

(2002) 11 KL CK 0090

In the High Court Of Kerala

Case No : Criminal Appeal No. 1169 of 2001 (C)

Suresh S. Nair

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 12-11-2002

Acts Referred:

Penal Code, 1860 (IPC) — Section 300

Citation : (2003) CriLJ 1152 : (2003) 1 ILR (Ker) 520 : (2003) 2 RCR(Criminal) 323

Hon'ble Judges : Joseph, J;G. Sasidharan, J

Bench : Division Bench

Advocate : B. Raman Pillai, for the Appellant; Noorji Noushad, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

G. Sasidharan, J.—Appellant is the 1st accused in Sessions Case 84/1999 on the file of the Additional Sessions Judge, Pathanamthitta. Appellant and three others were charged with having committed the offence punishable u/s 302 read with Section 34 of the Indian Penal Code. After trial, the learned Sessions Judge found that the appellant committed the offence punishable u/s 302 of the Indian Penal Code and convicted him thereunder. On hearing the appellant on the question of sentence the learned Sessions Judge sentenced him to undergo imprisonment for life u/s 302 of the Indian Penal Code.

2. The allegation against the appellant and the other accused was that in furtherance of their common intention to cause the death of one Muraleedharan Nair at about 9.30 p.m. on 14-5-1998 they pelted stones on him and when he fell down on sustaining injuries the appellant hit him with a stone on his head and the other accused also hit with stones as a result of which he suffered injuries. It is stated that at 10.50 p.m. Muraleedharan Nair died as a result of the injuries suffered by him.

3. Muraleedharan Nair was employed in New Delhi and he along with his wife P.W. 15 was permanently staying in New Delhi. On 12-5-1998 they reached Kollam on taking leave and they stayed in the house of brother of P.W. 15. From there they went to the house of P.W. 15 in Alappuzha and stayed there on 13th and 14th. On 14-5-1998 they reached the house of Muraleedharan Nair at Pulikeezhu in Kumbazha Muri. At about 5 p.m. on 14-5-1998 Muraleedharan Nair and his wife, P.W. 15 reached the house and Muraleedharan Nair went out of the house for seeing his friends. He spent about four hours with his friends and went back to his house at 9 p.m. Again he went out of his house along with P.W. 15 to see P.W.2, who is the wife of Mohanan Nair, his brother. After seeing P.W.2 in her house Muraleedharan Nair and P.W. 15 came out of the house and went to the road for going to Ayakkarethu Illom. They reached Pallikuzhi junction and at that time autorickshaw stopped in front of them and two persons came out of the autorickshaw. It is stated that one of them flashed a torch light and the light fell on the face of Muraleedharan Nair. There ensued a wordy altercation. It is stated that Muraleedharan Nair asked his wife to go away from there on handing over a torch light he was having with him. P.W. 15 turned to go to her house and when she took two or three steps she heard her husband making request that stone should not be thrown at him. On hearing that, P.W. 15 came back to the place of occurrence and she saw the occurrence. P.W. 15 speaks about the occurrence in which her husband Muraleedharan Nair was assaulted by four persons.

4. P.W. 2, the sister-in-law of Muraleedharan Nair also says that she saw the occurrence. When Muraleedharan Nair and his wife, P.W. 15 Came out of the house of P.W. 2 for going to Aykkarethu Illom she also came out of the house along with her children, When she was standing in front of her house she heard commotion from the place of occurrence and she went to the place of occurrence. She also says that she saw the actual assault made by the appellant and the other accused on Muraleedharan Nair.

