
(2021) 11 KL CK 0037

In the High Court Of Kerala

Case No : Criminal Appeal No. 1052 Of 2016

Chandrasekhar Digal S/O.Dinobandu Digal

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 08-11-2021

Acts Referred:

Indian Penal Code, 1860 — Section 201, 302
Evidence Act, 1872 — Section 8, 27

Citation : (2021) 11 KL CK 0037

Hon'ble Judges : K.Vinod Chandran, J;C. Jayachandran, J

Bench : Division Bench

Advocate : Vishnu Chandran, Ralph Reti John, V.John Sebastian Ralph, Appu Babu, Shifna Muhammed Shukkur, Alex.M.Thombra

Final Decision : Allowed

Judgement

K. Vinod Chandran, J.

1. The plight of migrant workers is such, that any crime against one, is invariably saddled on another and the investigation proceeds in a preconceived manner assuming that the Courts would only convict.

2. The appeal arises from the judgment convicting the accused under Sections 302 and 201 of IPC and sentencing him to undergo imprisonment for life and rigorous imprisonment for a period of three years respectively and imposing a fine of Rs.50,000/- and Rs.10,000/- with default sentences. The substantive sentences were directed to be concurrently run. The accused was found guilty of the murder of his colleague, by beating him with MO1 wooden plank and causing disappearance of evidence by burying the body. The prosecution examined 21 witnesses, marked 20 documents, and 35 material objects.

3. Learned Counsel for the appellant Sri Ralph.R.John points out that there is absolutely no circumstance, linking the accused to the crime. There is not even a proper identification of the body as that of the missing person. The Doctor had

cautiously handed over the femur from the corpse to the police, which the I.O stated was for DNA examination. Neither was a DNA test conducted nor a superimposition of the photograph on the skull of the body. The father of the deceased who was examined as PW3, did not specifically identify the body to be that of his son. There is not even a confirmation that the body on which post mortem was conducted was that of a male. Though two mobile phones without sim cards were recovered, no investigation was carried out nor were the call details of the accused and the deceased requisitioned; whose mobile numbers would have been available in the hotel. The last scene theory has no legs to stand, since PW5 does not speak of having seen the accused and the deceased together.

4. There is no discernible motive and even the medical evidence is sketchy. PW16 was asked leading questions to elicit the cause of death and there is no substantive evidence of the Doctor that the wound suffered on the skull, would, in the ordinary course of nature, lead to the death of a person. *Sajan V. State of UP* (AIR 2016 SC 282) which declared that the Doctor has to depose on the cause of death is relied on. As far as the confession is concerned, PW8 is the Translator, who does not accompany the police at the time of recovery. It is not clear as to how the confession of the accused was recorded in the mahazar at the time of recovery. Reliance was placed on *Sanjay Oraon V State of Kerala* (2021 KHC 1) to contend that the recovery has to be totally eschewed since there is no proof that the disclosure was made by the accused in his language. It is pointed out that the sequence of recovery also does not inspire confidence, since first the weapon and spade were recovered and then the body exhumed; while normal human conduct will be to first exhume the body. The authorship of concealment is also not clear and the learned Counsel relies on the decision of the Hon'ble Supreme Court reported as *Ohalia Motya Valvi V State of Maharashtra* (1980 (1)SCC 530), *Ajayan @ Baby V. State of Kerala* (2011(1) KHC 1)U , *Golden Satheesan @ Satheesan and others V. State of Kerala* (2012 KHC 25). The learned counsel would urge that there is no evidence connecting the accused to the crime and that the accused be acquitted, setting aside the conviction and sentence imposed by the trial Court.

