

C. Narayanan (Writer) and Etc. Vs. State of Kerala and ors.

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Court : Kerala

Decided On : Dec-06-1991

Reported in : 1992CriLJ2860

Judge : K.T. Thomas,; P.K. Shamsuddin and; B.M. Thulasidas, JJ.

Acts : Code of Criminal Procedure (CrPC) - Sections 164 and 392; [Commissions of Inquiry Act, 1952](#); [Evidence Act, 1872](#) - Sections 3, 6, 11, 14, 32 and 32(1)

Appeal No. : Crl. A. Nos. 488, 489 and 490 of 1985 and 175 and 193 of 1986

Appellant : C. Narayanan (Writer) and Etc.

Respondent : State of Kerala and ors.

Advocate for Def. : T.R. Raman Pillai (Special Prosecutor for CBI),; K.T. Harindranath and;

Advocate for Pet/Ap. : M.K. Damodaran and; K. Kunhirama Menon, Advs.

Judgement :

K.T. Thomas, J.

1. This is a case in which a Sub Inspector was shot dead inside his police station. The crucial question involved here is whether he shot himself dead or was shot at by one of his subordinates in conspiracy with others in the police station. Sessions

Court found that he was shot dead by one of his subordinates. One Head Constable and two Constables (out of seven persons arraigned as accused in the trial court) were convicted and sentenced for murder and also for certain other allied offences. Other accused were acquitted. The first three appeals are those preferred by the convicted accused. Union of India filed one appeal for enhancement of sentence from imprisonment for life to death penalty and another appeal against acquittal.

2. The scene of occurrence was the Sub Inspector's room in Panur Police Station. The date of occurrence was 12-3-1981 at 11-55 a.m. The facts of this case are simple, but evidence is much. Three different agencies have handled the investigation in this case at three different stages. The first two (local police and then crime branch wing of Kerala Police) concluded that this is a case of suicide. But the Central Bureau of Investigation (for short 'C.B.I.') reached the conclusion that this is a case of homicide and that the seven accused conspired to murder the Sub Inspector. Evidence consists of opinions and conclusions of a number of experts. There are circumstances pointing to divergent conclusions regarding the Sub Inspector's death --suicide or homicide.

3. Earlier, these appeals were heard by a Division Bench consisting of Sukumaran and Rajasekharan, JJ. They differed in their conclusions. But Sukumaran, J. instead of pronouncing judgment, passed an order expressing his desire that the entire matter should be heard and decided by a larger bench. Under the proviso to Section 392 of the Code of Criminal Procedure, the case shall be heard by a larger bench in such circumstances. Accordingly, the Hon'ble Chief Justice constituted this Full Bench.

4. The accused put forward their defence, right from the beginning, that death of Soman was a case of suicide. If it is so, a wrong conclusion by the court that it is was homicide could be calamitous to the accused. The converse position is also fraught with dangerous portends. If actually they had murdered the Sub Inspector, it would also be a calamity that the murderers become guardians of law and order. Therefore, while evaluating the evidence in this case we remind ourselves of the serious implications involved in this case.

5. A synopsis of the prosecution case is this : Soman, the deceased, was posted at Panur Police Station and took charge as S.I. of the police station on 9-11-80. He was living with his wife (P.W. 1) and child in the police quarters. They are Harijans, who converted as Christians. Some of the subordinates in the police station developed hostility towards deceased as the latter was strict in his dealings with his subordinates. About two weeks before his death, some constables, of Panur Police Station bargained for getting rupees one hundred as bribe money from a lorry driver, but the deceased who made a timely interference did not allow them to have even rupees fifty already paid by the said lorry driver. That incident was followed by some constables (including two among accused) visiting his quarters in the night in a drunken condition and threatening him. Deceased got Ext. P1 anonymous letter written by third accused threatening that deceased would be murdered soon. On the date of occurrence, deceased left his house at 7-15 a.m. after informing his wife to expect him for lunch. After reaching the police station, he detailed duties to the constables. He registered an FIR on the basis of a complaint lodged by one Kunhircaman (P.W. 25) at 10-30 a.m. As the Sub Inspector was sitting in his chair inside his office room and doing his official duties, first accused (pursuant to a criminal conspiracy entered into between him and other accused) fired a loaded revolver at the deceased thrice. He died instantaneously. Still he was taken to the Public Health Centre, Panur, but he was pronounced dead. Accused then gave false information to the superior officers through telephone that the Sub Inspector committed suicide. First accused prepared an FIR as unnatural death and registered the case as Crime No. 31/81. Second accused kept the revolver in the drawer of his office table. P.W. 39 held the inquest at 12-30 p.m. He seized M.O. 18 revolver together with its holster (it is a O. 38 calibre semi-automatic six chambered revolver). Autopsy was conducted by Dr. Bhagya Laxmi (P.W. 14) at Public Health Centre, Panur. P.W. 1 (wife of the deceased) was brought to the Public Health Centre and later the deadbody was taken to Thiruvananthapuram which is the native place of the deceased. As the relatives of the deceased desired, another autopsy was conducted on the body on 14-3-81 by Dr. V.K. Ramankutty (P.W, 13) who was then Asst. Professor of Forensic Medicine in the Medical College, Thiruvananthapuram. He recovered two bullets from the body.

