

State of Kerala Vs. Hariharan

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Court : Kerala

Decided On : Oct-04-2005

Reported in : 2006(1)KLT173

Judge : J.B. Koshy and; K.R. Udayabhanu, JJ.

Acts : [Evidence Act, 1872](#) - Sections 27 and 32; Indian Penal Code (IPC) - Sections 34 and 302

Appeal No. : Crl. A. No. 912 of 2003

Appellant : State of Kerala

Respondent : Hariharan

Advocate for Def. : V.N. Achuta Kurup, Sr. Adv. and; Bindu Sreekumar, Adv.

Advocate for Pet/Ap. : P.M. Habeeb, Public Prosecutor

Disposition : Appeal dismissed

Judgement :

J.B. Koshy, J.

1. This appeal is filed by the State against the acquittal of the accused, four in number, in S.C.No. 505/1999 on the file of the Sessions Judge, Kasaragod. The accused were charge sheeted under Section 302 read with Section 34 IPC. The

prosecution case was summed up by the Sessions Judge as follows:

Two police constables attached to Hosdurg Police Station, PW1 and PW2, were on picket duty at Keloth on the night of 29-9-1996 in view of law and order problems arising from political skirmishes in that locality. At about 10.30 pm., being informed by three pedestrians passing through that some one was lying beside, at Chalingal Slope, with them PW-1 and PW-2 proceeded to the spot and found a person lying in sanguine bathe with injuries over the head and lower limbs. He was rushed to District Hospital in an autorickshaw by the two constables and the three pedestrians and on the way to the queries of PW-1, the victim revealed his identity as Rajan son of Krishnan and that he was assaulted at the spot by the accused after being brought there in the autorickshaw of the 4th accused. The victim when brought to District Hospital was directed to be taken for better treatment, by the doctor PW-3 and while an ambulance was being arranged for his transportation he succumbed to the injuries. PW-1 then went over to Hosdurg Police Station and reported the incident giving P1 statement, on which the crime was registered. The investigation was taken over by PW-8 Circle Inspector of Hosdurg Police Station who questioned the material witnesses and recorded their statements. He also arrested the accused, all of them the next day after occurrence and seized MO.1 and MO-2, the weapon of offences, purportedly on the basis of disclosure statements of A1 and A2 respectively and also seized into custody the autorickshaw of A4 in which the accused took the victim to the spot. The investigation was continued by PW-9 his successor in office who on its completion laid the charge against the accused for the offences punishable under Sections 302 read with 34 IPC.

2. There was no eyewitness to the incident. The prosecution hence relied on the dying declarations said to have been made by the deceased to the police constables for conviction of A1 to A4. Recovery of M.O.1 and M.O.2 iron rods, on the basis of the disclosure made by Accused Nos. 1 and 2 respectively was also relied on as a corroborating piece of evidence. Accused No. 3 was also sought to be connected on the ground of being last seen together with the accused. The trial court did not believe the dying declaration said to have been stated by the deceased. The recovery under Section 27 of the Evidence Act was also not

accepted and it was also found that the evidence that the third accused was last seen with the deceased was not within a proximate time. Prosecution was also not able to prove any motive for the offence. In an appeal against acquittal, even though the appellate court would be entitled to reappreciate the evidence, interference will not be made unless view of the court acquitting the accused is unreasonable or perverse as held by the Supreme Court in *State of Punjab v. Ajaib Singh* 2004 (2) Supreme 494. Apex Court in *Narinder Singh v. State of Punjab* : 2000 CriLJ3462 and *Harijan Megha Jesha v. State of Gujarat* : 1979 CriLJ1137 held that if the evaluation of evidence by the trial court does not suffer from any illegality, manifest error or perversity and the main grounds relied on for acquittal are reasonable and lawful, High Court shall not disturb the order of acquittal even if another view is possible. In *G.B. Patel v. State of Maharashtra* : 1979 CriLJ51 , the law summarised by a three-member Bench of the Apex Court as follows:

