
(2021) 10 KL CK 0068

In the High Court Of Kerala

Case No : Criminal Appeal No. 336 Of 2017

Muraleedharan @ Chenda Murali Kannankara Veedu

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 12-10-2021

Acts Referred:

Code of Criminal Procedure, 1973 — Section 313
Indian Penal Code — Section 300, 302, 304, 304II, 324
Evidence Act, 1872 — Section 106

Citation : (2021) 10 KL CK 0068

Hon'ble Judges : K.Vinod Chandran, J;Ziyad Rahman A.A., J

Bench : Division Bench

Advocate : P.Vijaya Bhanu, Alex M.Thombra

Final Decision : Partly Allowed

Judgement

Ziyad Rahman A.A., J.

1. The appellant is the sole accused in S.C.No.728 of 2015 on the file of the IIIrd Additional Sessions Court, Kollam, who is aggrieved by the judgment dated 31.10.2016 passed therein. As per the said judgment, the appellant was found guilty for the offence punishable under Section 302 of the Indian Penal Code and was sentenced to undergo imprisonment for life.

2. The prosecution case is that: On 24.2.2013 at 12.15 p.m. the appellant, due to animosity against the deceased Bhaskaran, a casual labourer, as he failed to do some works of the appellant/accused even after receipt of wages for the same, with an intention of causing death, inflicted serious injuries on the deceased, by hitting his face on the hard ground of the courtyard of the house of the accused and by kicking on his body. Even though the deceased was taken to hospital, he died at 1 a.m. on 25.2.2013. Immediately after the incident, Crime No.223/2013 was registered by the Station House Officer, Ezhukone Police Station and after conducting investigation, the Circle Inspector of Police, Ezhukone Police Station submitted a final report against the appellant for the offence mentioned above.

To prove the prosecution case, 14 witnesses were examined, Exhibits P1 to P12 and Exts.D1, D2 and D2(a) were marked, and material objects MO1 and MO2 were identified. After the trial, incriminating materials were put to the appellant under Section 313 of Code of Criminal Procedure (Cr.PC), but he denied the same. Thereafter, on analysis of the entire materials, the Sessions Court arrived at the conclusion that the appellant is guilty of the offence and he was imposed with the sentence as mentioned above. This appeal is filed in such circumstances.

3. Heard Sri. P. Vijaya Bhanu, the learned Senior Counsel for the appellant and Sri.Alex M. Thombra, the learned Public Prosecutor for the respondent.

4. The learned Senior Counsel for the appellant contends that the prosecution failed to prove the motive alleged. There are glaring inconsistencies in the evidence of the witnesses. None of the witnesses have seen the appellant inflicting injuries upon the deceased and there is nothing to connect the appellant with the crime. In such circumstances, he submits that, the prosecution failed in establishing the guilt of the appellant, beyond reasonable doubts.

5. Per contra, the learned Public Prosecutor contends that there is direct evidence of PWs.2,3,4 and 7, which are sufficient to establish the guilt of the appellant. The entire sequence of events is clearly revealed from the evidence adduced by the prosecution and the involvement of the appellant in the commission of crime is established beyond doubt. In such circumstances, no interference is warranted.

6. The preliminary question that emerges is as to whether the death of the deceased is a homicide or not. PW9 is the Assistant Professor, Forensic Medicine at Medical College, Thiruvananthapuram who conducted postmortem on the body of the deceased and issued Ext.P7 certificate. PW9 noticed the following ante-mortem injuries on the body of the deceased:

1. Multiple small abrasions over an area 7.5x3cm on forehead across midline, 5cm above root of nose.
2. Abrasion 6x3cm on right side of forehead 2.5cm outer to midline and just above eyebrow, with a contusion 4x3x0.5cm underneath.
3. Abraded contusion 6*3*0.5cm horizontal on left side of forehead and head 5cm outer to midline and just above eyebrow.
4. Contusion 12*10*0.5cm on left temporo parietal region, 2cm above ear lobe (seen on dissection).
5. Multiple small abrasions over an area 5*3cm on back of left ear lobe 2cm above lobule.
6. Contusion 5*2.5*0.5cm on front of left ear lobe with an abrasion 1.5*0.5cm just above tragus of ear.
7. Abrasion 2.5*2cm on left cheek.