5. The learned Public Prosecutor, Sri.Alex M.Thombra argues that the discovery of the corpse was on the same being pointed out by the accused. Even if it cannot be said to be a recovery under Section 27 of the Evidence Act, it has to be treated as a relevant factor under Section 8 of the Act. *Ningappa Yallappa Hosamani v. State of Karnataka* [(2009) 14 SCC 582] and *State of Maharashtra v. Suresh* [(2000) 1 SCC 471] are relied on to argue that, when the dead body is recovered on the voluntary information supplied by the accused, the presumption is that, it was the accused who killed the deceased and buried the dead body. The subsequent conduct of the accused is also relied on to point out that immediately on the parents of the deceased coming to the hotel, the accused disappeared, which shows the guilty mind. The deposition of the father of the deceased, PW3, indicates that the families of the accused and deceased were

known to each other. The last scene theory is clinching to bring home the guilt of the accused and there is no explanation as to how the deceased, who slept in the same room as the accused, was killed and buried. The confession statement of the accused also led to the recovery of weapon, MO2, and the spade, MO3, used to dig a pit to bury the dead body. Chemical examination showed that the sand particles on the spade, match the sample collected from the property. The accused had stated a deliberate falsehood to the other employees of the hotel regarding the disappearance of his colleague; that he left for home. All these circumstances together unerringly prove the guilt of the accused. The conviction of the accused under Sections 302 and 201 IPC has to be upheld and the sentence imposed sustained.

6. The accused and the deceased, natives of the State of Orissa were working in one Bellard Bunglow Hotel at Fort Cochin. On 08.11.2009, the deceased was found missing. The other employees of the hotel made enquiries with the relatives and friends of the missing person. Having not traced him out, an FIR was registered on 01.12.2009. The First Information Statement (FIS) of PW1, the Supervisor of the Hotel, before the Police was that the house keeping employee of the Hotel was missing from 08.11.2009. The missing person(the deceased) was working in the hotel for the past one year and he was staying along with his friend, the accused, in the staff room. On 07.11.2009, from 7 to 12 in the night, both of them were watching TV. After 12'0 clock, the accused went to his room to sleep and later, the missing person also came to the room to sleep. At around 6'0 clock in the morning, when the accused was in the bathroom, the friend, who went missing, knocked on the door and said that he is going to the nearby Hotel Casalinta. When he was not seen for half an hour, the accused called the neighbouring hotel and it was informed that the missing person has not reached there. The accused and the other employees tried to contact him through the mobile phone, but his mobile phone was switched off. They enquired with all known friends of the missing person and not having been able to trace him, his relatives in the State of Orissa were informed. Even on further enquiries, trace of the missing person was not obtained. It was hence the FIS was given after about one month. It was specifically stated that PW1 was not aware of why the missing person left the hotel. It was also stated that the missing person had taken all his belongings, except an old suitcase and some old clothes. Both the missing person and the accused were having good relationship, between themselves and also with the other employees of the hotel. There was nothing taken from the hotel, by the missing person, which did not belong to him.

7. Enquiries were conducted and later, the accused is said to have been arrested from the State of Orissa and brought back to Kerala. On interrogation, he is said to have made some confessions by virtue of which the body of the missing person was detected as buried in the hotel compound. The FIR was modified and offence under Section 302 and 201 added. PW1, the Supervisor of the Hotel admitted the FIS having been given by him. He deposed that, in addition to PW2, the Receptionist, there were three employees in the hotel, the accused and the

deceased, natives of Orissa and one Philomina. Immediately, we have to notice that in the FIS, the statement was that both the accused and the deceased were in very friendly terms with the employees Bapu and Tintu; which has been omitted before Court. Further, PW1 denied his presence in the hotel, on the night of 07.11.2009. He also added that he had arranged a room to be given to a tourist party, by calling PW2 over the telephone. The driver who brought the family also stayed in the same hotel and on the next day, when PW1 came to the hotel, the tourist party had left. This is a crucial embellishment and the prosecution case now rests on that driver. PW1 deposed on the missing of the employee, the enquiries made and the accused having taken three days leave, later. After a week, the accused returned and requested a job for his brother in law. The brother in law was declined employment and the accused remained for 3 to 4 days and then again left without informing the Supervisor. It was also stated that the accused left when the parents of the deceased came to enquire about their son.