13. The dictum of the Privy Council in *Sheo Swarup v. Emperor* AIR 1934 PC 227 (2) 61 Ind App 398 and bead-roll of decisions of this Court have firmly established the position that although in an appeal from an order of acquittal the powers of the High Court to reassess the evidence and reach its own conclusions are as extensive as in an appeal against an order of conviction, yet, as a rule of prudence, it should to use the words of Lord Russel of Killowen -'always give proper weight and consideration to such matters as (1) the views of the Trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.' Where two reasonable conclusions can be drawn on the evidence on record, the High Court should, as a matter of judicial caution, refrain from interfering with the order of acquittal recorded by the Court below. In other words, if the main grounds on which the Court below has based its order acquitting the accused, are reasonable and plausible and cannot be entirely and effectively dislodged or demolished, the High Court should not disturb the acquittal.

In the absence of direct evidence for connecting the accused, the chain of circumstances must be so completed without any missing link or reasonable doubt as held by the apex court in Prem Thakur v. State of Punjab : 1983 CriLJ155 . Apex Court in Anil Kumar Singh v. State of Bihar 2004 SCC (Cri) 1167 held that in order to base a conviction on circumstantial evidence, each and every piece of incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than the one of guilt of the accused and the circumstances cannot be explained on any hypothesis other than the guilt of the accused. The court has to be cautious and avoid the risk of allowing mere suspicion, howsoever strong, to take the place of proof. A mere moral conviction or a suspicion howsoever grave cannot take the place of proof. With this background, we may consider the circumstances relied on by the prosecution.

3. With regard to the dying declaration, evidence was adduced by PWs. 1 and 2 Police constables attached to the jurisdictional police station. They deposed that they were on picket post duty on that day i.e., 29-9-96 in view of the law and order problems in that locality due to rivalry between B.J.P. and CPM parties. At 10.30 p.m. on that day three pedestrians passing through that road informed them that one person was lying near the Chalingal Slope. Along with the above three persons, PWs. 1 and 2 proceeded to the spot and found a person lying there with injuries over the head and lower limbs. An autorickshaw was called and the injured was taken to the district hospital by PWs.1 and 2 along with the above three pedestrians i.e. CWs.3, 4 and 5. On the way to the hospital, the injured revealed that he is Rajan, S/o. Krishnan and that he was brought there by A1 to A3 in an auto rickshaw driven by the 4th accused and accused Nos. 1 to 3 assaulted him and left there. Since the condition of the injured was serious, PW3, the doctor of the district hospital, Kanhangad, referred him to the Medical College Hospital, Mangalapuram. Ambulance was arranged. By the time he succumbed to the injuries by 11.30 pm. PW-1 gave the F.I. Statement. In the deposition of PW-1, it was stated that the injured was taken to the hospital in an auto rickshaw. Other than the injured, there were five persons in the auto, i.e. the two constables and CWs 3,4 and 5. The injured was laid on the platform of the auto, four persons sat in the back and one person was seated along with the driver. There was no light in

the auto and while traveling in the auto to the hospital, the dying declaration was made. It is stated as follows:

He also stated that when they reached the hospital, the injured was in a serious stage:

PW-2 also stated in a similar way. But PW-3 doctor who issued Ext.P2 wound certificate deposed that the patient when brought to the hospital was critically ill. The alleged cause of injury was stated as stabbing by one Hariharan and Madhavan at about 10.30 p.m. on that day. The deposition is as follows:

Patient when brought was critically ill, the alleged cause of injury was stated to me as stabbing by one Hariharan and Madhavan at about 10.30 p.m. on that day. It was stated to me by the injured in the presence of the police personnel.

Ext. P2 wound certificate was issued at 11 A.M. He was brought to the hospital at 11 P.M. and as per the prosecution, on the way to the Mangalapuram hospital, he succumbed to his injuries.

