

(2012) 02 KL CK 0103

In the High Court Of Kerala

Case No : Criminal Appeal No. 1946 of 2007 (C)

Prasad, C. No. 1799 Central Prison, Trivandrum

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 01-02-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 300, 302

Citation : (2012) 02 KL CK 0103

Hon'ble Judges : R. Basant, J;K. Vinod Chandran, J

Bench : Division Bench

Advocate : Sajeew T.P, for the Appellant; Gikku Jacob George, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

R. Basant, J.—Did the court below err in placing reliance on the testimony of PW4, the only eye witness examined by the prosecution?

(ii) Did the court below err in accepting and acting upon the alleged dying declaration spoken to by interested witnesses PWs 1 and 3, brothers of the deceased?

(iii) Is the accused entitled to the benefit of any reasonable doubt?

(iv) Does the impugned judgment warrant interference on any count?

These are the questions that have been raised before us for our consideration in this appeal by Advocate T.P.Sajeew, the learned counsel for the appellant.

2. The appellant has been found guilty, convicted and sentenced to undergo imprisonment for life u/s 302 I.P.C. No sentence of fine is seen imposed.

3. According to the prosecution, the appellant had, on account of enmity consequent to monetary disputes, caused the death of his friend, deceased Saji,

on 23.02.2004 at about 5.30 p.m on the public road leading to a toddy shop.

4. Investigation commenced with Ext. P1 F.I statement lodged by PW1. Investigation was completed and final report/charge sheet was filed by the predecessor of PW15. That Investigating Officer had expired before the matter came up for trial.

5. The learned Magistrate committed the case to the Court of Session. The appellant/accused denied the charge framed against him by the learned Sessions Judge. Thereupon PWs 1 to 15 were examined and Exts.P1 to P20 were marked by the prosecution. MOs. 1 to 7 were also marked. The accused took up a defence of total denial. No defence witnesses were examined and no defence exhibits were marked. There was only blanket denial on the part of the appellant.

6. The learned Sessions Judge on an anxious consideration of all the relevant inputs came to the conclusion that the oral evidence of PW4 duly supported by the evidence of dying declaration made by the deceased tendered by PWs 1 and 3 and the other circumstances in the case can safely be accepted and acted upon. Accordingly, the learned Sessions Judge proceeded to pass the impugned judgment.

7. Before us the learned counsel for the appellant and the learned Public Prosecutor have advanced detailed arguments. The learned counsel for the appellant contends that the evidence of PW4, which is not even attempted to be corroborated by other ocular evidence which evidently was available, should not have been accepted and acted upon. The dying declaration spoken to by PWs 1 and 3 should not have been accepted and should not have been used to corroborate the ocular account tendered by PW4. The evidence of recovery of MOs.1 to 4 by the Investigating Officer under Exts.P11 and P5 should not also have been accepted and acted upon, contends the learned counsel.

8. The learned Prosecutor on the contrary contends that the evidence of PW4 is convincing. He cannot be described to be an interested witness. His evidence did inspire the confidence of the court. The evidence of PWs 1 and 3 about the dying declaration was also rightly accepted by the court below. The evidence of recovery of MOs.1 to 4 eminently supports the case of the prosecution. The appellant is not entitled to the benefit of any reasonable doubt, argues the Prosecutor.

9. We have considered all the relevant inputs. In this appellate judgment, which ought to be read in continuation of the judgment of the trial court, we do not deem it necessary to re-narrate the oral and documentary evidence relied on by the prosecution. Suffice it to say that we have been taken in detail through the oral evidence of PWs 1 to 15. We have been taken through the contents of Exts. P11 to P20. The charge framed by the court below and the answers given by the accused in the course of his examination u/s 313 Cr.P.C have also been read to us. We shall advert to relevant materials specifically wherever necessary in the course of discussions.

10. The prosecution relied on the following pieces of evidence/circumstances.

1) Motive for the incident as indicated by the oral evidence of PW7, the wife of the deceased;

2) Oral evidence of the eye witness PW4;

3) The evidence of the dying declaration made by the deceased implicating the appellant perceived by PWs 1 and 3, brothers of the deceased;

4) Seizure of blood stained MO.1 knife under Ext. P11 as per the information furnished by the appellant to the Investigating Officer;

5) Recovery of MOs.2 to 4 when the appellant allegedly produced the same, before the Investigating Officer under Ext. P5 seizure mahazar.