8. According to PW1, the police inspected the registers of the hotel and a mahazar was prepared. While in the FIS, it was stated that the accused informed him that the deceased had spoken of going to the neighbouring hotel and was not seen thereafter, before Court, PW1 stated that the accused told him that the deceased had gone home. PW1 identified MO1, wooden plank, the alleged weapon and MO2, spade allegedly used for digging a pit to bury the body as recovered by Ext.P2 mahazar; to which PW1 was a witness. PW1 spoke of having seen the police party following the accused to the place where the body was buried. The various belongings of the accused were identified as MO3 to MO5, being a bangle, 'T' shirt and bermuda shorts. The blanket in which the body was covered, was identified as MO6, and a turkey towel found near the body was identified as MO7. In cross examination, a specific question was put as to whether he told the police that the accused left the hotel when the parents of the deceased came, to which he replied that he does not remember.

9. PW2 is the Receptionist who was on duty on 07.11.2009 and remained in the hotel till 10 pm. He spoke of the other employees, as PW1 deposed. He also spoke of the tourists having rented out a room in the night and the driver, PW5, having stayed in the TV room of the adjacent building, where the accused and deceased also had their accommodation. He speaks of having seen three people in the TV room when he left the premises; who are, the accused, deceased and the driver, PW5. Again, contrary to the FIS, he also said that the accused informed them of the deceased having left with his bag. He spoke of having helped the police recover two mobile phones, with the help of a mug tied to a stick from the well in the property. The mobile phones, though stated to be belonging to the deceased, were not shown to the witnesses and identified. PW2 was also a witness to Ext.P3 mahazar, by which a suitcase and belongings of the deceased were recovered on 02.12.2009, which are marked as MO8 and MO11 to MO31. PW2 also spoke of the accused having come back with his brother in law for employment. However, his deposition was that the Manager having refused

employment, both the accused and the brother in law had left. This is quite contrary to the statement of PW1 that the accused had remained in the hotel for 3 to 4 days after he came back from leave. PW2 further deposed about the recoveries made under Section 27 on the confession statement of the accused. That is, the weapon and spade, MO1 and MO2, as also the discovery of the corpse.

10. PW3 is the father of the deceased who had repeatedly come to the hotel in search of his son. He was present at the time when the body was exhumed. He merely stated that when the police dug up the spot, his son's body was recovered covered in a blanket. This statement falls short of identification of the body as that of his son. The witness had merely assumed that the body recovered was that of his son. He identified the clothes found on the body and the bangle which was worn by his son. PW4 was another witness to Ext.P4 mahazar, by which MO1 and MO2 were recovered. He also witnessed the exhumation of the body. PW5 is the driver of the tourist party, who took a room for a night, on whom hinges the last scene theory. PW5 is a resident of Bangalore and the tourists were stated to be residents of Darjeeling. PW5 also stated the number of his Car. PW5, it has to be noted, is a chance witness and his presence there has not been proved. That PW5 was a taxi driver and that he had resided there along with a tourist family was not proved by the prosecution. PW1 specifically stated that the registers in the hotel were inspected and mahazar prepared but nothing has been produced to show the stay of a family in the Hotel on that night. As far as the last scene theory is concerned, PW5 states that he was watching TV along with the accused and the deceased. The deceased left at around 12'0 clock to sleep. Then, himself and the accused watched TV for some more time. Later, he slept on a cot on the floor of the TV room and when he woke up at 6.30, none were seen. When he went out to wash his car, he saw the accused who served him tea. He was called to the station on 30.3.2012 and then a statement was recorded. In cross examination, he stated that he could not recollect the dress worn by the accused and the deceased.

11. PW6 is the Assistant Manager of the Hotel. He deposed that while on 08.11.2009, he was coming to the hotel, the accused called him and told him that the deceased had gone to Casalinta and not returned. When the accused called the deceased on the mobile, he had merely responded with a 'hello' and then turned off the mobile. Casalinta, it was stated by PW6, was a sister concern. He also said that the accused went on leave and returned with his brother in law for employment. On declining employment, both of them left. PW7 is the witness of inquest and PW8, the translator who aided the interrogation of the accused. PW9 is the Head Constable, who prepared Mahazar on inspection of the register of the hotel which register was not seized or produced before Court. PW10 is the Head Constable, on whose instruction, PW2 recovered the two mobile phones MO9 and MO10 from the well. He identified the mobile phones but as earlier noticed, it was not shown to the witnesses, who could have identified them to be that of the accused. PW11 is another Head Constable, who carried out bandavas