6. On 14-3-1981 P.W. 1 sent Ext. P2 petition to the Home Department expressing strong suspicion that her husband would have been murdered by the constables attached to Panur Police Station. The local police who proceeded with the investigation reached the conclusion that Soman's death was a case of suicide. However, investigation was taken over by the crime branch wing of the Kerala Police. They also reached the same conclusion. As there was public agitation, Government appointed Mr. Zacharia Mathew, I.A.S. (a member of the Revenue Board) to hold an enquiry into the death of Soman under the provisions of [Commissions of Inquiry Act, 1952](#). He submitted his report recommending a detailed investigation through an independent agency. In July '82, Government of Kerala decided to entrust further investigation to C.B.I. and issued a notification pursuant thereto. Government of India, in turn, directed the C.B.I. to take up the investigation.

7. P.W. 43 (Dy. S.P. of C.B.I.) arrested all the seven accused on 11-11-1983. After completing investigation, C.B.I. laid charge sheet against seven accused on 7-2-1984 for criminal conspiracy, murder etc.

8. Learned Sessions Judge enumerated all circumstances relied on by the prosecution as well as the defence in favour of conclusions which rival sides sought to establish. Learned Sessions Judge concluded ultimately that death of Soman was a case of homicide. But he found that prosecution has failed to prove the charge of criminal conspiracy. However, he found that A1 to A3 have shared common intention and first accused shot the deceased in furtherance of the said common intention.

9. There, is no dispute that Soman died with bullet injuries sustained at or near 11-55 a.m. on the date of occurrence while he was sitting in his chair inside the Sub Inspector's room at Panur Police Station.

10. A death due to bullet injuries can either be suicidal or homicidal or accidental. Nobody in this case has advanced a theory that soman sustained bullet injuries accidentally. Hence we need not strain ourselves over that theory. The dispute really swings between the theory of suicide and homicide. The site and the track of the three bullet injuries on the chest (besides one exit wound on the back)

sustained by Soman can better be described by quoting from the post-mortem certificate (Ext. P 33) issued by Dr. V.K. Ramankutty (P.W. 13). They are :

(1) A circular wound 0.8 cm in diameter with irregular edges on the front of left chest wall 3.4 cm to the left of midline and 14 cm below the collar bone. The wound was directed downwards and backwards and extended up to the left chest cavity by splintering the sixth coastal cartilage. It made a perforating wound 0.8 cm in diameter involving both chambers at the apex of the heart. (The exit wound which corresponds to the above entry wound was on the back of chest 3.5 cm of the left of mid line over the tenth rib and the rib was found splinted correspondingly). A metallic bullet was found emerging out.

(2) An oval wound 1.5 x 1 cm with irregular edges on the front of left chest wall 3 cm outer to injury No. 1. The wound was directed downwards and backwards and penetrated the chest cavity through sixth inter-coastal space. It caused a vertical gutter injury on the lower lobe of left lung having a dimension of 4 x 1 x 0.5 cm and perforated the left dome of diaphragm by 1 cm diameter, left lobe of liver by 1 cm in diameter and caused two injuries on the small intestine measuring 2 cm and 1.5 cm each in length with surrounding bruising.

(3) An oval wound 0.8 x 0.5 cm on the left side of the chest 3 cm outer to the nipple. The surrounding skin showed a collar of aberration. The wound was directed down wards and backwards in the subcutaneous plane for a depth of 7 cm. (A metallic bullet was recovered from the base of the wound).

11. The crucial point, whether Soman committed suicide or was murdered, can be considered from two broad angles. First is, whether suicide theory can be ruled out beyond reasonable doubt from the condition of bullet holes found on the kakki shirt (M.O. 1) worn by the deceased read along with the track of the three bullet wounds. If so, we can come to the irresistible conclusion that Soman was murdered. The second angle is, (which need be adopted only if the first angle does not provide a conclusive result) if both homicide and suicide are possible, whether the other proved circumstances would unerringly establish that Soman was actually murdered.

