4 on the question of sentence. For the conviction of A1, 2 and 4 for the offence punishable u/s 341 I.P.C. each of them was sentenced to simple imprisonment for one month and to pay fine of Rs. 500/- and on default to pay the Crl. Appeal No. 197 of 2007 fine, to suffer simple imprisonment for one week. For the conviction u/s 302 I.P.C., A1 (the Appellant herein) was sentenced to imprisonment for life and to pay fine of Rs. 5,000/- and on default to pay the fine to undergo rigorous imprisonment for a period of one year. Set off was allowed to A2 and A4. It was directed that A1 will be entitled to set off subject to remission u/s 432 Code of Criminal Procedure. It is the said judgment which is assailed in this appeal filed by the 1st accused.

7. We heard Adv. Sri. S. Rajeev, the learned Counsel for the Appellant as well as Adv. Sri. C.S. Hrishwik, the learned Public Prosecutor.

8. The only point which arises for consideration in this appeal is as to whether the conviction entered and the sentence passed against the Appellant are sustainable or not ?

The Point:

9. P.W.1 (Nazar) is the owner of the tea shop and Coolbar by name Lubina Coolbar situated inside the Nagampadam bus stand in the heart of the Kottayam Town. According to the prosecution, the occurrence took place in front of the tea shop of P.W.1 inside the bus stand soon after midnight when the said tea shop was remaining closed. P.W.1 is not an occurrence witness. He gave Ext.P1

F.I. statement to the Sub Inspector (P.W.11) of Kottayam East Police Station at 5.30 a.m. on 23-08-2005 after discovering the dead body of the deceased lying in front of the tea shop. He had initially telephoned the police station from his shop at about 4.50 a.m. The police came there and then as requested by the police P.W.1 went to the police station in an auto rickshaw at about 5.15 a.m. and lodged the F.I. statement at on 5.30 a.m.

10. P.W. 2 (Kamalan) claims to have been a patient in the Nagambadam Homeo Hospital allegedly for disc prolapse. At about midnight on 12-08-2005, he claims to have heard a commotion from the direction of the private bus stand. When he looked through the ventilator he claims to have seen the deceased running with a saree and A2 (Rajamma) running behind him demanding her saree back and A1 following A2. He had also seen A3 and A4 standing near the bus stand. Hearing further commotion, he claims to have gone back to his bed.

11. P.W.3 (Mohammedkutty) was the witness cited by the prosecution to prove the entire occurrence. He, however, partly turned hostile to the prosecution by only admitting that part of the incident in which A2 was seen chasing the deceased for her saree. He is a temporary worker employed as a plumber under one Samad who had taken the contract of cleaning the comfort station situated towards the north-western corner of the Nagampadam bus stand. He and another employee by name Joseph @ Appachan (CW22) claims to have seen the occurrence. But all that this witnesses deposed was that both himself and Appachan saw the deceased running with folded MO1 saree and A2 chasing him demanding her saree and two others standing there in the bus stand. He did not support the prosecution with regard to the latter portion of his statement u/s 161 Code of Criminal Procedure and was declared hostile to the prosecution. Ext.P2 is his case diary contradiction.

12. P.W.4 (Sudhan) is a sanitary worker of B-Zon attached to Kottayam Municipality. His duty during the night of 22-8-2005 was from 9 p.m. to 12 midnight. Sometime prior to the midnight P.W.4 and one Muthuswami (CW6) went past the Nagampadam bus stand. He claims to have seen A3 & A4 sleeping in the bus stand and A1 and A2 sleeping on the eastern side of the Homeo Hospital. He also claims to have seen the deceased walking along the vicinity of the Confort Station. He had also seen 2 or 3 beggars in the bus stand. Mos 2 and 3 which are the shorts of A3 and A4 were marked through him.