11. We shall now proceed to consider these pieces of evidence/circumstances.

12. Circumstance No. 1

According to the prosecution, there was some monetary dispute between the appellant and the deceased. PW4, who spoke about the incident proper, had perceived some disputes and quarrels between them immediately prior to the infliction of the injury. He was unable to give details about the said monetary dispute between the appellant and the deceased. The wife of deceased-PW7, tendered evidence that the deceased was expecting the appellant to return an amount of Rs. 2,000/- which was borrowed by the appellant from the deceased long prior to the occurrence. PW7 did not also have specific and direct knowledge about that transaction. In these circumstances, it has got to be seen that convincing evidence about the motive has not been adduced by the prosecution. Suffice it to say that the evidence of PWs 4 and 7 clearly indicate the possibility of some strain in the relationship between the appellant and the deceased and the bone of contention evidently was the liability of the appellant to return some amount to the deceased in respect of an earlier monetary transaction. Motive is not an ingredient of the offence of murder. The evidence of motive only helps the court to appreciate the other evidence adduced in the case. Sufficiency of motive cannot be gauged or decided by a criminal court. However the evidence available indicates, we repeat, some strain in the relationship between the appellant and the deceased following a monetary dispute between them. To this extent alone the prosecution has succeeded in establishing this first circumstance.

13. Circumstance No. 2

The prosecution relies on the ocular account about the evidence tendered by PW4. The appellant and the deceased were friends and that was indicated by the evidence of all the witnesses. On the date in question, PW4 had perceived some quarrel between the appellant and the deceased. This allegedly took place in front of the toddy shop where PW4 was employed. PW4 narrated his perception of the entire evidence. We have gone through the cross examination of PW4. There is not a semblance of suggestion which can even remotely indicate that

PW4 is in any way interested in favour of the deceased or against the appellant. According to us, it would be absolutely improper to reckon PW4 as an interested witness using any yardstick. PW4's evidence is inherently inspiring. There is nothing to vitiate his evidence. He has given a fair and complete narration of the entire incident. After the deceased suffered the fatal stab injury, PW4 had run to PW1, the brother of the deceased, and had passed on the information to PW1. PW1 had lodged the F.I statement promptly on the same day. The incident had taken place at about 5.30 p.m and the F.I.R was registered at 11 p.m. F.I.R had reached the learned Magistrate at 10.30 a.m on 25.02.2004. In Ext. P1 it is stated that PW4 had informed PW1 about the incident. The oral evidence of PW4 is thus eminently supported by the contents of Ext. P1 F.I statement. It is true that there was some delay in Ext. P8 F.I.R reaching the court. PW11, who registered the F.I.R, is not cross examined on that aspect at all. In these circumstances, we are satisfied that the contents of the contemporaneous F.I statement - Ext. P1, can be used to draw inspiration for the oral evidence of PW4. The medical evidence about the injury suffered by the deceased, as revealed by the oral evidence of PWs 6, 9 and 12 and Exts.P4, P6 and P5-wound certificates/postmortem certificate do also eminently support the narration of PW4 about the incident proper. The observations in the scene mahazar Ext. P3 do also support the oral evidence of PW4. Suffice it to say that not a modicum of doubt is aroused in our mind about the acceptability of the oral evidence of PW4 broadly to inspire any confidence. It rhymes well with the broad probabilities. Intrinsically it does not generate any reasonable doubt in our mind. All the other circumstances also do support the evidence of PW4. In these circumstances, we are unable to find fault with the court below for having placed reliance on the oral evidence of PW4 which, we repeat, is inherently inspiring.

14. It is contended that the prosecution, which could have corroborated the oral evidence of PW4 by more independent evidence, has not chosen to adduce such evidence. This contention appears to be factually correct. The prosecution had in addition to PW4 cited two other independent witnesses-CWs 9 and 10. But, after examination of PW4 it is seen that they were given up by the prosecution. They were not examined. The learned counsel for the appellant submits that it was not a case where the prosecution could not have attempted to offer corroborative evidence for the oral evidence of PW4. In spite of the fact that such evidence was readily available the prosecution had not examined these witnesses. This is fatal to the prosecution. The prosecution cannot now request the court to be satisfied with the oral evidence of PW4 when evidence of other more independent witnesses have been withheld from the court by the prosecution.