5. P.Ws. 2, 6 and 15 took Muraleedharan Nair to District Hospital, Pathanamthitta. They reached the hospital by 10.50 p.m. Then P.W. 8, the doctor in the above hospital examined Muraleedharan Nair and said that he was already dead. Exhibit-P10 is the wound certificate prepared by P.W.8. In Exhibit-P10 the history and cause of injury is given as "fainted and fallen down". P.W. 1 is the brother of Muraleedharan Nair and he is residing at Kodumon. He, who knew about the occurrence, at 8.15 a.m. on 15-5-1998 gave Exhibit-P1 first information before P.W.16, the Assistant Sub-Inspector of Police. Crime 296/1998 was registered in Pathanamthitta Police Station u/s 302 read with Section 34 of the Indian Penal Code; P.W. 17 took over the investigation of the crime and went to the hospital and prepared Exhibit-P12 inquest report on holding inquest on the dead; body of Muraleedharan Nair. P.W. 17 went to the place of occurrence and prepared Exhibit-P17 scene mahazar at 2 p.m. on 15-5-1998. P.W. 14, the Scientific Assistant (Biology) in DCRB Unit, District Police Office, Pathanamthitta was also present at the place of occurrence as requested by P.W. 17. Exhibit-P15 is the report prepared by P.W. 14. M.Os. 3 and 4 are the banian and shirt worn

by Muraleedharan Nair at the time when the occurrence took place and those were taken into custody by P.W. 17, on preparing Exhibit-P13 mahazar. P.W. 15 produced M.Os.3 and 4 before the Circle Inspector of Police. On 17-5-1998 P.W. 17 arrested the appellant and the other accused and produced them before Court on submitting Exhibit-P20 remand application.

6. P.Ws. 2, 6 and 15 say that from the place of occurrence Muraleedharan Nair was taken to the Government Hospital, Pathanamthitta. P.W. 8, the doctor says that Muraleedharan Nair Was brought dead in the hospital. He proved Exhibit-P10 as the wound certificate prepared by him. In Exhibit-P10 only one injury on the head is noted and P.W.8 says that he did not examine the body for finding out whether there were other injuries because by the time Muraleedharan Nair reached hospital he was dead. P.W.7 is the doctor who conducted autopsy on the dead body and prepared Exhibit-P6 certificate. The injuries found on the dead body of Muraleedharan Nair are noted in Exhibit-P6. P.W.7 says that the death was due to blunt injuries sustained to the head and neck, i.e., Injury Nos. 1 and 2. He also says that injuries 1 and 2 are fatal and are sufficient in the ordinary course of nature to cause death. He went on to say that the above injuries are independently sufficient to cause death. The above evidence would clearly prove that Muraleedharan Nair died as a result of the injuries suffered by him at the place of occurrence.

7. P.W. 1 is not a witness to the occurrence. He is the brother of Muraleedharan Nair and he knew about the occurrence from two of his cousins and then he gave Exhibit- P1 first information to the police on the basis of which crime was registered. In Exhibit- Pi the name of the 1st accused is mentioned and it is stated that there were other persons also who participated in the commission of the offence. P.W. 1 was examined for the purpose of proving that it was he who gave the first information which led to the registering of the crime.

8. Prosecution mainly relies on the evidence of P.Ws.2 and 15 for proving that the appellant and the other accused assaulted Muraleedharan Nair as a result of which he suffered injuries on his head and subsequently succumbed to those injuries. Even though P.Ws.3 to 6 were examined by the prosecution for proving the occurrence, those witnesses did not support the case of the prosecution that the appellant and other accused assaulted Muraleedharan Nair. They said before the Court that Muraleedharan Nair fainted and fell down and suffered injuries. These witnesses were declared hostile by the learned Public Prosecutor and were examined.

9. P.W. 15 says that she and her husband Muraleedharan Nair were employed in Delhi. According to her, P.W.2 is the wife of the brother of Muraleedharan Nair. She says that on 12-5-1998 they came to Kerala from Delhi and by 5-5-.30 p.m. on 14-5-1998 they reached the house of Muraleedharan Nair. Their son, aged 10 1/2 years, was also with them. After reaching home Muraleedharan Nair went out of the house saying that he wanted to see his Mends. The version of P.W. 15 is that Muraleedharan Nair came back home by 9 p.m. and thereafter she along

