
(2000) 02 KL CK 0061

In the High Court Of Kerala

Case No : Criminal Appeal No's. 1062 of 1998 and 49 of 1999

Omanakuttan alias Biju and Binu T. and etc.

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 14-02-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 201, 302, 34

Citation : (2000) CriLJ 4893

Hon'ble Judges : Arijit Pasayat, C.J;K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : M.V.S. Namboothiry and John Varghese, for the Appellant; Grashious Kuriakose, Public Prosecutor, for the Respondent

Judgement

Arijit Pasayat, C.J.—These two appeals are inter-linked being directed against the judgment of learned Sessions Judge, Kottayam in SC 32 of 1996. While appellant in CrI. A. 49 of 1999 (hereinafter referred to as "accused Rajan") has been convicted for offences punishable under Sections 302 and 201 of Indian Penal Code, 1860 (in short "IPC"), appellant in CrI. A. 1062 of 1998 (hereinafter referred to as "accused Biju") has been convicted for offence punishable u/s 201, I.P.C. read with Section 34, I.P.C. Former has been sentenced to undergo imprisonment for life for offence punishable u/s 302, I.P.C. and a further sentence of five years for the other offence; while latter was sentenced to undergo rigorous imprisonment for two-and-half years.

2. Accusation which led to trial and conviction of accused persons are essentially as follows :

Sarala (hereinafter referred to as "deceased") was living with first accused (Rajan) in his house at Karamala. She was the sister of Radhakrishnan Nair (P. W. 1). Second accused (Biju) is a close friend of Rajan. Both accused Rajan and deceased had previous marriages. Deceased had a son, Abhilash, from the first marriage. After Abhilash's father deserted deceased, Rajan married her in the

late 80s and since then they were living as husband and wife. P. W. 1 and his parents were also residing at Karamala, at a short distance from the house of accused-Rajan. On the evening of 3-12-1995, Narayanan Assari (P. W. 2), the immediate neighbour of Rajan, heard cries of deceased from the eastern rubber plantation. At that time, he was in the house of one Thankappan watching television along with his family members. All of them heard the cry. P. W. 2 and others rushed to the spot and found accused-Rajan beating his wife, the deceased. They saw Rajan dragging deceased to the courtyard of the house. There he again beat her in their presence. When they intervened, accused Rajan got wild and took out a radio from the house and threw it into the courtyard and broke it. They came back to the house of Thankappan at about 6 p.m. While he was returning to his house, P.W. 2 found accused Rajan sitting on the steps of his house and deceased was standing in the courtyard and was crying. While he was sitting on the verandah of his house, at about 8 p.m., he found accused-Biju going to the house of accused-Rajan through the lane in front of his house. He heard noises from the house of accused-Rajan till he went to sleep at about 9.30 p.m. Next day morning at about 5 a.m. he woke up and went for rubber tapping work. At that time he heard no sound from the house of accused-Rajan. At about 4.30 a.m. on that day, accused-Rajan went to the house of deceased's parents and stood (sic) it. P. W. 1 and his brothers were getting ready to go for tapping work. Accused-Rajan called them and disclosed that he had done away with his wife and thrown the dead body into an old unused well in the rubber plantation and told them if they wanted, they could take the body out. When P. W. 1 and his brother disclosed this to their parents, they advised them to go and see what really had happened. They went to the house of accused-Rajan and found the broken radio in the courtyard. There was nobody in the house. Therefore, they went and searched for the deceased and in an old unused well in the rubber plantation of Sathyavan Pillai situated towards east of the house of accused-Rajan, they could find the deadbody in the well. They informed the matter at Karukachal Police Station. Information was recorded. Investigation was undertaken and charge-sheet was placed. During trial, accused persons pleaded innocence. 10 witnesses were examined to further prosecution version. Learned trial Judge found both the accused persons guilty, convicted and sentenced them as indicated above.

3. According to learned counsel for appellants, conviction is essentially based on the extra-judicial confession claimed to have been made and the fact that accused Rajan and deceased were last seen together. This being a case of circumstantial evidence, it was pleaded that chain of circumstance is not complete. Learned counsel for the State, on the other hand, submitted that the circumstances unerringly point at the accused to be the authors of the crime. It is submitted that deceased was accused-Rajan's wife and they were last seen together alive. Prior to that he was found assaulting the deceased. Extra judicial confession was made before persons on whom he could repose confidence. That being the position, conviction was proper.

4. Going into the facts of the case, it is to be noted that there was no eye-witness and the entire case was built up on circumstantial evidence. Law relating to circumstantial evidence has been elaborately dealt with by apex Court in several cases.