8. Abrasion 5*4cm on left side of face 8cm outer to midline and 2cm below eyebrow.
9. Abrasion 1*0.5cm on left side of face 7cm outer to midline and 6cm below eyebrow.
10. Multiple small abrasions over an area 6*3cm on left side of face 3cm outer to midline along the jaw margin.
11. Abraded contusion 8*4*0.5cm on right cheek and adjoining face, 5cm outer to midline.
12. Fracture separation of mandible on right side, 5cm outer to midline Brain showed diffuse subarachnoid haemorrhage over the left temporal pole and over the frontal regions on either side with flattening of gyri and narrowing of sulci.
13. Abrasion 2*1.5cm on right side of front of chest 4cm outer to midline and just below collarbone.
14. Multiple small abrasions over an area 4*3cm on right side front of chest 5cm outer to midline and 6cm below collar bone.
15. Multiple small abrasions over an area 4*3cm on right side of front of chest 10cm below upper end of sternum and 1cm outer to midline
16. Abrasion 1*0.5cm on outer aspect of right side of chest 6cm below armpit and 15cm outer to front midline. Horizontal fracture of sternum between 3rd and 4th costal cartilage. Fracture of II to VI ribs of right side seen on front aspect with blood infiltration around right chest cavity contained 200ml of blood.
17. Surgical intercostal drainage wound 2.5cm long, horizontal on outer aspect of right side of chest 8.5cm below armpit and 13.5cm outer to midline with pieces of black silk on either side and entered the chest cavity between V and VI ribs.
18. Multiple small abrasions over an area 2*2cm on left side of front of chest 5 cm outer to midline and 3cm below collar bone.
19. Multiple small abrasions over an area 11*7cm on left side of front of chest 3cm outer to midline and 9cm below collar bone
20. Surgical intercostal drainage wound 2cm long oblique on outer aspect of left side of chest upper front end 9cm below armpit and 13.5cm outer to front midline with pieces of black silk on either side and entered the chest cavity between VI and VII ribs.
21. Abrasion 1*1cm on top of right shoulder 6cm outer to root of neck
22. Abrasion 2*1.5cm on right side of back of chest 5cm below top of shoulder and 10cm outer to midline
23. Abrasion 1.5*1cm on right side of back of chest 11cm outer to midline and 11cm below top of shoulder

24. Abrasion 4*0.5 to 1cm oblique on right side of back of chest upper inner end 13cm below root of neck and 2cm outer to midline
25. Multiple small abrasions over an area 7*6cm on right side of back of trunk, 27cm below top of shoulder and 5cm outer to midline, with fracture of XII rib near the vertebral end with blood infiltration around.
26. Abrasion 1.5*1cm on left side of back of chest 5cm outer to midline and 7cm below top of shoulder
27. Abrasion 2.5*0.5cm oblique on left side of back of chest, upper inner end 18cm below top of shoulder and 12cm outer to midline.
28. Abrasion 0.5*0.5cm on left side of back of trunk, 7cm outer to midline and 8cm above top of hip bone.
29. Abrasion 0.5*0.2cm on left side of back of trunk 5cm outer to midline and 3cm above top of hipbone.
30. Multiple small abrasions over an area 2.5*2cm on front of tip of right shoulder
31. Abrasion 3.5*1cm horizontal on back of right arm, 5cm below top of shoulder
32. Multiple small abrasions over an area 4*4cm on back of right elbow
33. Multiple small abrasions over an area 5*3.5cm on middle of back of right hand 3cm below wrist
34. Multiple small abrasions over an area 7*5cm on outer and back aspects of left elbow
35. Abrasion 0.5*0.5cm on back of left wrist along the inner border.