with Muraleedharan Nair went to the house of Mohanan Nair, brother of Muraleedharan Nair. The above house was in the immediate neighbourhood and after seeing P.W.2 and her children they came out of the house for going to Ayakkarethu Illom. The version of P.W. 15 is that at the time when they reached the road P.W.2 and her children were standing in front of their house. Then she says that by the time they reached the road an autorickshaw came and stopped near them and two persons got down from the autorickshaw. One of them flashed a torch light on the face of Muraleedharan Nair and then he asked who was flashing the torch light. P.W. 15 went on to say that the person, who flashed the torch light, said that he was Suresh. He also asked Muraleedharan Nair what he would do, if torch is flashed on his face, and caught hold of his hand. P.W. 15 told his husband that they would go home without picking up quarrel with them. She says that she also requested those persons, who came there, not to quarrel with them. Then Muraleedharan Nair asked P.W. 15 on giving the torch light to her to go home by saying that he would come later. She turned to go to her house and when she took four or five steps two other persons also got down from the autorickshaw calling out Anil and Surendran to pelt stones on Muraleedharan Nair. Immediately P.W. 15 came back to the place of occurrence and she saw the appellant and the other accused pelting stones on Muraleedharan Nair. She speaks about the presence of light at the place of occurrence. According to her, there was street light. She saw the appellant hitting with a stone on the side of the head of her husband. By that time, according to P.W. 15, P.W.2 and her children came to the place of occurrence. Muraleedharan Nair fell on the road on sustaining injuries and he was taken to hospital. P.W. 15 says that Muraleedharan Nair was taken to Pathanamthitta District Hospital and by the time he reached the hospital he was dead.

10. P.W.2 says that on seeing a commotion she went to the place of occurrence and saw Muraleedharan Nair being assaulted by the appellant and the other accused. The version of this witness is that she saw the appellant hitting on the head of Muraleedharan Nair with a stone. The submission made by the learned Public Prosecutor is that the medical evidence available in this case will support the version of P.Ws. 2 and 15 in respect of the manner in which the assault was made. P.W. 7, the doctor, who conducted postmortem examination of the dead body and prepared Exhibit-P6, said before Court that Injury No. 1 could be caused by hitting with a stone.

11. The main argument advanced by the learned counsel appearing for the appellant is that the identity of the person, who is alleged to have assaulted Muraleedharan Nair by hitting with a stone on his head, has not been established in this case. This is a case in which even though P.Ws.2 and 15 said about the assault made on Muraleedharan Nair they would say that they had no previous acquaintance with the person, who assaulted him. P.W.2 says in the cross-examination that she did not have any acquaintance with the accused prior to the occurrence. She also says that after arresting the accused they were shown to her on 16-5-1998. She went on to say that the photographs and names of all

the accused were there in the newspapers. She even went to the extent of saying that it was on seeing the photographs and names that she could understand who were the accused in the case. It was before the photographs were published in the newspapers that the accused were shown by the police to P.W. 2. P.W. 15 says in the cross-examination that she did not know the appellant before the occurrence. Her version is that she did not have any previous acquaintance with all the four accused and that she had never seen them before the occurrence. Then she said that she saw the accused when the police brought them. The evidence of the investigating officer is also that after arresting the accused he showed them to the witnesses. P.W.17, the Circle Inspector of Police said that when the accused were shown to the witnesses they identified them. The question to be considered is whether the above evidence regarding the identification of the appellant made by P.Ws.2 and 15 in Court will establish the identity of the appellant as the person who actually assaulted Muraleedharan Nair by hitting him on his head with a stone.

12. There is evidence that the appellant was identified by P.Ws.2 and 15 in Court. The evidence of identification of the accused at the trial of the first time is from its very nature inherently of a weak character. What is substantive evidence is the identification of the accused made by the witnesses in Court. Facts which establish the identity of accused are relevant u/s 9 of the Evidence Act. When the witnesses are not having acquaintance with the accused prior to the occurrence, the identification of the accused in Court for the first time will have to get corroboration. There must be evidence on record to corroborate the evidence regarding identification of the accused in Court. In cases in which a test identification parade is conducted the identification of the accused at the time of test identification parade can be taken as evidence which would corroborate the evidence of the witnesses identifying the accused in court. The purpose of test identification is to test and strengthen the trustworthiness of the evidence regarding identification of the accused in Court.