5. In cases where evidence is of circumstantial nature, the circumstances from which conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

6. The "Panchsheel" of proof of a case based on circumstantial evidence, which is usually called five golden principles, have been stated by Apex Court in Sharad Birdhichand Sarda Vs. State of Maharashtra, They read as follows :

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established, as distinguished from "may be" established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

It is the cardinal principle of criminal justice that fouler the crime, higher the proof required. A golden thread which runs through the web of administration of criminal justice is to the effect that if two views are possible on the evidence adduced, one pointing to the guilt of the accused and the other to his innocence, the latter is to be adopted. This principle has a special relevance in cases where the guilt of the accused is sought to be established by circumstantial evidence. Baron Alderson stated the following to the Jury in Reg. v. Hedge (1838) 2 Law 227 :

The mind was apt to take a pleasure in adopting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenious the mind of the individual, the more

likely was it. Considering such matters, to over-reach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete.

This was referred to in *Shankarlal Gyarasilal Dixit Vs. State of Maharashtra*, and in *Jaharlal Das Vs. State of Orissa*, . Unlike direct evidence, indirect circumstances which throw light, may vary from suspicion to certitude and care must be taken to avoid subjective pitfalls of exaggerating a conjecture into a conviction.

7. It is settled principle of law that the circumstances relied upon by the prosecution must be fully established and the chain of evidence furnished by those circumstances should be fully complete so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. In a case of circumstantial evidence not only various links of evidence should clearly establish guilt of the accused, but also it must be such as to rule out a reasonable likelihood of the innocence of the accused. Where the various links satisfactorily makes out a case and the circumstances point to the accused as the probable assailant with reasonable definiteness and in proximity to the accused as regards time and situation and the accused offers no explanation, which if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence. Such absence of explanation or false explanation would itself be an additional link, which completes the chain. But, at the same time, it has to be borne in mind that it does not mean by implication that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must meet any and every hypothesis suggested by the accused, however, extravagant and fanciful it might be. In other words, when deciding the question of sufficiency, what the Court has to consider is the cumulative effect of all proved facts, each one of which reinforce the conclusion of guilt, and if the combine effect of all those facts taken together is conclusive, and establish guilt of the accused, conviction would be justified even though it may be that any one or more of these facts by itself is not decisive.

8. Before taking up the task, it may be stated that for a crime to be proved, it is not necessary that the crime must be seen to have been committed and must, in all circumstances, be proved by direct ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or "factum probandum" may be proved indirectly by means of certain inferences drawn from "factum probans", that is, the evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together, they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed.

9. It has been consistently laid down by Apex Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only

when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person, (see : Hukam Singh Vs. State of Rajasthan, ; Eradu and Others Vs. State of Hyderabad, ; Earabhadrapa v. State of Karnataka : AIR 1983 SC 446 : 1983 Cri LJ 846; State of U.P. Vs. Sukhbasi and Others, ; Balwinder Singh alias Dalbir Singh Vs. State of Punjab, and Ashok Kumar Chatterjee Vs. State of M.P., .

10. The circumstances from which an inference as to the guilt of accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram Vs. State of Punjab, , it was laid down that where the case depends upon the conclusions drawn from circumstances, the cumulative effect of circumstances must be such as to negative the innocence of accused and bring the offences home beyond any reasonable doubt.

11. See also State of U.P. Vs. Ashok Kumar Srivastava, , in which it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

12. What is important is that the possibility of the conclusions being consistent with innocence of accused must be ruled out altogether.

13. So far as extra judicial confession is concerned, it is to be noted that persons who claim that such a confession was made are co-villagers and relatives.

Confessions may be divided into two classes, i.e., judicial and extra judicial. Judicial confessions are those which are made before Magistrate or Court in the course of judicial proceedings. Extra judicial confessions are those which are made by party elsewhere than before a Magistrate or Court. Extra judicial confessions are generally those made by a party to or before a private individual which includes even a judicial officer in his private capacity. It also includes a Magistrate who is not especially empowered to record confessions u/s 164 of the Code of Criminal Procedure, 1973 (in short "Code") or a Magistrate so empowered but receiving the confession at a stage when Section 164 does not apply. As to extra judicial confessions, two questions arise : (i) were they made voluntarily? and (ii) are they true? As the Section enacts, a confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, (1) having reference to the charge against the accused person, (2) proceeding from a person in authority, and (3) sufficient, in the opinion of Court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. It follows that a