It was opined that the death was due to the injuries sustained to the head and heart. According to PW9, the injuries sustained by the deceased could be on account of use of blunt force like kicking and fisting. From the nature of injuries and the expert opinion of PW9, it can be safely concluded that, the death of the deceased was a homicide. This finding takes us to the next crucial question as to whether it was the accused who committed the homicide of the deceased, as alleged by the prosecution.

7. In order to establish the guilt of the accused, the prosecution mainly relies on the evidence of PW2, PW3, PW4 and PW7. The evidence of PW3 would indicate that she is a neighbour of the appellant. On 24.2.2013 at about 12 p.m. she had seen the appellant and the deceased together, walking towards the house of the appellant. Later, she heard a commotion from the house of the appellant and when she looked, she could find a person lying on the courtyard of the house of the appellant. Immediately she called PW7 Jaysingh, another neighbour, who is conducting a restaurant named "Thiruvonam Hotel" in front of his house, which is near to the place of occurrence; the residence of appellant. Immediately, PW7 along with PW2 reached the place of occurrence. Thereafter police also came

there and they have taken the deceased to the hospital. However, PW3 denied having made any statement to the police to the effect that she had seen the appellant assaulting the deceased. She also denied having made a statement to the effect that when she asked the appellant not to kick the deceased, she was told to mind her business, by the appellant. On account of the said denial, she was declared hostile and contradictions in her statement under section 161 of Cr.P.C, were marked as Ext.D2 and D2(a).

8. PW2 is a local political leader and at the relevant point of time, he was in the hotel of PW7 to enquire as to whether the order placed by him for meals was ready or not. PW7, the owner of the hotel, informed him that the appellant is assaulting an aged person in his courtyard and he asked PW2 to go and verify the situation. Accordingly, PW2 and PW7 went to the place of occurrence together and found that the deceased was lying on the courtyard of the appellant in a pool of blood. They also found the appellant in an inebriated condition and using abusive language. Immediately, PW2 informed the Circle Inspector of Police and accordingly the police party reached the place of occurrence and took the deceased to the hospital.

9. The evidence of PW7 is in tandem with the evidence of PWs. 2 and 3. He deposed that, on 24.2.2013, he received a telephone call from PW3 and was informed that the appellant was having a quarrel with another person. At that point of time, PW2 was also in the hotel and he informed him the matter and accordingly both of them went to the place of occurrence and stood outside the compound wall of the courtyard of the appellant. They could see the deceased lying in the courtyard in a pool of blood. When he enquired with the appellant regarding the incident, he abused PW7. Thereupon, PW2 informed the police and they reached the place of occurrence immediately thereafter. An ambulance was also called for and he was taken to the hospital in the ambulance. Later, he was informed that the victim died due to the injuries sustained. However, he denied having made any statement to the police to the effect that he had seen the appellant assaulting the deceased. Because of the same, he was declared hostile by the prosecution.

10. PW12 is the Station House Officer, Ezhukone Police Station and he deposed that on 24.2.2013 at 12.15 p.m., they got information that the appellant had assaulted the said Bhaskaran and he is lying in the courtyard of the appellant. Immediately, police party reached the place of occurrence and made arrangements for treatment of the said Bhaskaran. Consequent to the said incident, Crime No.223/2013 was also registered under Section 324 of the Indian Penal Code. He prepared scene mahazar and also made arrangements for guarding the same. The F.I.R. which was registered as suo motu was marked as Ext.P9 and F.I.S. was marked as Ext.P9(a). PW11, a Civil Police Officer, who accompanied PW12 to the scene of occurrence, has also deposed in tune with the testimony of PW12.