13. P.W. 5 (Sumesh) is an attester to Ext.P3 mahazar dated 25-8-2003 for the recovery of Mos 2 and 3 shirts belonging to A3 and A4 allegedly in pursuance of Ext.P5 disclosure statement given by A3. P.W. 12 the Investigating Officer seized Mos 2 and 3 shirts under this mahazar.

14. P.W.6 (Jacob) is a witness to Ext.P4 mahazar dated 25.08.2005 for the seizure of MO4 granite stone allegedly used by A1 and seized pursuant to Ext. P14 disclosure statement given by A1. P.W.12 seized MO4 under Ext.P4 mahazar.

15. P.W. 7 (Thajudeen) is a witness to Ext.P5 scene mahazar prepared by P.W.12

the Investigating Officer at 11 a.m. on 25-08-2005.

16. P.W. 8 (Dr. P. Babu) who is the Assistant Professor and Deputy Police Surgeon attached to the Medical College Hospital, Kottayam conducted autopsy over the dead body of Aniyappan @ Padayappa at 10 a.m. on 23-08-2005 and issued Ext.P6 postmortem certificate as per which the cause of death of Padayappa was due to head injuries.

17. P.W.9 (Zacheria Thomas) is the Assistant Professor of Forensic Medicine , collected samples of hair of the accused persons on 25-08-2005 on the request made by the Invetigating Officer and handed over the same to a police constable who accompanied the Investigating Officer. It is pertinent to note that no mahazar is seen prepared by the Investigating Officer for taking custody of the hair samples from P.W.9.

18. P.W. 10 (Ramesh Kumar) is the Village Officer of Muttambalam Village. He proved Ext. P7 scene plan prepared by him on 9-11-2005 on the strength of Ext.P5 scene mahazar.

19. P.W.11 (K.R. Muraleedharan) who was the Sub Inspector of Kottayam Police Station registered Ext.P1 (a) First Information Report on the strength of Ext. P1 F.I. statement given by P.W.1. The case was initially registered under the caption "unnatural death" u/s 174 Code of Criminal Procedure and the F.I.R. was forwarded to the Sub Divisional Magistrate, Kottayam. He also held inquest over the dead body of the deceased from 7 a.m. to 10.15 a.m. on 23-08-2005 as revealed by Ext. P8 inquest report. M Os 5 to 11 were seized under the said inquest report. He thereupon gave Ext.P9 report for adding Section 302 I.P.C. and to transmit Ext.P1 F.I.R. to J.F.C.M. Kottayam since the case according to him revealed the offence of murder.

20. P.W.12 (V.G. Vinod Kumar) was the Circle Inspector of Kottayam East Police Station who conducted the rest of the invetigation. He proved Ext.P10 mahazar as per which Ajith Kumar (Scientific Assistant - CW23) had collected the following items in six different packets from the body of the deceased.

- i) Loose hairs found on the left palm.
- ii) Loose hairs found on the face
- iii) Hairs found on the white dhoti with which the dead body was covered.
- iv) Microscopic particles from both palms of the deceased using cellophane tape.
- v) Blood from the body (unsealed)
- vi) Control sample for the blood from the body.

He proved Ext.P11 report submitted by C.W.23 with regard to the collection of the aforesaid items. On 23-08-2005 at about 11 a.m. P.W.12 prepared Ext.P5 scene mahazar. He submitted Ext.P13 report for adding Sections 323, 324 and 341 read with Section 34 I.P.C. He arrested all the four accused persons on

24-08-2005 at 6.45 p.m. On 25-08-2005 at 8 a.m. P.W.12 seized MO4 blood stained granite stone pursuant to Ext.P14 disclosure statement given by A1. P.W.6 is an attester to Ext.P4 mahazar. On the same day at 10 a.m. P.W.12 seized Mos 2 and 3 shirts of A3 and A4 pursuant to Ext.P15 disclosure statement given by A3 . P.W.5 is an attester to Ext.P5 scene mahazar. Ext.P16 F.S.L. report, P17 series of photographs taken by P.W.13 and Ext.P18 chemical report of viscera and blood pertaining to the deceased were marked through him. Ext.P18 report shows that the deceased had 40.25 ml. grams per 100ml. of alcohol in his stomach contents.

