Jose Vs. State of Kerala

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Court : Kerala

Decided On : Feb-14-1983

Reported in : 1984CriLJ748

Judge : G. Balagangadharan Nair and ; K. Sukumaran, JJ.

Appellant : Jose

Respondent : State of Kerala

Judgement :

K. Sukumaran, J

1. In the dark night of 14th January, 1980, (just three days prior to the new moon day which fell on 17-1-1980) two babies, Gini and Gina, found their watery grave. The children were born to the accused, aged 26, and his wife P. W. 6, aged 25. A cousin and neighbour of the accused, P. W. 1, gave Ext. P1 first information statement before the Head Constable P. W. 10 at 9.30 a. m. on 15-1-1980. Ext. P1 implicated the accused as the person responsible for the death of the children. A crime was registered--Crime No. 6 of 1980 of the Koratty Police Station P. W. 10 prepared the inquest reports Exts. P4 and P5. The investigation was continued by P. W. 11 who took over the same on 16-1-1980. The accused was arrested on 25-2-1980. A charge was laid against him before the Judicial First Class Magistrate's Court, Chalakudy (where the case was registered as C. P. No. 23 of 1980) for offences punishable under Section 302 of the Indian Penal Code, of causing the

death of the children by throwing them into the tank at 10.30 p. m. on 14-1-1980 with the intention that they should be drowned.

2. The accused pleaded not guilty. The prosecution examined eleven witnesses and produced six documents, The previous statements given by P. W. 3, and P. W. 6 were marked on the side of the accused, portions of the statement of P. W. 3 having been marked as Exts. Dl to D5 and those of P. W. 6 as Exts. D6 and D7. The learned Sessions Judge found the accused guilty of the offence of murder under two counts, for causing the death of the two children. A conviction was accordingly entered against him under Section 302 of the I. P. C. He was sentenced to rigorous imprisonment for life for each of the murders, the sentences having been directed to run concurrently. The accused has come up before this Court in appeal against the conviction and sentence passed against him by the court below.

3. According to the prosecution, there were frequent quarrels between the accused and his wife P. W. 6. She, therefore left her matrimonial home a few days prior to the day, of the tragic incident. She entrusted the children with a sister of the accused when she so left the house. The children were thereafter living with the accused in his house. The entreaties of the accused to his wife for her return home were unsuccessful. On the fateful day, the accused carried with him the two children at about 10.30 in the night, proceeded to a tank situated in the property belonging to P. W. 9 and threw them into the tank.

4. There are no eye-witnesses to the incident. The conviction of the accused depends upon the evaluation of the circumstantial evidence in the case. That evidence consists of P. Ws. l to 3, P. W. 6 and P. W. 9. The witnesses P. Ws. 4 and 5 are doctors attached to the hospital at Chalakudi who conducted the postmortem and issued the certificates Exts. P2 and P3 in respect of the two children. P. W. 8 the Village Officer prepared the plan Ext. P6 giving the relevant details of the scene of occurrence. The Panchayat President of Koratty, P. W. 7, is a witness to the inquests Exts. P4 and P5.

5. The first question calling for determination is whether the children had a homicidal death. Exts. P2 and P3 and the evidence of P. Ws. 4 and 5 clearly

establish that the children died as a result of drowning. The cause of death was given as asphyxia due to drowning. A suggestion that the body was thrown into the water after death due to asphyxia for some other reason, was rejected by P. W. 4, who emphatically stated: 'If the body is put into water after death due to asphyxia for some other reason, the frothy fluid in the cut section of the lungs will not be present. I am quite sure that the symptom of frothy fluid in the cut section of the lungs will not be present unless the baby is put alive in water'. The medical evidence, therefore, conclusively establishes that the children were thrown into the water when they, were alive.

6. P. W. 6, the wife of the accused, has given evidence relating to the background in which she was forced to leave her husband's home. According to her, after her first delivery, there were frequent assaults on her, and incessant quarrels in the family. The accused felt that the wife was not beautiful enough to mix in the company of others. Some days before the incident she entrusted the children with her sister-in-law P. W. 5(sister of the accused), who resides about 100 feet away from the accused's house. She went to the hospital for treatment, and was advised to be an inpatient. She did not accept that suggestion but went to her father's house.She heard about the tragic story while she was in the hospital, where she had gone subsequently. She speaks about the cruelty of her husband which constrained her to be mostly with her father after the very first year of the married life.

7. The children were found by P. W. 1 with the accused in his house on the day previous to the incident, P. W. 1 is a cousin, mother's brother's son of the accused, and is his neighbour. At 7.30 a. m. on 15-1-1980 he saw the dead bodies of the children in the tank about two furlongs away from the house of the accused and situated in the property belonging to P. W. 9. He spoke about the quarrel between the accused and his wife and about P. W. C being in her father's house, and about the children staying with the accused. The dead bodies of the children were naked at the time when he saw them. Immediately on seeing the dead bodies of the children, he made enquiries about the accused. But the accused could not be traced. P. W. 1 gave the statement Ext. P1 to the Head Constable P. W. 10 at 9.30 a. m.