of the dead body sent for post mortem. He took charge of the various articles found on the dead body and also the blanket in which the body was covered, as handed over to him by the Doctor. Pertinently, there was no bangle said to have been recovered from the body, by PW11, to whom, the Doctor, who carried out the post mortem examination, handed over everything found on the body. PW12 is the witness to Ext.P8, which is the mahazar, by which the articles found on the dead body and Ext.P9, by which the femur was handed over, to the Circle Inspector. PW13 is the Videographer, who caught on video the exhumation, which CD was not produced before Court. PW14, Village Officer prepared the site plan and PW15, Scientific Assistant collected samples of soil from the scene of occurrence. PW16 is the Doctor who carried out the post mortem and PW17, the Tahsildar was another inquest witness. PW18, SI of Police, registered the missing FIR and identified the belongings of the accused recovered on inspection of the room in which the accused was staying. PW19, SI arrested the accused and on detecting the graver offence of murder, handed over the investigation to PW20. PW20, CI carried out the investigation and PW21, CI, laid the charge.

12. The FIS does not tally with the testimony of the witnesses who were associated with both the deceased and the accused at the hotel. PW1 made the statement as if he had direct knowledge of the incident. But, before Court he admitted that he was not present at the scene of occurrence. PW2, the Receptionist, was available in the hotel till 10.00 p.m and according to him, when he left, he saw the accused and the deceased along with the driver, PW5, watching TV in the TV room, in a building adjacent to the hotel. PW5 says that, the deceased first left the TV room and then he fell asleep in the TV room, lying on a cot on the floor. He does not specifically speak of having seen the accused with the deceased, later to the deceased having left the TV room. The last seen theory, hence, does not stand scrutiny, especially due to the fact that the deceased was last seen together not only with the accused, but also with PW5 as deposed by PW2. PW5 also states that on the next day morning, he saw the accused and asked for a tea, which he was served with. Hence, the accused had not absconded from the scene of the alleged crime immediately on such alleged commission.

13. PWs.1, 2 and 6; all employees of the hotel, admitted that the accused had taken leave only after 3 or 4 days. There is also no clear evidence as to what happened when the deceased was found missing. PWs.1, 2 and 6 would say that the accused told them that the deceased informed him that he is going to the nearby hotel. However, while PW1 says that the accused called the nearby hotel to know about the whereabouts of the missing person, it is PW6's statement that the accused called the deceased, who picked up the phone and after saying 'hello', immediately disconnected. In this context, it has to be stated that the police could have easily obtained the mobile numbers of both the accused and the deceased from the hotel and carried out an investigation with reference to the call details, which were not requisitioned. Further, two mobile phones were recovered from the well, which have not been proved to be that of the deceased.

The mobile phones were not confronted to PWs.1, 2 and 6 to establish that they were owned by the deceased. It has also come out from the evidence of all the three witnesses that, the accused returned after leave with his brother-in-law and sought employment in the hotel for his brother-in-law also. The Manager having declined the request, it is the testimony of PWs.2 and 6 that both the accused and his brother-in-law left the place. PW1 however would say that the accused stayed for 3 - 4 days and left. In any event, the accused having come back after leave, it cannot be said that he absconded from the scene of occurrence.

14. Now, we come to the arrest of the accused and the recovery of the dead body and the weapons. PW18 registered the man missing FIR and carried out investigation. PW19 took over the investigation from PW18 and on disclosure of murder, the investigation was handed over to the superior officer, PW20. The arrest of the accused has been made within Kerala by PW20. PW20, the I.O, in cross examination stated that the accused was brought from the State of Orissa by one of his subordinates, who is not examined before Court. It is also stated that the accused was apprehended for questioning with the help of the police in the State of Orissa and that an S.I assisted him. If an arrest was made in the State of Orissa, definitely the accused could have been transported only with a transit warrant, which has not been produced before Court. The inconsistencies in the evidence of PW19 and PW20 stares at the prosecution and throws suspicion on how the accused was apprehended. There is no evidence to show the accused having left Kerala for Orissa.