confession would be voluntary if it is made by accused in a fit state of mind, and if it is not caused by any inducement, threat or promise which has reference to the charge against him, proceeding from a person in authority. It would not be involuntary, if the inducement, (a) does not have reference to the charge against the accused person, or (b) it does not proceed from a person in authority, or (c) it is not sufficient, in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that, by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. Whether or not the confession was voluntary would depend upon the facts and circumstances of each case, judged in the light of Section 24. The law is clear that a confession cannot be used against an accused person unless the Court is satisfied that it was voluntary and at that stage the question whether it is true or false does not arise. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the Court may refuse to act upon the confession, even if it is admissible in evidence. One important question, in regard to which the Court has to be satisfied with, is whether when the accused made confession, he was a free man or his movements were controlled by the police either by themselves or through some other agency employed by them for the purpose of securing such a confession. The question whether a confession is voluntary or not is always a question of fact. All the factors and all the circumstances of the case, including the important factors of the time given for reflection, scope of the accused getting a feeling of threat, inducement or promise, must be considered before deciding whether the Court is satisfied that in its opinion the impression caused by inducement, threat or promise, if any, has been fully removed. A free and voluntary confession is deserving of highest credit, because it is presumed to flow from the highest sense of guilt. (See *R. v. Warcikshall* (1783) 1 Lesch 263). It is to be conceived that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. Deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual 2000 Cri. L. J. 307 proofs in law. An involuntary confession is one which is not the result of the free will of the maker of it. So, where the statement is made as a result of harassment and continuous interrogation for several hours after the person is treated as an offender and accused, such statement must be regarded as involuntary. The inducement may take the form of a promise or of threat, and often the inducement involves both promise and threat, a promise of forgiveness if disclosure is made and threat of prosecution if it is not. (See : *Woodroffe Evidence*, 9th Edition, page 284). A promise is always attached to the confession, alternative while a threat is always attached to the silence-alternative; thus, in the one case the prisoner is measuring the net advantage of the promise, minus the general undesirability of a false confession, as against the present unsatisfactory situation; while in the other case he is measuring the net advantage of the present satisfactory situation, minus the general undesirability of the confession against the threatened harm. It must be borne in mind that

every inducement, threat or promise does not vitiate a confession. Since the object of the rule is to exclude only those confessions which are testimonially untrustworthy, the inducement, threat or promise must be such as is calculated to lead to an untrue confession. On the aforesaid analysis, the Court is to determine the absence or presence of inducement, promise etc. or its sufficiency and how or in what measure it worked on the mind of the accused. If the inducement, promise or threat is sufficient in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil, it is enough to exclude the confession. The words "appear to him" in the last part of the Section refer to the mentality of the accused.

14. An extra-judicial confession, if voluntary and true and made in a fit stage of mind, can be relied upon by the Court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any Court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility. When the witnesses are co-villagers and relatives, there is no reason for making the false claim of the accused having made a confession before them.

15. There is another factor which supports prosecution version. Unimpeached evidence of witnesses goes to show that deceased was being assaulted by accused Rajan in the evening of 3-12-1995. Thereafter accused Rajan and deceased were the only occupants of the house where they lived. Next morning, deceased was found without life and accused has offered no explanation whatsoever as to the cause of death. The principle of "last seen theory" is based on the logic which can be safely drawn from the circumstances that when two persons were last seen alive and immediately thereafter one of them is found dead, the other owes an explanation as to how death occurred. Otherwise, accusing finger can be raised at him to be the author of crime leading to homicidal death. This theory has one exception, i.e., when a considerable length of time elapses between the point of time when both are seen alive and when

one is found dead and the other alive. Time gap should be such as would bring in possibility of somebody else committing the crime. Last seen theory can be pressed into service by prosecution effectively when the two persons last seen together are closely related to one another, like in the present case. If they live under one roof and were seen alive at a point of time and no explanation is offered as to how one is found alive and the other dead after that point of time, the circumstance assumes importance and is sufficient enough to fasten guilt on the person who is alive. At the cost of repetition, it may be stated that accused Rajan has offered no explanation whatsoever as to how and in what circumstances deceased was found dead when they were last seen together alive undisputedly. The fact that he was assaulting deceased in the evening and thereafter sound of cry was no longer heard is certainly a circumstance to rope in the accused. The cumulative effect of the circumstance leads to only one irresistible conclusion, i.e., accused Rajan was the author of the crime. That being the position, learned trial Judge was justified in convicting him u/s 302, I.P.C.

16. Section 201, I.P.C. presents a case of accusation after the fact. "An accessory after the fact", said Lord Hale, "may be, where a person knowing a felony to have been committed, receives comforts, or assists the felon, (see 1 Dale 618). Therefore, to make an accessory ex post facto it is in the first place requisite that he should know of the felony committed. In the next place, he must receive, relieve, comfort or assist him. And generally, any assistance whatever given to a felon to hinder his being apprehended, tried or suffering punishment, makes the assister an accessory. The ingredients of an offence u/s 201, I.P.C. are (1) that an offence was committed, (2) that the accused knew or had reason to believe that such an offence has been committed, (3) that the accused caused evidence thereof to disappear, and (4) that the accused caused disappearance of the evidence with the intention of screening the offender from legal punishment. What Section 201 requires is that the accused must have had the intention of screening the offender. To put it differently, the intention to screen the offender, must be the primary and sole object of the accused. The fact that the concealment was likely to have that effect is not sufficient, for Section 201 speaks of intention as distinct from a mere likelihood.

17. Background facts show that accused Rajan was guilty of offence punishable u/s 201 of I.P.C. But the evidence is quite inadequate to fasten guilt on accused Biju. The only evidence worth the name about role of accused Biju is that he was found going towards house of accused Rajan. In the absence of anything else, the accusations against him cannot be maintained. Prosecution has failed to establish its case against him. Conviction and consequentially the sentence, so far as he is concerned, are indefensible and are set aside. In the ultimate result, Crl. Appeal No. 1062 of 1998 filed by accused Biju is allowed, while Crl. Appeal No. 49 of 1999 filed by accused Rajan fails and is dismissed.