8. P. W. 2, an employee in the canteen run by Premier Cables and distantly related to the accused, on his way home after the day's work on 14-1-1980 saw the accused at about 10.15 p. m, taking the children, with no dress on them, in the direction of P. W. 9's compound. One child was on the shoulder and the other one on the hip. P. W. 2 asked the accused where he was going with the children. The accused replied that on the next day they would all know. He heard about the dead bodies of the babies floating in the tank, during the talks at the tea-shop the next morning. He also testified to the fact that in the house of the accused, the parents of the accused were not staying and that the only inmates of the house had been the accused, his wife and children.

9. P. W. 3, aged 83 resides very close to the house of the accused, in the house of his only daughter. He recalls the quarrels between the couple and about the accused's wife (P. W, 6) leaving the accused and going to her father's house. Thereafter there were only the accused and his two children in that house. There was a previous incident where the wife had gone home but was brought back at the persuasion of the accused and his brother. When there was a further beating, P. W. 6 went home and refused to return. P. W. 3's brother's daughter was staying at the end of the compound belonging to P. W. 9. On 14-1-1980 in the night at about 10 p. m., P, W. 3 was proceeding to that niece's house, to keep her company in view of the absence of her husband at home on that night. On his way, he met the accused. In the flash of the torch-light, the witness noticed the disturbed face of the accused. The witness asked him whether it was Jose. The accused did not answer; and the two proceeded in opposite directions.

10. The learned Sessions Judge lias believed the evidence of P. Ws. 1 to 3. He found that the evidence of P. Ws. 1 and 6 established that the children were in the custody of the accused immediately before the occurrence. The evidence of P. Ws. 2 and 3, according to the Sessions Judge, indicated clinching circumstances regarding the complicity of the accused in the crime. The learned Judge, as stated earlier, accordingly, held that the prosecution had proved beyond reasonable doubt that the 'accused was responsible for throwing the two children in the tank whereby both of them got drowned.'

11. Counsel for the appellant, challenged the finding of the learned Sessions Judge on diverse grounds. The evidence of P. Ws. 1 to 3 was not reliable and could not be acted upon, according to him. We do not, however, find any substance In the criticism so levelled against the evidence of P. Ws. 1 to 3. P. W. 1, as noted earlier, is a direct cousin of the accused. There is nothing in his evidence which would indicate that he had a vicious motive to implicate the accused with a serious crime. There was no suggestion of any enmity on the part of the witness when he was examined in the case. Though in his 313 statement, the accused has stated that there had been a quarrel with P. W. 1 and that there was enmity between them there is no basis whatever for such a suggestion. The evidence of P. W. l regarding the accused's wife going to her father's house is corroborated by P. W. 3. There is no cross-examination on this point. Equally unjustified is the suggestion about enmity attributed to P. W. 2 by the accused. He is distantly related to the accused. Having regard to the place of his employment and the nature of his duties, his evidence regarding his meeting the accused at about 10,15 p. m. near the tank cannot be characterised as improbable or unnatural. He has explained that being employed in the canteen, he used to return very late, sometimes at 9 p. in, and sometimes even at 12 midnight. On the crucial day lie had returned from his place of work at 9.30 p. m. He refuted the suggestion made in the cross-examination about a quarrel between him and the accused. There is no proof regarding such an enmity as put forward in the 313 statement of the accused. The attack on the evidence of P. W. 3 was mainly on the footing that he was far too advanced in age and could not, therefore, clearly identify a person or object, particularly during night. This attempt, however, did not succeed. In the course of his cross-examination, the witness could correctly identify the colour of the shirt worn by the process server, the clothes around the dais of the court, the Sessions Clerk sitting about 12 feet away from him and the people standing near the wall at about a distance of 20 feet He also correctly identified the accused in the dock and the colour of the lungi and shirt worn by the accused. He spoke about his habit of sleeping late, by about midnight.

12. After anxiously considering the evidence of these witnesses we have no hesitation to believe them and to act. upon their testimony.