11. PW4 is another crucial witness who is an autorikshaw driver. He knows both

the appellant and the deceased. On the date of occurrence, the appellant hired his autorikshaw along with the deceased Bhaskaran, from Cheerankavu and he was asked to go to Ezhukone. As instructed by them, he stopped the autorikshaw near Ezhukone School which is near to Thiruvonam hotel and both of them got down. According to him, the hiring of autorikshaw was between 10 a.m. and 12 p.m. He denied having made any statement to the police to the effect that, he dropped the appellant and the deceased in front of the house of the appellant. Because of such denial, PW4 was declared hostile to the prosecution.

12. When we examine the aforesaid evidence, particularly that of PW2, PW3, and PW7, it can be gathered that, all of them have specifically narrated the incident in perfect alignment with the case advanced by the prosecution. (It is true that Pws 3,4 and 7 were declared hostile by the prosecution. However, merely because of the said reason entire evidence of the said witnesses need not be eschewed. It is a well settled principle of law that, such part of the evidence of a hostile witness which is found to be credible, could be taken into consideration and it is not necessary to discard the entire evidence. [(2019)8 SCC 333(Sudru V. State of Chattisgarh)] and [(2012) 4 SCC 327 (Bhaiju @ Karan Singh V. State of M.P.)]. The evidence of PW3 would indicate that, she had seen the appellant and the deceased, coming to the house of the deceased together at 12 p.m. which was just before the incident. Even though, she had not stated about witnessing the incident of inflicting assault on the deceased, her evidence would indicate that, the deceased was last seen in the company of the appellant in a healthy manner as he was found walking towards the house of the deceased along with the appellant. She has also stated that when she heard a commotion from the house of the appellant, she could notice the deceased lying on the courtyard. Her statement that she immediately informed the matter to PW7 stands corroborated by the evidence of PW7 who admitted having received such a telephone call from PW3. The evidence given by PW3 is also corroborated by the evidence of PWs.2 and 7. According to PW2, upon getting intimation from PW7, PW2 went to the scene of occurrence along with PW7 and the matter was informed to the police by him. The evidence of PW7 is in tune with the aforesaid evidence of PW2 and deposition of both the said witnesses would clearly indicate that the appellant was standing near to the deceased who was lying on the courtyard of the house of the appellant and the appellant was in an inebriated condition. The evidence of PW7 further shows that when he enquired with the appellant as to the incident, he shouted at him. All these together would show the involvement of the appellant in the commission of the offence.

13. Learned Senior Counsel for the appellant points out that, none of the witnesses mentioned above, have stated that they witnessed the incident of inflicting injuries by the appellant. The learned counsel also brought the attention of this Court to the fact of denial on the part of the relevant witnesses, having made any statement to that effect to the police. However we are of the view that the said aspect is not fatal to the prosecution. The evidence of PW3 and PW4 would clearly indicate the presence of the deceased along with the appellant just

before the incident in a healthy condition. PWs.2,3,7 have seen the deceased lying on the courtyard of the house of the deceased immediately thereafter with multiple injuries, in a pool of blood. As the proximity of time between these incidents is very narrow, the appellant is having an obligation to explain the injuries on the body of the deceased. In this case, one explanation offered by the appellant is that, while he was engaged in making some paintings in his house, he heard a sound from outside and thereupon he could find the deceased with injuries in the courtyard of the appellant. According to him, somebody else had inflicted injuries upon the deceased and put him in the courtyard of the appellant. As mentioned above, the aforesaid explanation cannot be accepted under any circumstances particularly in view of the evidence of PWs.3,4 and 7. The presence of the accused immediately before the incident along with the deceased is proved. Similarly, his presence along with the deceased, immediately after the deceased sustained injuries can also be seen from the evidence of PWs.2, 3 and 7. In such circumstances, the explanation offered by the appellant is not at all believable as it is completely contrary to the facts revealed from the evidence of the above witnesses.