13. In *Mohanlal Gangaram Gehani Vs. State of Maharashtra*, it was held that when a witness did not know the accused before the occurrence and no test identification parade was held to test his power of identification and he was also shown by the police before he identified the accused in Court, his evidence becomes absolutely valueless on the question of identification. That was a case in which there was evidence regarding identification of the accused in Court and it was brought out that the witness was not having any acquaintance with the accused before the occurrence. No test identification parade was conducted during the investigation of the crime. The Supreme Court said that since the order of conviction was entered on the evidence of such a witness the accused was entitled to be acquitted on the sole ground that there was no proper identification of the accused by the witness.

14. In *Shaikh Umar Ahmed Shaikh and Another Vs. State of Maharashtra*, the Supreme Court held that the evidence of identification parade is not substantive

evidence, but its utility is for purposes of corroboration. It is utilised for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to the witnesses. The real and substantive evidence of the identify of the accused comes when witnesses give evidence in Court identifying the accused. Even in cases where evidence is given regarding the identify of the accused, if there are materials to show that, even though there is an identification parade conducted, before conducting the identification parade the accused were shown to the witnesses, the fact that identification was made at the time of conducting identification parade will not be considered as an item of evidence which would give support to the evidence given in Court regarding the identity of the accused. When the accused were already shown to the witnesses before the identification parade, the identification in Court by the witnesses will not get corroborating from the evidence regarding identification of the accused at the time of conducting the identification parade. *Ganpat Singh v. State of Rajasthan* 1998 SCC (Cri) 201 was a case in which there was only one witness who said about the seeing of the occurrence. Police showed the accused in that case in the police station before conducting the test identification parade. Taking into consideration the above fact the Supreme Court said that no reliance could be placed on the identification made at the time of test identification parade and hence his evidence regarding identification in Court cannot be relied upon.

15. In *Ravindra @ Ravi Bansi Gohar Vs. The State of Maharashtra and Others*, the Supreme Court had the occasion to consider about the reliability of the evidence regarding identification of the accused in Court. That was a case in which the photographs of the accused were shown to the witnesses before test identification parade was held. The Supreme Court found that the fact that photographs were shown to the witnesses before the test identification parade rendered the evidence regarding identification in the test identification parade not reliable for giving corroboration to the evidence regarding identification of the accused in the Court. In the above decision, an earlier decision of the Supreme Court in *Laxmipat Choraria and Others Vs. State of Maharashtra*, was referred to and it was held that the evidence of witnesses so far as it related to identification of the accused who were not known to them from before was unworthy of credit as admittedly, their photographs were shown to them before the test identification parade. Identification parade is done during the investigation stage and it serves to provide the investigating authority with materials to assure themselves that the investigation is proceeding on the right lines. It is through the identification parade that the investigating agency is required to ascertain whether the persons whom they suspect to have committed the offence are the real culprits and not by showing the photographs of the suspects to the witnesses.

16. The learned Public Prosecutor placed reliance on *Daya Singh Vs. State of Haryana*, in which the need for conducting identification parade in cases in which the witnesses did not know the accused prior to the occurrence was given

emphasis. In that case when considering the question whether the evidence of the injured eye-witnesses was sufficient to correct the appellant with the crime beyond reasonable doubt the Supreme Court said that it was necessary to bear in mind that the purpose of test identification was to have corroboration to the evidence of eyewitnesses in the form of earlier identification and that the substantive evidence of a witness was the evidence in the Court. If the evidence regarding identification in Court is found to be reliable, then absence of corroboration by test identification would not be, in any way, material. In cases in which the witnesses knew the accused prior to the occurrence the evidence given by the witnesses identifying the accused in Court, if found trustworthy, can be reliable evidence regarding the identification of the persons who committed the offences. The necessity of conducting identification parade and getting the accused identified by the witnesses at that time will arise only in cases in which the witnesses are not previous acquaintance with the accused.