15. It is also PW20, who speaks of the confession as per mahazar and marks it. Ext.P2 & P4 mahazars dated 10.02.2010 contains Ext.P2(a) & P4(a) confession statements; both identical, regarding the burial of the body, the room in which the crime was committed and the concealment of the weapon and spade, used to dig a pit. Ext.P2 mahazar is with regard to the recovery of the weapon and spade while Ext.P4 is a scene mahazar describing the room in which the alleged crime was committed. The exhumation of the body from the spot pointed out by the accused is seen from Ext. P5 Inquest report which is also dated 10.02.2010. But the confession statement has not been recorded in the language of the accused, which is an essential requirement as declared in Sanjay Oraon (Supra).; as follows:

"In the instant case what has been recorded is what has been stated by the translator and obviously even the Police Officer who recorded it does not know whether the words are an exact translation. We garner further support from AIR 2000 SC 591 Mujeeb & Ors. Vs. State of Kerala: "Though according to Investigating Officer the recovery was made on the basis of statement of the accused but we find from the evidence that actual words in verbatim leading to recovery were not recorded by the Investigating Officer" (sic). Therein the recorded statement was in the third person. But the principle applies squarely even when the accused speaks in a language not familiar to the person recording

it, when a translation is warranted, where a third person comes in between the accused and the Investigating Officer. The person recording the statement obviously is not aware of what the accused says and it is the translator's words that are recorded. When it comes to Court the satisfaction of the Court also stands substituted by the satisfaction of the translator. The accused is left in the dark as to how his words are reflected in the statement and in the translated form he has no chance of challenging it. We have a prevalence of such situations in India, a multi-lingual nation and this State, being a favoured destination of migrant labourers. I would also respectfully refer to the concluding portion of my learned Sister's Judgment which eloquently speaks of the sad plight of the migrant labourers who are left to the vagaries of official apathy and native scorn. These migrant labourers from marginalised sections of society are mostly illiterate and are often familiar only with their native language and dialect; pithily said, for the uninitiated, a 'peculiar tongue'. Proof of such a statement after excluding all possible sources of error can be achieved only if the statement, as their Lordships in the fore cited decisions held; is recorded verbatim in the language spoken and a translation appended. In that event even the translator need not be examined and the Prosecution or the Court can get the services of a responsible person, like a language teacher, to opine on the exact words spoken to verify the genuineness of the recorded translation. We also extract the further declaration of Naresh Chandra Das in Para 49:

...In order thus to be admissible against the accused under Section 27; (1) the information must be the one given by the accused the statement conveying the information must be his own statement in his own language and then (2) only so much of the information as is necessary and sufficient to cause the discovery will be admissible." (sic)

16. When a Translator was used and it is admitted that the accused spoke in Hindi, the confession statement ought to have been recorded in Hindi. The accused obviously was not conversant in malayalam and the same is very evident from the depositions recorded of the witnesses. The learned Sessions Judge has cautiously translated the evidence in the Malayalam to Hindi for the benefit of the accused. Going by the dictum in Sanjay Oraon (Supra), we refuse to place any reliance on the recoveries made. It is also to be observed that the translator, PW8 speaks of the confessions having been made, translated and recorded by the Police on 09.02.2010, when the accused was questioned in the Police Station. He also deposes that he went to the station on the next day morning, helped the Police in the questioning of the accused and gave a statement to the CI of Police. The translator was not present at the scene of occurrence when the recoveries or exhumation was carried out. But the confession statements are seen recorded in Exts. P2 & P4 mahazars and the Inquest report on 10.02.2010 at the scene of occurrence from where the recoveries and exhumation was carried out. Ext. P4 is at 7.45 a.m, Ext. P2 at 8.35 a.m and Ext.P5 between 10.15 a.m and 01.30 p.m, belying the very confession. It puts to peril the prosecution story of the recovery and exhumation

being pursuant to the disclosure by the accused. In *Pohalya Motya Valvi* (supra) it was held so on the recovery in that case :