12. In considering the case from the aforesaid first angle, we must bear in mind, apart from the description of the injuries, that the kakki shirt (M.O. 1), containing three torn holes on the left pocket, was subjected to tests at the Forensic Science Laboratory, Thiruvananthapuram. P.W. 9, a ballistic expert of the said laboratory, gave his opinion as Exts. P21, P22 and P27. Not satisfied with the said opinion, the crime branch forwarded M.O. 18 revolver and M.O. 1 shirt for the opinion of Dr. Ramiah, who was the firearms expert attached to Tamil Nadu Forensic Science Laboratory and obtained Ext. D9 report. The revolver (M.O. 18) and a piece of cloth (similar to M.O. 1 shirt's cloth) were sent to Dr. Jauhari (P.W. 10), a ballistic expert of high reputation, for his opinion. The C.B.I. forwarded the opinion of P.W. 10 as well as Ext. D9 to Dr. G.R. Prasad (P.W. 31.), Head of Ballistics Division in the Central Forensic Science Laboratory, New Delhi. P.W. 31, on his part, forwarded them along with his own report of the incident to one Prof. T.K. Marshal (Northern Ireland) whom P.W. 31 considered to be an authority of great fame. Ext. P81 is the reply which Prof. T.K. Marshal sent to P.W. 31. (As the document was not proved in accordance with law, we sidestep it).

13. However, P.W. 31 gave his opinion in court favouring the theory of homicide, P.W. 31 preceded on the assumption that the range of two shots could have been 40 cms or above while the third one was a contact range shot. According to him, a suicider cannot fire multiple shots from 'non-contact range and at variable distances'. Yet another reason for P.W. 31 to reach his opinion is based on the sloping down of the tracks of the three bullet wounds. According to him, it is unlikely that all the three shots from the same distance would be sloping downwards 'in view of the natural tendency of the muzzle of the revolver to kick upwards when fired.'

14. P.W. 40, Professor and Head of Department of Forensic Medicine, Medical College, Kozhikode, gave his opinion based on the data collected from Ext. P33 postmortem certificate. According to him, probabilities are more for homicide. However, P.W. 40 did not rule out the possibility of suicide in spite of preponderance of probabilities in favour of homicidal theory. While considering the case from the first angle indicated above, the opinion of P.W. 40 is not very helpful as he points only to larger probabilities. Perhaps the said opinion may be useful

when we consider the case from the second angle mentioned above.

15. Opinion of P.W. 10 (Dr. Jauhari) may be useful if we decide that at least one of the torn holes on the shirt did not contain deposit of firing residue. P.W. 9 (Dr. Vishnu Potty) said that after conducting 'Walker's test' on M.O. 1 shirt, he found that the first and last torn holes on the shirt 'were not found bearing any burning, blackening or tattooing marks around them; the middle hole was found bearing burning, blackening and tattooing marks around it; and abraded collars were present around the torn holes'.

16. Learned Sessions Judge accepted the result of the tests conducted by Dr. Vishnu Potty (P.W. 9) mentioned in Ext. P21 and held that there was neither blackening nor tattooing marks on two of the torn holes of the shirt. Based on that fact, Dr. Vishnu Potty concluded that the middle hole on the shirt would have been caused by discharging the revolver from a distance of about 5 cm and the other holes could have been caused by discharging the revolver 'keeping it at a distance of more than about 1 metre'.

17. The conclusion arrived at by P.W. 9 that there was no peppering (or tattooing) and blackening on two torn holes of the shirt has been severely criticised by the defence counsel both in the trial court and in this Court. The counsel went to the extent of suggesting that P.W. 9 cannot be regarded as an expert in ballistic science and that he would not have conducted 'Walker's test' on the shirt. The counsel even suggested that P.W. 9 would have fabricated his work sheet (Ext. P31) later in order to make it appear that he conducted walker's test. To support this contention Sri. K. Kunhirama Menon, learned counsel, pointed out that the particular sheet in Ext. P.31 (on which mention is made about walker's test) contains a style and ink different from the rest of the sheets and that P.W. 9 did not mention even a word of walker's test in Ext. P21 report.

18. We are not persuaded, despite the vehement arguments, to think that P.W. 9 had fabricated Ext. P31 or that he would not have conducted a test (which he considered as walker's test) on the shirt. But the question is whether we should accept without demur his conclusion based on his own observations that there was no blackening or peppering on two torn holes of the shirt. We considered that

aspect with great concern and care. We would have accepted what P.W. 9 said in toto if there is any other material to assure the correctness of his conclusion. Usually, the photographs taken by a ballistic expert, who conducted walker's test, would be preserved for a counter check. But unfortunately P.W. 9 did not preserve those photos which he took. His explanation is that since photos are likely to fade out by lapse of time, he did not think it necessary to preserve them. It must be borne in mind, in this context, that P.W. 10, who conducted walker's test for experimental firing, did preserve the photos (Ext. D 10 series are those photos). Even now (after eight years) those photos remain clear.