14. Another suggestion put forward by the learned Senior Counsel for the appellant is that, it has come out in evidence that, the courtyard of the house of the appellant is lying at a lower level than the road and there are certain steps leading to the said courtyard from the road. It is submitted, the injuries sustained by the deceased could be because of a fall of the deceased from the steps while he was stepping down in a drunken state. The nature of injuries as deposed by PW9 doctor and Ext P7 postmortem certificate would clearly indicate that most of the injuries were abrasions and contusions suggestive of using blunt force such as kicking and fisting upon the body of the deceased. Moreover, a specific suggestion was also put to PW9 doctor while he was being cross-examined by the learned counsel for the appellant. The response from PW9 was to the effect that going by the nature of injuries, such a theory is not possible at all. The above aspects would clearly establish that the suggestions put forth, for the appellant in this regard are not sustainable.

15. In such circumstances, we are of the view that, the appellant miserably failed in discharging his burden to explain the reasons as contemplated under Section 106 of the Evidence Act. In *Rajender @ Rajesh @ Raju v. State* (NCT of Delhi) [(2019) 10 SCC 623], the Honourable Supreme Court was pleased to observe as follows:

"Having observed so, it is crucial to note that the reasonableness of the explanation offered by the accused as to how and when he/she parted company with the deceased has a bearing on the effect of the last seen in a case. S.106 of the Indian Evidence Act, 1872 provides that the burden of proof for any fact that is especially within the knowledge of a person lies upon such person. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company with the deceased. In other words, he must furnish

an explanation that appears to the Court to be probable and satisfactory, and if he fails to offer such an explanation on the basis of facts within his special knowledge, the burden cast upon him under S.106 is not discharged. Particularly in cases resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, such failure by itself can provide an additional link in the chain of circumstances proved against him. This, however, does not mean that S.106 shifts the burden of proof of a criminal trial on the accused. Such burden always rests on the prosecution. S.106 only lays down the rule that when the accused does not throw any light upon facts which are specially within his/ her knowledge and which cannot support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce an explanation as an additional link which completes the chain of incriminating circumstances."

In the light of the principles laid down by the Honourable Supreme Court in the said judgment, lack of reasonable explanation on the part of the appellant as to the injuries on the deceased, which is proved to have been sustained in the court yard of the appellant in his presence, provides an additional link in the chain of circumstances proved against him.

16. The learned counsel for the appellant would further point out that, the prosecution failed to establish any motive for the crime. It is to be noted that the motive projected by the prosecution is the previous animosity of the appellant towards the deceased due to the fact that the deceased failed to carry out the works as agreed by him even after receipt of wages in advance. It is true that prosecution could not produce any documents to substantiate the receipt of any wages by the deceased and also as to any commitment on the part of the deceased for doing any work for the appellant. However, it is a well settled position of law that the failure to establish motive by the prosecution is not of much significance when there are direct evidence available to establish the guilt of the accused. In *State of Uttar Pradesh v. Kishan Pal and others* ((2008) 16 SCC 73), it was observed by the Honourable Supreme Court as follows:

".....It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction."

It is true that, in this case, none of the witnesses have seen the incident of assault on the deceased by the appellant. But, as discussed above, the evidence of PW2, PW3, PW4 and PW7 which are in tandem with each other, clearly indicate the involvement of the appellant. The deceased was last seen alive with the appellant and his presence in the scene of occurrence immediately after the incident is also proved. On account of the close proximity of the time of such

events, the evidentiary value of the said witnesses is as good as the statements of eyewitness who witnessed the assault. In such circumstances, the principles laid down by the Honourable Supreme Court in Kishan Pal's case (Supra) are clearly applicable to this case.

17. Thus from all the above materials, the only conclusion possible is that, it was the appellant who inflicted injuries upon the deceased which eventually resulted in his death. We are unable to draw any conclusion from the materials available on record, as to the existence of any hypothesis of innocence of the appellant.