13. It was submitted that Ext. P4 and P5 were received in court on 11-2-1980 and that the accused was arrested only on 24-2-1980 and that these circumstances indicated a manipulation on the part of the police and foisting a false case against the accused. Complaint was also made about the absence of a scene mahazar. The omission to indicate the existence of a pathway or road in the plan Ext. Pti was yet another circumstance urged on behalf of the accused by his counsel as a fatal omission on the part of the prosecution. C. W. 5, Annakutty the sister of the accused, and C. W. 7, the father-in-law of the accused, had been cited but not examined and that too was a factor justifying the rejetcion of the prosecution case according to the appellant's counsel. We do not find any substance in any of these contentions. It must he noted that the inquests Exts. P4 and P5 had been prepared by P. W. 10 on 15-1-1980 itself. The post-mortem was also conducted by P. Ws. 4 and 5 at 3.40 p. m. on 15-1-1980. P. W. 10 has given evidence on this aspect. He has stated that the inquest reports were sent on 15-1-1980 itself. In the light of the above facts, and in particular, the post-mortem examination conducted on 15-1-1980 itself, we are not satisfied that the delay in the receipt of the inquest reports in the court has in any way caused prejudice to the accused. P. W. 1 has given evidence as to how the accused was missing from his house when he made enquiries about him on the morning of the 15th when the dead bodies of the children were found. The delay in apprehending the accused is, therefore, understandable. When a detailed inquest report had been prepared the omission to prepare a separate mahazar is also of no serious consequence. The evidence in the case reveals that the road going along P. W. 9's property, on either side of which the tank and the house were situate, was away from the tank which is the scene of occurrence. The existence of the road is spoken to by P. Ws. 1 and 2. The omission to indicate the road in Ext, 6 plan is not, therefore, of any serious consequence,

14. There is no merit in the contention that evidence is lacking on the question of the custody of the children with the accused. Counsel submitted that, according to P. W. 6, the mother of the children, the children were entrusted with C. W, 5, her sister-in-law. As to how C. W. 5 parted with the custody of the children is not establish. The non-examination of C.W. 5 was emphasised in that context. This argument does not bear scrutiny. As indicated earlier, P. W. 1 has given positive

evidence of his having seen the children with the accused on the evening previous to the day of the incident. The evidence of P, Ws. 2 and 3 is also to the effect that after the return of p. W. 5 to her home, the accused was staying In his house with the children and that his sister used to visit the accused's house occasionally. There was no cross-examination on this point. We are, therefore, clearly of the view that the prosecution has established the custody of the children with the accused, at the relevant time. What is more, P. W. 2 saw that accused carrying the children, one on his shoulder and the other on his hip on the night of 14-1-1980 itself. The evidence, therefore, clearly establishes not only the custody of the children with the accused but his proceeding in the direction of the tank at about 10 p. m. with the children in their naked condition, in which condition their dead bodies were found floating on the next morning.

15. The subsequent conduct of the accused, is also a definite pointer to his culpability, totally inconsistent with his innocence. Any normal father would have undergone an excruciating agony, when the babies of tender age in his custody, were missing. If, as is suggested by the counsel for the appellant, the custody was with the sister, he would have taken her to task for the disappearance and the death of his children. What is proved by the evidence, however, is that the accused made himself scarce from the locality from the time the dead bodies of his children were detected. He could be arrested by the police only more than a month later.

16. Yet another factor which could be taken note of in this connection is this false plea put forward by the accused in the course of his 313 statement. He would plead ignorance about his relationship with P. W. 1. Not only that. He pleads ignorance about the evidence of P. W. 1 of his having two children aged 11/2 years and 6 months. The plea of ignorance is also put forward while being questioned about the quarrels in his house. Even in relation to the evidence about his children having been dead and the cause of death being asphyxia due to drowning, he pleads ignorance. We are well aware of the fact that a false defence is no substitute of proof which the prosecution has to establish. It has been pointed out by the Supreme Court in Shankarlal v. State of Maharashtra : 1981 CriLJ325 . Even so, that decision itself had indicated that such a false plea could be

considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused.

17. Counsel for the appellant made yet another effort to contend that the circumstantial evidence in the case did not measure up to the requisite standard of proof so as to conform to the rigorous requirements justifying a finding of guilt. Judicial decisions dealing with circumstantial evidence were placed before us, to buttress that contention. It is no longer necessary to emphasise the requirements of proof for a finding of guilt when the evidence is entirely circumstantial. One of the recent Supreme Court decisions in which reference was made to the principles applicable to a case which depends solely upon circumstantial evidence is Prem Thakur v. State of Punjab : 1983 CriLJ155 . The Supreme Court cautioned (Para 11):

Very often, circumstances which establish the commission of an offence in the abstract are identified as circumstances which prove that the prisoner before the court is guilty of the crime imputed to him. An a priori suspicion that the accused has committed the crime transforms itself into a facile belief that it is he who has committed the crime. Human mind plays that trick on proof of the commission of a crime by resisting the frustrating feeling that no one can be identified as the author of that crime.