19. P.W.13 (George) was the photographer who had taken Ext.P17 photographs. He also proved Ext.P19 negatives.

21. Strangely enough, the court below had marked a rough sketch as Ext.P20 produced by the Public Prosecutor during the course of arguments on 28-09-2006 without any petition or memo to that effect. This rough sketch showed the location of the Homeo hospital at a site which was not the site mentioned by P.W.1.

22. The learned Addl. Sessions Judge relied on the following materials to record the conviction against the Appellant and others:

i) The testimony of P Ws 2 to 4 and Ext.P20 rough sketch to appreciate their evidence.

ii) The recovery of MO4 blood stained granite stone at the instance of A1.

iii) Exts. P10 mahazar and P11 report prepared by CW2 (Scientific Assistant) along with Ext.P16 to hold that the type II hair collected from the left palm of the deceased matched with the specimen scalp hair collected from the Appellant.

23. After a careful re-appraisal of the oral and documentary evidence in the case and after hearing both sides , we are of the view that the material relied on by the court below do not unerringly establish the complicity of the Appellant behind in the death of Aniappan @ Padayappa.

24. Admittedly, there is no direct ocular evidence regarding the occurrence. P.W.1 is admittedly not an occurrence witness . In the case of P.W.2 all that he allegedly saw through the ventilator of the Homeo Hospital where he claims to have been admitted for disc prolapse , is the deceased running with a saree and A2 chasing him demanding her saree back and A1 following A2 and A3 and A4 standing near the bus stand. Going by Exts. P5 and 12 scene mahazras and Ext.P7 scene plan, the Nagampadam bus stand building having a length of 90 metres and width of 15 metres lies north-south with parking area for buses on either side. The occurrence allegedly took place at about 1.90 metres in front of the Lubina Cool bar belonging to P.W.1 and situated almost in the middle of the bus stand building. The evidence shows that immediately to the north-south of the place of occurrence there is a big rectangular concrete pillar. It is also in evidence that there are several such pillars in the bus stand building. According

to P.W.1 there are four more stalls to the north of the place of occurrence inside the bus stand building. At about 60 metres of the north-west of the place of occurrence is a Comfort Station. Going by the evidence of P.W.1 the above Comfort Station is situated immediately to the south of the Homeo Hospital. As noted earlier, the occurrence took place soon after the midnight of 22-08-2005. Going by the topography as revealed by the scene mahazars and the scene plan it would be difficult for P.W.2 to have seen the deceased and A2 running by standing and by looking through the ventilator of the Homeo Hospital situated immediately to the north of the Comfort Station. Both the Comfort Station as well as the massive pillars inside the bus stand building would have obstructed his view even assuming that there was sufficient light inside the bus stand building and its vicinity. Presumably, sensing the above difficulty, it appears that the Public Prosecutor who conducted the case before the Court below produced a rough sketch during the stage of arguments. We are surprised to find that the learned Addl. Sessions Judge had no hesitation to mark the same as Ext.P20 which was not produced along with any memo or petition. Going by Ext.P20 rough sketch the Homeo Hospital is shifted from the north-western corner of the bus stand to the north eastern side in line with the place of occurrence so as to persuade the court to hold that from that position it was possible for P.W.2 to have witnessed the place of occurrence. It is not know why such a procedure was resorted to, particularly, when P.W.2 has no case that he had actually witnessed the occurrence in which the deceased sustained the fatal injuries. All that he saw was the deceased running with a saree presumably wrested from A2 (Rajamma) and A2 chasing the deceased demanding her saree back and A1 who is the husband of A2 following A2. Merely from the fact that A2 was scene chasing the deceased demanding her saree, it does not follow that A1 to 4 are behind the assassination of the deceased.

25. What P.W.3 saw was also nothing different from what P.W.2 saw. He too saw the deceased running with folded MO1 saree and A2 following him asking for her saree back.