15. We have considered this contention anxiously. We are unable to agree that any adverse inference can or Ought to be drawn against the prosecution for not examining more number of independent witnesses. The prosecutor has the prerogative to choose to examine such witnesses as are necessary to unfold the case of the prosecution. The basic question is whether the evidence of PW4 does inspire the confidence of the Court. If it does, it would be idle to expect the

prosecutor to unnecessarily multiply the evidence.

16. In this context we visit the oral evidence of PW4 again. PW 4 is not shown to have any motive against the appellant or interest in favour of the deceased. The deceased was a casual toddy tapper who used to supply toddy to the toddy shop where PW4 was working. This is the only nexus/connection between PW4 and the deceased. We repeat that there is nothing to indicate that PW4 had any adverse interest against the appellant. There is no contention that the incident did take place in any manner other than the manner in which PW4 narrated the same. It is significant that there is no contention that the deceased was the aggressor or that the incident took place in any manner other than that advanced by PW4. There is no contention even that PW4 is suppressing any part of the true incident. A careful perusal of the evidence of PW4- particularly the cross examination of the PW4 by the accused, must convince the court that it was totally unnecessary for the prosecutor to ritualistically increase the number of witnesses to tender evidence on the same aspect. It is of course true that the prosecution had with them an array of eye witnesses-total 3 in number. One was examined (PW4). His evidence did not project the need for examination of any other eye witnesses. In these circumstances, we are unable to hold that the non examination of more number of independent witnesses can justifiably arouse any reasonable doubt in the mind of the Court. Corroboration is not a fetish. It is not a rigid rule of law. It is a rule of prudence. Suffice it to say that a careful reading of the evidence of PW4 reveals the hollowness of the contention that more number of witnesses must have been examined to tender evidence on the same aspect. We do in these circumstances come to the conclusion that the prosecution cannot be found fault with for not examining CWs 9 and 10. The challenge on this count cannot succeed.

17. Circumstance No. 3

The prosecution relied on the oral evidence of PWs 1 and 3 about the dying declaration allegedly made by the deceased while he was being transported to the hospital. He had suffered a serious injury. There was no external bleeding. Evidently, there was internal bleeding. We have indications to suggest that the condition of the injured had aggravated as time passed after the occurrence. However, both PWs 1 and 3 on oath stated that the deceased who was worried and perturbed about the fate of his wife and the infant child was expressing his apprehension that he may succumb to the injury suffered. Even in Ext. P1 F.I statement it is very clearly stated by PW1 that the deceased was alert and speaking while he was being removed to the hospital. Of course, a dying declaration is not specifically narrated in Ext. P1. We do not reckon that as crucial or significant. PW1 had come to know of the identity of the assailant and he had narrated the same in Ext. P1. He did state in Ext. P1 that the deceased was alert, conscious and speaking while he was removed to the hospital. In these circumstances, the omission on his part to narrate in Ext. P1 that a dying declaration had been made is not reckoned by us to be crucially relevant. It is

not disputed that in his case diary statement before the Investigation Officer he had narrated dying declaration made to him by the deceased. It is evident from the absence of omissions and contradictions marked that the present version about the dying declaration is absolutely in tandem with his case diary statement given to the Investigating Officer subsequent to Ext. P1. PW1 is a lay witness. In Ext. P1 he has narrated all crucial details including the complicity of the appellant. He may not have then perceived the significance of the dying declaration. Only when the Investigating Officer tapped his version in the course of his investigation he came out with the details.

18. PW3 had got into the vehicle in which the deceased was being carried to the hospital enroute. To him also a dying declaration was made by the deceased that he had suffered the injury at the hands of the appellant. The evidence of PWs 1 and 3 support each other. We must note that this is not a case where any finding is to be founded on such dying declaration made by the deceased to PWs 1 and 3. In this context, the non examination of two other witnesses and the driver who were present along with the deceased, PW1 and PW3 in the vehicle is not according to us vital or crucial. The version of PWs 1 and 3 is indicated to be in perfect compliance with the 161 statement made by them to the Police as can be gathered from the absence of marking of any case diary contradiction or omission. We are in these circumstances satisfied that the dying declaration made by the deceased to PWs 1 and 3 by which the deceased conveyed to his brother and brother-in-law that he had suffered the injury at the hands of the appellant is found to be absolutely convincing. Though it is not necessary to found any finding of fact on such dying declaration, such dying declaration also helps the court to draw inspiration for the oral evidence of PW4. In this view of the matter the 3rd circumstance is also firmly established by the evidence of the prosecution.