"16. It may be recalled that the appellant was in custody of the Police Patil from 2nd Oct. 1970 and it is alleged that he had pointed out the place where the dead body was kept, evidence on which point has not been accepted by both the courts. He was formally arrested on 3rd Oct. 1970 and he is alleged to have made a statement leading to the discovery of the spear on 4th Oct. 1970. He was thus in custody for nearly 48 hours and was unceasingly questioned both by the relatives of Motibai and by the Police Patil Kutrya before the investigating Officer entered the scene. In this background it is difficult to believe that it was for the first time the appellant gave information to the PSI leading to the discovery of the spear. It is more probable to believe that the place where the dead body and the spear were lying were already known and, therefore, it is not possible to accept the suggestion that it was for the first time the appellant gave information on 4th Oct. 1970 leading to the discovery of the spear."

In the present case too, there cannot be a finding that the confessions were made on the day the recovery was made.

17. As has been argued by the learned Public Prosecutor, the recovery of the body at the instance of the accused, could have been used as a relevant fact under Section 8 of the Evidence Act, even if it cannot be strictly considered as a recovery under Section 27. We have already held that the recovery and even the detection of the body cannot be said to be at the instance of the accused; in the previous paragraphs. Moreover, there is no identification of the body as has been vigorously argued by the learned counsel for the appellant. PW3, the father of the deceased, was examined, who did not specifically say about any identification of the body having been carried out. He only says that when the police dug up the spot pointed out by the accused, his son's body was obtained in a decomposed state, covered in a blanket. There is no identification made from the features of the body recovered and it is a mere assumption that the body would be that of his son. The prosecution has heavily relied on the recovery of a rubber bangle which is stated to be the one owned by the deceased. However, there is no clear indication of whether the bangle was recovered from the body or from the pit. We say so, since the inquest clearly indicates the dress in the body having been removed by the Doctor and handed over to the police. If the bangle was worn on the body, then definitely it would not have been easy to take it out, especially in the decomposed state. Further, on the sole evidence of a bangle worn by the deceased having been found in the property or the pit from which the body was recovered, it cannot be assumed that the body recovered was that of the missing person. The Doctor, who conducted the postmortem, had very cautiously removed the femur from the body and handed it over to the I.O. The I.O. was also conscious of the fact that there could be a DNA examination conducted to identify the dead person. In fact, the procedure would have been very easy, since though the missing person was a migrant worker, his parents

were present on the spot at the time of the alleged recovery and the post mortem examination. There was no difficulty in taking the blood sample of the parents to carry out an identification by a proper DNA test. This was not done by the I.O nor was an attempt made for identification by superimposition of the skull, with the photo of the missing person.

18. The inconsistencies regarding what happened in the night and the early hours before the friend of the accused was found missing, puts to peril the prosecution case that accused has murdered his friend. PW5, Driver is a chance witness whose presence in the premises of the hotel; which could have been proved by the production of the register of the hotel, was not attempted by the prosecution. The last scene theory does not apply since from the evidence what we learn is that the missing person retired alone to his sleeping quarters. The hotel authorities did not promptly report the missing to the police. There are a lot of inconsistencies with respect to how the accused was apprehended. The accused had not absconded after the crime as the prosecution has argued. As has been held by us, there is no identification of the body recovered to be that of the missing person. The discovery of the body is irrelevant, since the identification has not been carried out. The weapon said to have been used was not concealed and was lying in the premises of the hotel and so was the spade. The confession statements are put to peril by reason of the language in which it was recorded and also the inconsistency regarding the time in which it has been recorded. The sand recovered from the spade and the sample from the property was found to be the same in chemical examination; a natural circumstance since the spade found in the property would have had sand from that property itself. We are satisfied that the circumstances placed before Court have not unerringly brought home the guilt of the accused. We hence over turn the judgment of the trial court both on the aspect of conviction and sentence. The accused will stand acquitted and he shall be released forthwith, if there are no other cases pending against him. The appeal stands allowed.