4. Acceptance of dying declaration is indicated in the maxim '*nemo moriturus praesumitur mentire*' i.e. a man will not meet his maker with a lie in his mouth. This principle was adopted under Section 32 of the Evidence Act. It is well settled that if the court is satisfied that the dying declaration is true and voluntary, it can be sufficient to find the conviction without any further corroboration as held by the apex court in *State of U.P. v. Ram Sagar* : 1986 CriLJ836 . It was also held by the apex court that since there is no opportunity for the accused to cross-examine the maker of the declaration, the court must scrutinize the dying declaration and before acting upon it must evaluate the same and satisfy that it is true and voluntary as held by the Apex Court in *K. Ramachandra Reddy v. Public Prosecutor* : 1976 CriLJ1548 . If the dying declaration is suspicious, it should not be acted upon without corroboration as held by the Supreme Court in *Rasheed Beg v. State of M.P.* : 1974 CriLJ361 . Dying declaration may be oral, but the Apex Court in several cases held that even if the dying declaration is given orally, it is better to record the same or reduce it in writing by the person who hears it. It is true that merely because dying declaration was made only to the police officer,

there is no infirmity, provided the version made by the police officer is true and creditworthy. But when it is made to a police officer, as far as possible, they should get it signed as held by the Supreme Court in *Remavati Devi v. State of Bihar* : 1983 CriLJ221 and *Balak Ram v. State of U.P* : 1974 CriLJ1486 . Even though there is no bar in relying on the dying declaration to police officer, they should record it and it should at least be attested by an independent witness if others were present. Here, the dying declaration was stated to be made to PW-1 and PW-2, police constables, in the presence of C.Ws. 3, 4 and 5, independent persons. They were not examined. Non-examination of independent witnesses on whose presence the injured made dying declaration to the police officer creates serious doubts in its authenticity. Statement was not recorded even after death. It was not got attested by C.Ws. 3, 4 and 5. The auto driver was not examined; in fact, no search was made to find out the auto driver who carried them to the hospital. There is no evidence regarding the state of mind, memory etc. of the deceased. In *Smt. v. Om Prakash and Ors.* : 2001 CriLJ3302 it was held as follows:

One of the important tests of the reliability of the dying declaration is a finding arrived at by the Court as to satisfaction that the deceased was in a fit state of mind and capable of making a statement at the point of time when the dying declaration purports to have been made and/or recorded. The statement may be brief or longish. It is not the length of the statement but the fit state of mind of the victim to narrate the facts of occurrence which has relevance. If the Court finds that the capacity of the maker of the statement to narrate the facts was impaired or the court entertains grave doubts whether the deceased was in a fit physical and mental state to make the statement the Court may in the absence of corroborative evidence lending assurance to the contents of the declaration refuse to act on it.

According to the prosecution, C.Ws. 3, 4 and 5, the persons who saw the injured lying on the road informed PWs 1 and 2 and PWs. 1 and 2 along with C.Ws.3, 4 and 5 took the injured at 10.30 P.M. and by 11 P.M., they reached the hospital. At that time, the injured was in very serious condition and that is why he was not admitted there. PW-3 doctor himself stated that his condition was very serious and hence he advised them to take the injured to Mangalapuram Hospital. The injured

died within half an hour. Whether in that condition deceased can give a dying declaration is a matter of guess. It is highly improbable. The names of all the four accused were alleged to have been stated by the victim to PWs 1 and 2. But to PW-3 doctor, only the names of A1 and another person Madhavan was told. Alleged cause of injuries as per Ext.P2 wound certificate is 'stabbed by one Hariharan and Madhavan today at about 10.30 p.m. near Chalingal (Ravaneswar Road)'. However, police was not able to find out that Madhavan, as deposed by the investigating officer. So the names given were different in the second dying declaration. Multiple dying declarations allegedly made were not tallying. It is also stated in Ext.P2 certificate that injured was 'critically ill'. It is also recorded that 'history narrated by the patient himself in front of the police'. The accused has got a suggestion that near the hospital, there was a Magistrate, but, in a case of emergency, it may not be possible to get the statement recorded by Magistrate. In this case, however, the oral dying declaration to PWs.1 and 2 is suspicious. Declaration given to the police constables is different from the version given to the doctor and the state of mind of the injured was also not proved to satisfaction. As held by the Apex Court in K. Ramachandra Reddy v. Public Prosecutor : 1976 CriLJ1548 , the court must scrutinize the dying declaration and must ensure that the deceased had opportunity to observe and identify the assailants and was in a fit state of mind to make the disclosure. The trial court disbelieved the version said to have been given to PWs 1 and 2. We see no ground to interfere with the finding as such a view is probable.