18. What was the context in which those observations were made by the Supreme Court? The case was one where the prosecution alleged that the appellant therein murdered five persons, while they lapsed into a deep spell of sleep after having been administered liquor, the dead bodies having been carried one by one to the bottom of a thirty five feet deep tube-well and thereafter set on fire. The medical evidence showed that the liquor consumed by the deceased could not have produced unconsciousness of the five deceased persons. The Supreme Court observed (at p. 157):

How it could induce such stupor verging upon hypnosis is more than one can reasonably imagine. The prosecution case requires for its success the incredible assumption that the five persons done to death by a single individual were under such a heavy spell of sleep that none of them woke up when the other or others

were attacked. When the first of the five victims was attacked, lie would have shrieked or shouted and thereby the others would be aroused from their sleep. They were young, able-bodied labourers. It puts quite some strain on our credulity to accept that a single person could have finished off his five companions in the fiction-like manner alleged by the prosecution.

19. It is always necessary and desirable that the observations of the Supreme Court made with reference to the peculiar factual matrix of a case are understood in their proper perspective and context. As pointed out by Chief Justice Chandrachud in Shankarlal's case supra, 'legal principles are not magic incantations and their importance lies more in their application to a given set of facts than in their recital in the judgment'. What is more important is 'a proper and careful evaluation of circumstances in order to determine whether they are compatible with any other reasonable hypothesis', a later decision of the Supreme Court in Gambhir v. State of Maharashtra : 1982 CriLJ1243 , has also summarised the position relating to the law regarding circumstantial evidence justifying conviction in a criminal case. It must, however, be noted that the aforesaid decision did not purport to lay down anything new and had only summarised the law Which was 'well-settled'. The statement in that decision that the circumstantial evidence should be inconsistent with his innocence, occurring at the end of the passage contained in para 9 of the judgment, does not cast any additional burden on the prosecution, than the one which has been cast on it. already under the earlier judicial decisions. To cite only a few, in addition to Shankarlal's case supra:

State of Punjab v. Mukhtiar Singh : AIR 1975 SC2001 . K.M. Shelke v. State of Maharashtra : [1974]1SCR266 . Hukam Singh v. State of Rajasthan : 1977 CriLJ639 . Vidya Sagar v. State of U.P. : 1977 CriLJ950 .

20. The decision of this Court in Gabriel v. State of Kerala, 1982 Ker LT 772 : 1983 Cri LJ 94, has to be understood only in the above background. It is not necessary for the purposes of this case to consider whether there has been an overstatement of the principles in the aforesaid decision, having regard to the clearly established factual situation in the present case. We have, therefore, not considered it necessary to deal with that decision in greater detail,

21. While considering the question whether the circumstantial evidence is inconsistent with the innocence of the accused, the standard to be adopted must be reasonable and not fantastic. The Courts cannot be too willing to accept such fantastic probabilities as circumstances positing a hypothesis inconsistent with the guilt of the accused. As observed by the Supreme Court, evidence 'must be qualitatively such that on every reasonable hypothesis the conclusion must be that the accused is guilty; not fantastic possibilities nor freak inferences but rational deductions which reasonable minds make from the probative force of facts and circumstances'.(emphasis supplied) see Mohanlal Pan-gasa v. State of U. P. 1974 Cri LJ 800 (SC). Mark also the words of Khanna, J. in K.M. Shelke v. State of Maharashtra : [1974]1SCR266 :

The circumstances must show that within all reasonable probability the impugned act must have been done by the accused.

(emphasis supplied)

22. In the light of the above discussion, we cannot accede to the wild suggestions made by counsel for the appellant in this case that even assuming that the children were with the accused on the fateful night, they could have been taken away by somebody and thrown into the water without the accused being aware of it. The conduct of the accused in disappearing from the scene altogether soon after the death of the infants in his care and custody, his absconding from the scene for over a month, and his setting up false defence in the course of his statement under Section 313 of the Cr.P. C, are all relevant factors which would establish the guilt of the accused and rule out any hypothesis of innocence. (We are aware that absconding by itself is not conclusive of either guilt or guilty conscience as has been pointed out by the Supreme Court in Rahman v. State of U. P. 1972 Cri LJ 23 : AIR 1972 SC Ho in para 21. The emphasis, however, is on the totality of the factors indicated above. Having regard to the distance between the house of the accused and the tank in P. W. 9's compound and the time at which the death has occurred (P. W. 5 has given evidence that the death could have taken place about 12 to 18 hours prior to his examination which was done at 4.30 p. m., on 15-1-1983 and the tender age of the infants, it is equally impossible

to accept any suggestion of the children having themselves found their way to the tank and get drowned therein.

23. In the light of the above discussion we are clearly of the view that the learned Sessions Judge was right in accepting the prosecution evidence, particularly the evidence of P, Ws. l to 3, and in finding the accused guilty of the offence punishable under Section 302, I. P. C. There is absolutely no merit in the appeal. We dismiss the appeal and confirm the conviction and sentence passed by the Court below.