26. What P.W.4 saw was only A1 and A2 sleeping on the eastern side of the Home o Hospital some time before midnight and A3 and A4 sleeping inside the bus stand. A1, according to the prosecution is none other than the husband of A2.. If the deceased had committed the erotic impropriety of peeling the saree of A2 and if A2 was seen chasing the deceased for re-possessing her saree A1 who is her husband had every right to follow her. From that alone it is not possible to conclude that A1 or any of the other accused were responsible for the death of Aniyappa @ Padayappa.

27. What is to be next considered is the recovery evidence pertaining to MO4 blood stained granite stone at the hands of A1. No doubt, MO4 stone was recovered by PW12 as per Ext.P4 mahazar pursuant to Ext.P14 disclosure statement given by A1. It is also true that MO4 was found stained with human blood, the group of which was that of the deceased. From that alone it cannot be

concluded that A1 was the culprit. It only shows that A1 showed the stone which might have been used for hitting on the head of the deceased. It is well settled that recovery evidence cannot constitute substantive evidence and it is only a piece of corroborative evidence which can be pressed in to service only when there is substantive evidence, if any, adduced by the prosecution. In the absence of any other material to show the complicity of A1, the said recovery evidence alone cannot be relied on by the prosecution to sustain the conviction of the Appellant.

28. What now survives for consideration is the evidence regarding the hair collected by CW23 the Scientific Assistant from the dead body of Aniyappa @ Padayappa and the scientific evidence provided by Ext.P16 F.S.L report. No doubt, the evidence of PW12, the Investigating Officer and Exts.P10 Mahazar and P11 report would indicate that among other things CW23, the Scientific Assistant had recovered some loose hair from the left palm of the deceased. It has not been established by the prosecution that what was shown as Item No. 16b in Ext.P16 FSL report constitutes the loose hair collected by CW23 from the left palm of the deceased and that the type II hair in item No. 16b matched with the scalp hair of A1 shown as Item No. 9 in Ext.P16, report. CW23, the Scientific Assistant was not examined to prove the link evidence to convict the hair recovered from the left palm of the deceased to be that of A1, the Appellant. Even assuming that the left palm of the deceased contained the hair follicles of A1, it should not be forgotten that soon before PW2 had seen A2 chasing the deceased for re-possessing her saree, A1 and A2 who are husband and wife were seen (by PW4) sleeping together on the eastern side of the Homoeo hospital. It must be remembered that what PW2 and PW3 had seen was the deceased running away with the saree of A2 (Rajamma) and A2 chasing the deceased demanding her saree back. Some time prior to the occurrence PW4 had seen both A1 and A2 sleeping together on the eastern side of the Homoeo hospital. A1 is said to be the husband of A2. If the deceased had wrested the saree of A2 and was chased by A2 when A1 also followed them, in every possibility the hands of the deceased could naturally contain the hair follicles of A2, the wife and also that of A1, her husband. It is quite natural that the hair follicles of A2 as well as her husband would have been on her saree which was pulled out and attempted to be taken away by the deceased. From the said evidence alone it was not possible to hold that A1 had involved himself in intentionally causing the death of the deceased. In the absence of any direct ocular evidence regarding the occurrence the aforementioned circumstances, in our opinion, cannot constitute a complete chain of circumstances unerringly pointing to the guilt of the Appellant. No doubt, the deceased have evidently died due to the bleeding injury sustained to his head. But, for convicting any of the accused there should be legal evidence indisputably pointing an accusing finger at the persons in the dock. The conviction entered and the sentence passed by the court below, overlooking the above vital aspects, cannot be sustained. The Appellant is accordingly found not guilty of offences punishable under Sections 341 and 302

IPC and is acquitted there under. The Appellant is set at liberty forthwith.

The Appellant shall be released from prison forthwith unless his continued detention is found necessary in connection with any other case against him.

In the result, this appeal is allowed as above.