5. The second circumstance mentioned is the recovery of M.O-1 at the instance of the 1st accused and M.O.2 at the instance of the 2nd accused. Witnesses to the seizure mahazars were not examined. Further, in the disclosure statement, authorship of concealment of the weapon was not stated by accused 1 and 2. They did not state that they had hidden the weapons at the place from which the alleged recovery was made. Apex Court in Pahalva Motya Valvi v. State of Maharashtra : 1979 CriLJ1310 observed as follows:. The recovery of a bloodstained spear becomes incriminating not because of its recovery at the instance of the accused but the element of criminality tending to connect the accused with the crime lies in the authorship of concealment, namely, that the appellant who gave information leading to its discovery was the person who

concealed it.:

Therefore, the trial court rightly held that on the basis of recovery alone, conviction could not be based. With regard to the last seen theory PW5, a relative of the deceased, deposed that he had seen the 3rd accused with the deceased on the previous day noon. Unless the accused and deceased are seen at a time very proximate to the death, he cannot be convicted on the basis of last seen theory. As held by the Apex Court in *Lakhanpal v. State of M.P.* AIR 1979 SC 1620, merely because accused and the deceased were seen together on the date of incident, we cannot jump into the conclusion that the accused must have murdered him. PW-5, son of the uncle of the deceased, deposed that on the previous day noon, he saw the deceased and A3 going to a Bar and he, the deceased and A3 got into an auto and A3 and deceased got down at a place called Cherkalam. There were many people in the bar and there was ample time-gap between the incident and the time when PW5 is stated to have seen A3 with the deceased. In this case, motive also is not proved. Ordinarily, there must be object and motive for every criminal act. Motive is something which prompts a man to do an act. If there is direct evidence regarding the assault which is worthy of credence it can be believed and absence of evidence regarding motive is not material. (See: *Balu Lodhi and Ors. v. State of U.P.* - : 1987 CriLJ1119). Proof of mere existence of motive is also not enough for conviction. But, where there is no direct evidence and prosecution relies on circumstantial evidence, proof of motive plays an important role. Without any motive, would the accused kill the deceased? If all other circumstantial evidence points to the guilt of the accused conclusively, absence of evidence regarding motive may be ignored. Prosecution need prove only some mental element as it is usually impossible to prove motive with mathematical precision. It was held by the Apex Court in *State of HP v. Jeet Singh* : 1999 CriLJ2025 as follows:

33. No doubt, it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no criminal offence would have been committed if the prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the

manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution. It is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended.

The only suggestion made by the investigating officer is that there were some matrimonial disputes between the deceased and his wife and A1 was a mediator and that may be the motive for the accused to kill the deceased. That is only a suggestion made by the investigating officer. There is no evidence to show that there was any matrimonial dispute between the wife of the deceased and the deceased and A1 was the mediator. No effort was made by the prosecutor to prove the motive. As held by the apex court in Ramgopal v. State of Maharashtra : 1972 CriLJ473 if in a criminal case, if prosecution puts forward motive as a circumstance, it must be fully established like any other incriminating circumstances. Here the motive is not proved. None of the circumstances relied on by the prosecution were proved. Absence of motive is one of the circumstances leading to conclusion of innocence of the accused.

In the above circumstances, there is no grounds to interfere in the acquittal passed by the Sessions Judge. The findings are not perverse or unreasonable. In any event it cannot be stated that the view taken by the trial Judge is not reasonably possible. Therefore, the appeal filed by the State is dismissed.

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