19. To err is human. If a margin of error cannot be ruled out in any test, here is a case where we are unsure whether any such error would have crept in the tests conducts or any error in the observations made by P.W. 9. We say this particularly in this case due to certain important circumstances to which we shall presently refer.

20. P.W. 39, Circle Inspector, noted in the inquest report (Ext. P56) that all the three bullet holes on the shirt had blackening around. In Ext. P119 (as per which the shirt was produced before court first) it was again mentioned that blackening was around all the three holes on the shirt. Subsequently when the court forwarded the shirt, along with other articles to Forensic Science Laboratory for scientific tests, the magistrate described the shirt pointing out that there are three holes on the left pocket and all the three holes have been surrounded by blackening. Over and above those materials, the Assistant Professor of Forensic Medicine (P.W. 13), who had occasion to examine the shirt on 21-3-81 very closely with magnifying glass has said in his report (Ext. P34) that all the three holes on the left pocket were surrounded by blackening. He conducted the examination along with Dr. V.K. Jayabalan who was the Director and Head of Department of Forensic Medicine. (Both sides agreed that Dr. V.K. Jayabalan is an eminent, experienced and senior professor). In his testimony P.W. 13 said further that he examined the three holes very carefully as he knew the seriousness and implications of his observations.

21. We cannot shut out eyes to those sturdy materials which consistently proclaim that all the three bullet holes were surrounded with black spots (indicating peppering or tattooing). Nor can we assume that P.W. 13 and Dr. Jayabalan would not have carefully examined the shirt.

22. A reasonable doubt thus arises that there could have been firing residue on the texture around all the three bullet holes on M.O. 1 shirt. Any conclusion made about the range of, shots based on the absence of firing residue around any one of the torn holes, therefore, cannot safely be acted upon in this case. We are thus led to a situation where it is difficult to decide the crucial question, whether it is suicide or homicide, from any estimation regarding range of shots alone.

23. Absence of cadaveric spasm on the fingers of deceased, multiplicity of fatal bullet wounds on his chest, the downward and backward track of all the three bullet injuries, and presence of a bruise on the chest of the deceased were focussed by Sri T.R. Raman Pillai as data from which a definite conclusion can be reached that this is a case of homicide.

24. Cadaveric spasm is the instantaneous stiffening of muscles, usually of the hand and arms in association with a violent or emotionally traumatic death. It is different from rigor mortis or cadaveric rigidity. In the case of cadaveric spasm, a weapon held in the hand before death is firmly grasped and can only be removed with difficulty. Here the contention is that, had this been a case of suicide the instantaneous muscle stiffening through cadaveric spasm would have retained the revolver in deceased's hand and since no indication of such spasm was noticed by the two doctors who conducted different autopsies, it is a sure test to rule out suicide. But text book authorities do not consider absence of cadaveric spasm as a sure test to rule out suicide. In M.W.V. Cox's Medical Jurisprudence and Toxicology edited by Dr. Bernard Knight (at page 165 of the 5th edition) it is observed that 'it is almost a medico-legal legend recounted in every text-book that cadaveric spasm can sometimes indicate that a suicide, especially from shooting, was genuine and not a concealed homicide.... However, it must be emphasised that several professional lifetime may pass before this highly unusual incident is encountered'. Absence of such muscle stiffening, therefore, is not decisive.

25. We found much force in the contention of Sri T.R. Raman Pillai that three bullet wounds on the chest of deceased are more in favour of homicidal theory. Dr. G.R. Prasad (P.W. 31) said that he could not remember to have come across a single case in which a suicide fired multiple shots from non-contact range at variable distances. Text book authorities are almost uniform in suggesting that multiple bullet wounds are not consistent with suicide and the most single useful factor in suggesting that firearm wounds are homicidal is multiplicity of discharges (vide at page 24 'Firearms and Firearm Injuries' by Dr. I. Bhooshana Rao, Shri. N. Jauhari and Shri N.M. Supanekar. Also at page 521 in 'Mechanical Trauma -- Forensic Medicine' by C.G. Tedeschi and William G. Eckert. * Further, at page 245 in Taylor's 'Principles and Practice of Medical Jurisprudence' --13th edition; and at page 285 in M.W.V. Cox's 'Medical Jurisprudence and Toxicology').

26. But here the most important point to be considered, while dealing with the case from the first angle specified above, is whether multiplicity of bullet wounds would rule out the possibility of suicide. Mere strong possibility of homicide may be useful when we deal with the case from the second angle.