19. Circumstance No. 4

The prosecution relied on the recovery of MO1 knife by the Investigating Officer on the basis of Ext. P15 information furnished by the appellant to the Investigating Officer. The Investigating Officer as stated earlier had expired before the matter came up for trial. PW15 his successor was examined by the prosecution. Ext. P11 is the seizure mahazar under which MO1 knife was recovered by the Investigating Officer. PW14 is an attester to Ext. P11. PW15 proved Ext. P15- relevant portion of the confession statement recorded by his predecessor. PW14 attester to Ext. P11 proved the fact that the appellant who was brought to the scene in the custody of the police had looked for, searched, obtained and produced MO1 knife before the Investigating Officer. Notwithstanding the inability of the prosecution to make the evidence of the Investigating officer available to the Court (consequent to his death before trial) we are of the opinion that this evidence of recovery introduced u/s 27 of the Evidence Act can safely be accepted. The court below had committed no error in accepting that evidence. The medical evidence tendered by PW12 Doctor and

Ext. P9 post mortem certificate clearly show that the fatal injury (the only injury) suffered by the deceased could have been inflicted with a weapon like MO1. MO1 was found to be blood stained - stained with human blood group of B, which was the blood group of the deceased. Arguments that in Ext. P11 presence of blood stains is not specifically indicated is according to us of no consequence considering the report of the chemical examiner Ext. P20. This evidence of recovery of blood stained MO1 knife on the basis of Ext. P15 information furnished by the appellant to the Investigating Officer which is proved by examination of PW14 as also the contents of the contemporaneous seizure mahazar Ext. P11 is according to us satisfactorily established by the prosecution. This circumstance is incriminating in itself. It also affords support and corroboration for the oral evidence of PW4.

20. Circumstance No. 5 The prosecution relied on seizure of MOs 2 and 4 under Ext. P5 when the appellant was arrested. MOs 2 and 3 are identified to be the clothes worn by the accused at the time of the occurrence. Those were produced before the Investigating Officer by the accused in MO4 cover. MOs 2 and 3 were found to be stained with human blood. One of them was identified to contain blood stain of Group B which was the blood group of the deceased. Seizure of blood stained MOs 2 and 3 under Ext. P5 is also in these circumstances well established and that in turn points to the complicity of the appellant. More importantly it affords assurance of the version of PW4. It is crucial that the appellant has not offered any explanation for the presence of human blood in MOs 2 and 3, his clothes.

21. We are in these circumstances satisfied that the 5 specific circumstances/pieces of evidence relied on by the prosecution have been established specifically. Together they lead to an unmistakable and clinching conclusion about the complicity of the appellant. The court below committed no error, we agree, in coming to the conclusion that the fatal injury suffered by the deceased was suffered by him at the hands of the appellant.

22. That injury had led to death. Anyone who inflicts such an injury on the deceased with a weapon like MO1 in that part of the anatomy can safely be assumed to have intended to cause the death of the deceased. Even otherwise, the injury is found to be an intentional injury inflicted. That injury, objectively assessed, is found to be sufficient in the ordinary course of nature to cause death. Death has resulted from that injury. In these circumstance the offence proved against the accused is certainly the one defined u/s 300 IPC. Under Clause thirdly of section 300 (if not under firstly of Section 300) the offence proved is the offence of murder defined u/s 300 IPC and punishable u/s 302 IPC. No contention has been raised nor is there any material to indicate, that the appellant is entitled to the imitative protection of any of the exceptions to section 300.

23. We do in these circumstances concur with the conclusions of the court below that the prosecution has succeeded in proving offence punishable u/s 302 IPC

against the appellant. The impugned judgment does not warrant any interference.

24. No other contentions are raised. We are satisfied in these circumstances that this appeal merits dismissal.

25. This appeal is dismissed.