17. In the above decision the Supreme Court refers to the decision in Rameshwar Singh Vs. State of Jammu and Kashmir, and observes that it is true that the absence of corroboration by test identification may not assume any materiality if either the witness had known the accused earlier or where the reasons for gaining an enduring impress of the identify on the mind and memory of the witness are, otherwise, brought out. Another decision referred to by the learned Public Prosecutor is Suraj Pal v. State of Haryana (1975) 2 SCC 64 which was referred to in the decision of the Supreme Court in Daya Singh Vs. State of Haryana, . In the above decision the Supreme Court said that the identification parade serves dual purposes. It enables the investigating agency to ascertain the correctness or otherwise of the claim of the witnesses that they have seen the offender of the crime as well as their capacity to identify him and on the other hand, it saves the suspect from the sudden risk of being identified in the dock by such witnesses during the course of the trial. That was a case in which the accused refused to take part in the identification parade and hence there could not be any evidence regarding identification of the accused by conducting an identification parade. The Supreme Court said that in such cases the evidence in Court regarding identification of the culprit can be accepted in spite of the fact that there was no identification of the accused by conducting an identification parade. In Daya Singh Vs. State of Haryana, also the Supreme Court found that the evidence regarding identification of the accused in Court can be accepted even though the accused were identified by conducting an identification parade. That was a case in which the accused did refuse to take part in the identification parade and there was evidence of the Tahsildar regarding the fact that there was refusal on the part of the accused to take part in the identification parade. The Supreme Court observed that the refusal on the part of the accused to take part in the identification parade was on his own risk and hence the evidence regarding identification of the accused given in Court for the first time could be accepted even though the witnesses were not acquainted with the accused prior to the occurrence.

18. In *Budhsen and Another Vs. State of U.P.*, the Supreme Court observed that the purpose of a test identification is to test and strengthen the trustworthiness of the evidence in Court and it is accordingly considered as a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceeding.

19. In *Dana Yadav alias Dahu v. State of Bihar (2002) 7 JT (SC) 68 : Dana Yadav @ Dahu and Others Vs. State of Bihar*, dealing with the necessity of conducting identification parade the Supreme Court said that evidence of identification of an accused in Court by a witness is substantive evidence whereas that of identification in test identification parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate identification of accused by a witness in Court. If an accused is well known to the prosecution witnesses from before the occurrence, no test identification parade is necessary and it would be meaningless and sheer waste of public time to hold such an identification parade. The Supreme Court said in the above decision that failure to hold test identification parade does not make the evidence of identification in Court inadmissible rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in Court should not form the basis of conviction. The Supreme Court, as stated above, observed that the evidence regarding identification in Court in its very nature is of weak character unless it is corroborated by his previous identification in test identification parade. It is not necessary that in all cases in which witness gives evidence in Court identifying the accused and it has come out that the witness is not having previous acquaintance with the accused before the occurrence, for accepting the evidence given in Court regarding identification of the accused identification parade is necessary. The evidence regarding identification made in Court can get corroboration from some other evidence also.

20. This is a case in which the witnesses, P.Ws. 2 and 15 say that they did not know the accused prior to the occurrence. P.W. 15 says that she had never seen any of the accused before the occurrence. That being the position, the evidence given in Court identifying the appellant as the person who assaulted Muraleedharan Nair has to get corroboration either from the evidence that the appellant was previously identified by conducting a test identification parade or from any other evidence which lends support regarding the identity of the accused. No test identification parade was conducted in this case. There is also no other evidence which would give corroboration to the evidence of P.Ws. 2 and 15 given in Court that the appellant is the person who assaulted Muraleedharan Nair. This is a case in which the identify of the appellant as the person who assaulted Muraleedharan Nair has not been satisfactorily established by the prosecution. We find that the appellant has to be acquitted for the reason that the identify of the appellant has not been satisfactorily established by the prosecution.

This appeal is allowed on setting aside the order of conviction and sentence of the appellant by the learned Sessions Judge. The appellant is acquitted of the charge against him u/s 302 of the Indian Penal Code. He shall be set at liberty forthwith.