27. Prof. Cyril John Poison and Prof. D.J. Gee (both from University of Leeds) and Bernard Knight (University of Wales) in their joint work 'The Essentials of Forensic Medicine' have narrated an instance at page 267 in which one man fired on himself with a 12-bore shotgun first on the abdomen, next on the top of his shoulder and third and the fatal one on the forehead. This illustration was sought to be distinguished on the premise that in the case on hand the weapon involved is a O. 38 calibre revolver and not a shotgun. At the first blush, we thought that this difference would make all the difference. But on deeper consideration we think that the said difference is not enough to hold that the suicide in the illustration could not have fired those shots had the weapon been a 0.38 calibre revolver like M.O. 18. The editor of the 13th Edition of Taylor's 'Principles and Practice of Medical Jurisprudence' mentions a case at page 231 in which a police inspector committed suicide by firing five times on his chest and abdomen in a locked flat with a service revolver. Four wounds were contact injuries which passed from right to left. Another instance is mentioned in the second edition of 'Medicolegal Investigation of Death' edited by Wernex U. Spits and Russell S. Fisher at page 263 in which a

seventy two year old man committed suicide by using a 0.25 calibre pistol firing three contact shots into his chest (the incident occurred in the bathroom). The autopsy in that case revealed that all the three shots had perforated the heart of the dead man. It is thus discernible that almost all authors, who observed that multiplicity of bullet wounds is a safe test in favour of homicidal theory, have also hastened to add that there are cases in which suicides have fired more than once on the chest inflicting fatal wounds. Prof. Tedeschi and Prof. Eckert have cautioned repeatedly that 'cases are on record in which a suicide has been able to fire the weapon several times even when the first discharge might well have been expected to be immediately fatal' (page 523 in the book cited supra). Hence we cannot reach an unquestionable conclusion that three shots on the chest could never have been a case of suicide.

28. Sri T.R. Raman Pillai tried to build up argument on the basis of the shape of the entry side of the three wounds as described by Dr. V.K. Ramankutty (P.W. 13) in Ext. P33 postmortem certificate (one is a circular and others are oval shaped wounds). Shape of wounds in this case would necessarily have been mutilated or changed as Dr. Bhagya Laxmi (P.W. 14) had sliced out the skin portions from the wounds to subject them to histopathological and biological tests.

29. Track of the wounds is not decisive. Firstly, it is not a safe premise as pointed out in 'The Pathology of Homicide' by Lester Adelson (at page 265). Profs. Tedeschi and Eckert have again struck a note of caution (at page 525 of their work -- cited supra) thus : 'The direction of the track depends upon the posture of the body at the time of impact. Dogmatic statements about the position of a weapon must be tempered with caution, as it is unsafe to assume that the body was in the normal upright position'. Secondly, chances of bullet deflecting before or after entering into the human body are very much in this case because the bullet discharged in one shot would have glanced off the steel whistle (attached to the pocket on M.O.1 shirt) and bullet discharged in another shot would have grazed a plastic button (attached to the pocket) and the remaining bullet had splintered through the sixth intercostal cartilage. None can foreclose, in such shots, the possibility of bullet deflection.

30. Downward track was given accentuation by the prosecution on the premise that the muzzle end of the revolver would jerk upward every time the trigger is pulled and such a jerk is absolutely unavoidable when the victim himself pulls the trigger keeping the barrel mouth towards his chest. Dr. Vishnu Potty (P.W. 9), Dr. G.R. Prasad (P.W. 31) and Dr. P. Sivasankara Pillai (P.W.40) have deposed to this theory of 'muzzle jump'. Though the endeavour of defence counsel to attack the said theory during cross-examination was not very successful, Sri K. Kunhirama Menon demonstrated before us with an unloaded 0.38 calibre revolver the possibility of projectiles going downward even after granting an allowance for the upward jerk of the muzzle. Sri T.R. Raman Pillai invited our attention to the decision of the Supreme Court in *Sunny v. State* 1960 Ker LT 1 in which Supreme Court declined to accept a similar argument where the bullet track was downward and backward. But no decision on facts in one case even if there are similarities with the facts in another case, can be used in the latter since there can be differences at least on shades and nuances between facts of the two cases,

31. The remaining feature is the presence of a bruise noted by Dr. V. K. Ramankutty (P.W. 13) on the chest which he described as injury No. 6 in Ext. P33 post-mortem certificate as 'bruising 3 x 3 cm on upper part of the centre of chest in between collar bones'. This injury may be important if the prosecution had succeeded in proving that the deceased would not have sustained it at least within two days prior to the time of occurrence (as the doctor could not fix the age of that injury).

32. The upshot of the above discussion is that the death of Soman could have been homicidal, but we cannot rule out the theory of suicide with reasonable degree of certainty.