18. At this juncture, it was urged by the learned Senior Counsel for the appellant that, even if it is found that it was the appellant who inflicted injuries upon the deceased, there is nothing to indicate that the appellant had any pre-meditation or intention to cause death of the deceased while inflicting the said injuries. The deceased was a person aged 70 years and with a height of 147 cms and weight of 45 kgs, as revealed from Ext.P7 postmortem certificate. The age of the deceased and the fragile nature of the person, would have aggravated the impact of such injuries, which were not inflicted upon him with the intention to cause death. In such circumstances, learned counsel for the contends that Section 302 IPC is not attracted and if at all the appellant is to be held guilty, it can only be under Part II of Section 304 of IPC. When we examine the materials before us, we find some force in the said contention. There is nothing to arrive at the conclusion as to any pre-meditation on the part of the appellant. PW4 has clearly stated that both the appellant and the deceased came together at Cheerankavu, hired his autorikshaw and he was asked to go to Ezhukone school which is a place near to the residence of the appellant. PW3 has also stated that, she had seen both of them walking together towards the house of the appellant. The evidence of the said witnesses do not indicate any thing, suggestive of any dispute or exchange of words between them at that point of time. The prosecution also could not adduce any evidence to establish any previous animosity for the appellant towards the deceased. In such circumstances, as there is no evidence of existence of any animosity between them, it points to the possibility of an assault in a sudden fight in the heat of passion. We find no materials to show that the acts proved to have been committed by the appellant would come within the ambit of any of the instances of murder, as contemplated under Section 300 IPC. This is particularly because the materials brought before us do not indicate the existence of an intention on the part of the appellant to cause the death of the deceased or to cause any such bodily injury as is likely to cause the death of the person. The evidence before us also do not reveal any intention on the part of the appellant in causing any bodily injury which is sufficient to cause death in the ordinary course of nature. Since no weapons were used by the appellant, it cannot also be held that while committing the assault on the deceased, the appellant had the knowledge that the injuries inflicted by him were so eminently dangerous that, in all probabilities, it would cause death of the victim. Probably the appellant had the knowledge that, by repeatedly assaulting the deceased, it was likely to cause death. In such

circumstances, we are of the view that only Part II of Section 304 IPC would get attracted. This is particularly because, as is evident from Ext.P7 postmortem certificate, the deceased was aged 70 years with a height of only 147 cms and weight of 45 kgs. which indicates the fragile nature of the deceased. As mentioned above, possibility of the said factors playing a decisive role leading to the death of the deceased, cannot be ruled out. Our view is fortified by the view taken by another Division Bench of this Court in Jomon @ Kava v. State of Kerala [2019 (5) KHC 486] wherein a case of similar nature was taken into consideration and conviction under Section 302 IPC was set aside by finding the accused therein guilty of Part (II) of Section 304 of IPC. In para 11 it was observed as follows:

"..... Fact that Mohanan @ Paninjon died on account of injuries inflicted by the appellant is established. However, there is no material on record to hold that he had an intention to commit murder of the deceased. Postmortem certificate would show that the deceased was moderately well built person with 158 cm height and only 39 Kgs of weight. It has also come out in evidence that he was a habitual drunkard. It is borne out from the records that the deceased was a weak and fragile person. Indiscriminate kicking, fisting and stamping on the body of such person would certainly result in serious consequences including loss of life. It is also an admitted fact that the appellant and deceased were known to each other even prior to the incident. On evaluating the totality of circumstances we can only find that the appellant had the knowledge that by incessantly assaulting the deceased it was likely to cause his death. We are inclined to think that the appellant has committed culpable homicide falling under section 299 of IPC. But in the absence of any intention to commit murder and also any of the ingredients under section 300 of IPC to attract the offense of murder, we are of the view that the appellant is guilty of culpable homicide not amounting to murder falling under S.304 Part II of IPC...."

In such circumstances, we are of the view that the conviction and sentence imposed upon the appellant under Section 302 IPC is not sustainable and he can only be convicted under part II of section 304 of IPC. In the light of the above findings, the appeal is partly allowed, the conviction and sentence under Section 302 is set aside and the appellant is found guilty of committing the offence under part II of Section 304 of IPC. Considering the facts and circumstances of this case and the reasons mentioned above, we sentence the appellant to undergo rigorous imprisonment for eight years and it is ordered accordingly.