33. Now we proceed to consider whether prosecution could establish, from other circumstances, that Soman would not have committed suicide. Soman's wife (P.W. 1) said that she could not believe that her husband would have committed suicide as Soman had no reason to feel depressed. She made out that their's was a small happy and contented family. P.W. 1 deposed that on the fateful day Soman set out to the police station at about 7-45 a.m. after informing her that he would return for

lunch. Admissibility of the said statement has been challenged both in the trial Court and in this Court. Counsel contended that the said statement is not one which falls Under Section 32 of the Indian [Evidence Act, 1872](#) (for short 'the Act'), since this is not a statement as to any of the circumstances of the transaction which resulted in his death and is hence inadmissible in evidence. We have to examine the legal position.

34. There was a controversy as to whether 'the circumstances' referred to in Section 32(1) of the Act would embrace only proximate circumstances and would exclude distant circumstances. A Full Bench of this Court has set at rest the aforesaid controversy in *State v. Ammini* (1987) 1 Ker LT 928 : 1988 Cri LJ 107 by resorting to the observations made by the Supreme Court in *Sharad v. State of Maharashtra* AIR 1984 SC 1622 : 1984 Cri LJ 1738. Now the position is that it is immaterial whether the circumstance is distant or near and both are embraced by the expression. But then it must be a circumstance of the transaction which resulted in his death. By no stretch of reasoning, can it be said that what the deceased told his wife that he would come back for lunch is a circumstance of the transaction which resulted in his death.

35. Be that as it may, now we have to consider whether the aforesaid statement is otherwise relevant de hors Section 32 of the Act. An endeavour was made by the learned counsel for C.B.I. to bring it under certain other provisions of the Act. Section 11 of the Act says that 'facts not otherwise relevant are relevant, if they are inconsistent with any fact in issue or relevant fact or if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable'. There is a catena of decisions giving a restrictive scope for the application of Section 11 of the Act holding that the section is controlled by Section 32 of the Act. (Vide *Ambica Charan v. Kumud Mohan* -- AIR 1928 Cal 893; *Mt. Naima Khatun v. Basant Singh* -- AIR 1934 All 406 (FB); *Sevugan v. Raghunatha* -- AIR 1940 Madras 273 and *Thakurji v. Parameshwar Dayal* -- AIR 1960 All 339). The ratio adopted in those decisions is that if a statement is not admissible Under Section 32 of the Act, it is not admissible under Section 11 of the Act and that there is a difference between the existence of a fact and a statement as to its existence. The title given to

Section 32 of the Act is 'cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant'. The body of the section also shows that certain statements made by a person dead or cannot be found are made relevant. But Section 11 of the Act starts with the premise that facts not otherwise relevant are relevant Under Section 11 of the Act. This means, if a fact is relevant Under Section 32 of the Act, there is no need to go to Section 11 of the Act. The latter is provided to cover the contingency arising from non-application of any other provision in the Act including Section 32 of the Act. Then the question is whether a 'fact' includes a statement. Section 3 of the Act defines 'fact' as anything capable of being perceived by the senses. Illustration (c) to the Section is this : 'That a man said certain words is a fact'. According to us, only by a very restrictive interpretation that 'statements' can be excluded from the purview of Section 11 of the Act. There is no need to place such a restricted interpretation. If legislature intended that all statements are liable to be excluded from the purview of the word 'fact', illustration (a) to Section 6 of the Act would not have been incorporated therein. The said illustration makes it unambiguously clear that statement made by the deceased shortly before or after the murder, is a relevant fact in certain circumstances. There could be statements which though inadmissible under Section 32 of the Act are nevertheless admissible Under Section 6 in the light of illustration (a) thereto. At any rate, Section 6 cannot be controlled by Section 32 of the Act. If the scope of Section 6 cannot be whittled down like that, why should the scope of Section 11 be curtailed by dragging it Under Section 32 of the Act. We find nothing in Section 11 of the Act to suggest that it is controlled by any other section. On the other hand, the words used in Section 11 of the Act indicate that the provision is an exception to other general provisions. We find support to this interpretation from the decision of a Division Bench in *Ram Bharose v. Rameshwar Prasad Singh*, AIR 1938 Oudh 26. Their Lordships observed thus :

It seems to us that the statements in question are relevant under Clause (1) of Section 11, Evidence Act, because they are inconsistent with the fact in issue. It was said that Section 11, Evidence Act, related to facts and not to statement, but 'fact' includes 'anything, state of things, or relation of things capable of being perceived by the senses'(vide Section 3) and a statement is thus included in the definition of 'fact', as is clear from Illus (a) to Section 6 also.

36. That apart, the said statement can as well be brought within the umbrella of Section 14 of the Act. The said section renders certain facts relevant, if such facts show the existence of any state of mind indicating his intention 'when the existence of any such state of mind.... is in issue or relevant'. Much strain is not necessary to explain the scope of the section in this context in view of illustrations (1) and (m) thereunder. Illustration (1) says that when the question is whether A's death was caused by poison, statements made by A during his illness as to his symptoms are relevant facts. Illustration (m) says that when the question is, what was the state of A's health at the time when an assurance on his life was effected, statements made by A as to the state of his health at or near the time in question are relevant facts. It must be borne in mind that statements referred to in those illustrations are not relevant Under Section 32 of the Act. Still the statute permits such statement to be used as relevant.

37. Hence, in our view, P.W. 1's evidence that deceased told her that he would come back for lunch cannot be excluded from evidence under law.

38. We have no reason to think that P.W. 1 would have stated falsely that her husband told her so. We noted that P.W. 1 mentioned about that fact even in Ext. P2 petition which she sent to the Home Minister on the next day of burial. Of course, the said fact is indicative that he had no intention to end his life as soon. But we cannot hold that he would not have changed his mind.

39. His official career was marred by some unpleasant developments in the recent past. Though he joined the service as Sub-Inspector in 1976, his probation remained undeclared. He got himself entangled in the vortex of a bad case. One Dr. Varghese, who was running a nursing home at Pulpally, sent a complaint to the Dy. S. P. alleging that Soman, while he was Sub-Inspector of Police at Pulpally, cheated him by conniving with an impostor called Varma whom Soman introduced to Dr. Varghese as a qualified doctor and recommended him strongly. Believing Soman's recommendation, Dr. Varghese set up a hospital by name 'Rural Mission Hospital' to accommodate that charlatan. Later, Dr. Varghese discovered that the said person was one Surendran who was a notorious sandalwood smuggler and that he had embezzled a good amount of money from

the hospital. On Soman being told about this, Soman genuflected before Dr. Varghese and assured him that his loss would be reimbursed, but he could not redeem the promise. Dr. Varghese then sent a complaint to the Dy. S.P. Enquiry was initiated against Soman on the said complaint. He had to bear with the diatribes hurled by the Dy.S.P. whom Soman met in this connection. After enquiry, a draft charge was prepared against Soman on 9th March, 1981. The aforesaid facts could be collected from Ext. D21 proceedings.

40. Soman's wife (P.W. 1) admitted that her husband had gone to Wayanad (within which Pulpally Police Station is situate) during second week of February '81 to ascertain the stage of enquiry. She also said that her husband made an effort to escape from the said case with the help of two M.L.As. and that he was very much affected by the development in spite of spending a lot of money to get salvage from that imbroglio. Learned counsel for the defence contended that perhaps the deceased would have come to know on the date of occurrence that draft charge was made against him by the Dy. S.P. in the aforesaid 'Varma's case'.

41. D.W. 11, Head Constable, was examined by the defence to show that Soman was very much upset over the developments in the aforesaid impersonation charge against him. P.W. 11 said that on 12-2-1981 he and Soman were present in the Court of Judicial Magistrate of Ist Class, Kannur, and that after the court work they together proceeded to take lunch and that on the way Soman exhibited crise de nerfs and told D.W. 11 that he would resort to some drastic steps so that his photo would appear in newspapers.

42. If D.W. 11's testimony can be believed, it would indicate that Soman was very much upset and was contemplating some drastic steps. Learned Sessions Judge did not believe his evidence and observed that 'a careful perusal of the testimony of D.W. 11 makes it clear that his testimony regarding this aspect is highly suspicious'. We do not think that D.W. 11's evidence could be disposed of as easily as that. D.W. 11 said that while Soman was exhibiting emotional breakdown, one 'Damu wakil' reached there and both of them went away leaving D.W. 11 alone. There are certain other telling circumstances which corroborate D.W. 11's evidence. First is, Ext. P176 file (which contains Ext. D60 report

submitted by D.W. 11 to his Sub-Inspector on 12-2-1981) shows that both Soman and D.W. 11 were examined in the court of the Judicial Magistrate of 1st Class, Kannur, on 12-2-81 as witnesses in one criminal case. Second is, Ext. P3 diary maintained by Soman contains an entry on 12-2-81 that Soman met 'Damu wakil' on that day.

43. Defence cited Damu wakil as a witness. But he evaded the process issued from the court repeatedly. Finally, the Sessions Judge dispensed with his examination with the consent of the defence counsel. It is difficult to disbelieve the testimony of D.W. 11 who would, in all probabilities, have stated the same version to all authorities who enquired into the death of Soman.

44. Ext. P3 diary of Soman further throws some light to his mental condition. 13th January, 1981 was noted by him as the 'most desperate day'. The page for 9th February contains an entry showing that Soman sought for Almighty's help to tide over his difficulties. Events started with introduction of the fake doctor 'Varma' would have snowballed into 'a catch 22 situation' for him. If the tormented mind of Soman as reflected in Ext. P3 diary is of any indication, Soman had enough causes to worry himself.

45. One of the circumstances which stultifies the homicide theory was given repeated accentuation by the defence counsel. According to them, soon after the shooting incident, Soman was rushed to the nearest hospital by the accused and Soman breathed his last only after reaching there. If it was so, no doubt, it is a formidable circumstance against the theory of homicide. If Soman was alive, there was the chance of his telling, at least, the doctor, if not others, that he was shot by so and so. Would the accused, if they had shot him, have taken that chance? To dilute this circumstance, prosecution urged that accused took Soman to the hospital only after Soman was dead. Of course, P.W. 15, doctor of the Public Health Centre, Panur, after examining Soman, pronounced him dead and he issued Ext. P38 in which it was recorded as 'brought dead'. But P.W. 15, in his evidence, said that one nurse Janaki was seen giving injection to Soman when Dr. Moidu of Public Health Centre was standing nearby. P.W. 15 could examine Soman only after that. Though nurse Janaki was cited by the prosecution as a

witness, she was not examined. In these circumstances, we are not in a position to say that Soman was taken to Public Health Centre only after the accused knew that he died.

46. Among the witnesses examined, P.W. 25 is the only person who saw Soman alive last. P.W. 25 said that he went to the police station in the morning and gave First Information Statement for 'a cycle theft case'. (Ext. P49 is the FIR signed by Soman which was prepared on the basis of the First Information Statement supplied by P.W. 25). His version is that while he was talking with first accused in the hall of the police station, he heard the sound of shots and then first accused rushed to the Sub-Inspector's room and cried out 'don't do it sir'. If the testimony of P.W. 25 is reliable, it is fatal to the prosecution case. But we have some hesitation in relying on the testimony of P.W. 25 because he told the magistrate (who examined him Under Section 164 of the Cr. P.C.) that he heard the sound of shots only after he passed the gate of the compound wherein the police station is situate.

47. It has been contended that since the revolver (M.O.18) was recovered from the drawer of second accused's table (in the police station) and since first accused admitted that it was he who handed it over to second accused from Sub-Inspector's table, the conduct must be regarded as highly incriminatory. The said conduct may or may not be incriminatory. We cannot draw that inference which is disadvantageous to the accused, when another inference favourable to him is also possible.

48. Another circumstance sought to be used by the prosecution is that Soman received Ext. P1 inland letter which contains a definite threat to Soman's life. From the seal affixed on Ext. P1 it can be inferred that it would have been posted on 30-12-1980. According to the prosecution, Ext. P1 was written by third accused. The handwriting expert opined that the address portion of Ext. P1 was written by third accused. The said letter is certainly a circumstance against third accused if it is proved that it was written by him. Sri K. Kunhirama Menon addressed elaborate arguments that handwriting expert's opinion is not dependable to discern the identity of the author of Ext. P1 letter. Even if the letter is treated as written by third

accused, that circumstance alone is not sufficient to conclude that first and third accused conspired together to murder the deceased. Hence we do not think it necessary to deal with the arguments advanced regarding handwriting expert's evidence.

49. Yet another circumstance pressed into service by the prosecution is that first and third accused along with two other constables went to the Sub-Inspector's quarters a few days prior to Soman's death and warned him that things would become very bad if the Sub-Inspector deprived them of their income. (This episode has been spoken to by P.W. 1. The context referred to herein was the incident in which Soman interfered when those constables bargained with a lorry driver to pay them rupees one hundred and they had to return the money to the lorry driver). Learned counsel for the defence argued that the above portion of P.W. 1's evidence cannot be believed. Even if we believe her version about that episode, that circumstance would be useful only if we otherwise reach a definite conclusion that death of Soman was a case of homicide. When that crucial question remains uncertain for us, this circumstance by itself does not carry us any further.

50. Subsequent conduct of first accused that he went away to the locality of P.W. 25 on the same afternoon and that he went to other places on 13-3-1981 for law and order duty were also pointed out as suggestive of his involvement in the homicide. Such circumstances may be relevant as incriminating the first accused if it could be found that Soman's death was a case of homicide. But such circumstances, delinked from the other, are not decisive.

51. Circumstances are thus indecisive though some swing in favour of homicide and yet some others in favour of suicide. After weighing all pros and cons of the various circumstances highlighted by the counsel on both sides with remarkable skill and adroitness, a reasonable doubt lingers in our minds as to whether death of Soman would have been due to suicide or homicide. As we cannot deny the benefit of that doubt to the accused, we cannot prevent them from escaping through the clouds of suspicion billowed against them.

In the result, we set aside the conviction and sentence passed on A1 to A3 and allow the appeals filed by them. We acquit them and they are directed to be set at liberty unless they are wanted in any other case. Other appeals are dismissed.

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