

State of Kerala Vs. Kuttappan

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Court : Kerala

Decided On : Nov-30-2004

Reported in : 2005(2)KLT664

Judge : J.B. Koshy and; K.P. Balachandran, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 27, 201, 302 and 404

Appeal No. : Crl. Appl. No. 765 of 2002

Appellant : State of Kerala

Respondent : Kuttappan

Advocate for Def. : Grashious Kuriakose, Adv.

Advocate for Pet/Ap. : T.K. Kunjabdulla, Public Prosecutor

Disposition : Appeal dismissed

Judgement :

J.B. Koshy, J.

1. This is an appeal filed by the State against acquittal of the accused in S.C.No.78 of 1999 on the file of the Additional Sessions Judge, Kottayam. The prosecution case as narrated in the appeal memorandum is as follows:

'A dead body of a young man, with injuries over his neck and head, was seen lying in the dry bed, embedded with loose rocks, close to the northern bank of Manimala river, while water was scarce during summer, in the early morning of 20.4.1992. Close-up property owner, one Devassia (C.W.1), reported the matter before the Sub Inspector of Police, Manimala Station, who recorded his statement and registered the crime under P-9(a) F.I.R. for the offence punishable under Section 302 of I.P.C. P.W.12, then, Circle Inspector of Police, Manimala took over the investigation of the crime. He proceeded to the scene of crime, conducted an inquest over the dead body, and arranged its lecroscopy through Dr. S. Gopalakrishna Filial (P.W.9), then Assistant Professor of Forensic Medicine and Deputy Police Surgeon in Medical College, Kottayam. P. W. 12 recovered from the scene of crime various articles found on the body of the victim and also close by, which are identified as M.O.1 to M.O.18, among them M.O.18 a side bar of wrist watch. Forensic dispensation of the dead body by the above doctor confirmed the death of the victim as homicide. Investigation by P.W. 12 revealed that in the previous evening the accused was seen roaming with the deceased at various places close to the scene of crime and that he was cohabitating with Gopalan (the deceased) under a common roof where the latter lived with his second wife (P.W.2). The accused was arrested and his custodial interrogation led to recovery of the weapon of offence, a stone (M.O.21) from close to the scene of crime and also a kaily and collar of a shirt, with its label found nearby, as concealed under the base of a plantain in the nearby property of C.W. 1, beside the river. Pursuant to another disclosure statement given by the accused, while he was in custody, a chisel, another weapon, used for inflicting injury on the deceased, and also his wrist watch were recovered from an old wooden box kept beside the foot path, in which various articles for cobblery were stored. The chisel so recovered is M.O.22 and the watch and the straps are M.O.6 series, and they were seized into custody under P-13 mahazar. P-14 report was filed before the Court informing that the investigation continued by implicating the accused as the offender in the crime.'

The investigation started by P.W.12 was completed by P.W.13 and the accused was charge-sheeted for the offences under Sections 201, 404 and 302 of the Indian Penal Code. He was acquitted by the Sessions Court as prosecution did not prove the case beyond reasonable doubt. It is well-settled law that, when an

appeal is filed against an acquittal, only for compelling and substantial reasons the Appellate Court can interfere. Case law in this regard is summarised by the Apex Court at paragraph 17 of the decision in *State of Madhya Pradesh v. Sanjay Rai*, 2004 (2) KLT SN 31 = 2004 (2) Supreme 744.

2. There is no eye-witness to the incident and prosecution relied on circumstantial evidence. To convict an accused on the basis of circumstantial evidence, the chain of circumstances must be so complete without any missing link or reasonable doubt. *Prem Thakur v. State of Punjab*, AIR 1983 SC 61. Motive is the first circumstance relied on by the prosecution. When there is no direct evidence and case is based on circumstantial evidence, the motive for committing crime on part of the accused assumes greater importance as held by the Apex Court in *Tarseem Kumar v. The Delhi Administration*, 1995 CrL.J. 470 (SC). P.W.2 was living with the deceased as his wife even though there was no legal marriage. According to the prosecution, when the deceased was earlier arrested in connection with an N.D.P.S. case, P.W.2 got the help of the accused in releasing him and thereafter the accused was also living with them. Accused asked the deceased to return the amount spent for releasing him from the custody and that is the motive. P.W.2 denied all these allegations. P.W.2 also stated that the accused was not living with them and she alone was living with the deceased. No other evidence was adduced to prove motive. In the above circumstances, the learned Sessions Judge correctly found that motive is not proved. We agree with the above finding.

3. The second circumstance relied on by the prosecution is that the accused and the deceased were last seen together. According to prosecution, after taking tea from the tea shop of P.W.3, they went to the nearby cinema theatre. P.W.3 and P.W.5 (theatre employee) were examined to confirm the same. In the tea shop as well as theatre several persons used to come for taking tea and for seeing cinema. Even though P.Ws.3 and 5 have no previous acquaintance with the accused, perhaps on the next day they might have identified the deceased. But, according to the learned Sessions Judge, the fact that they identified the accused when shown by the police is difficult to accept as identification parade was not conducted. Description of the person was also not stated by those persons before the accused was shown to them. Not only that, P.W.3 stated that the accused was

shown by the police after 2-3 days of the incident. But, accused was arrested only after one week of the incident. P.W.6 another tea shop owner deposed that after coming from the theatre, the accused and the deceased took from his shop. P.W.6 has also no previous acquaintance with the accused and the deceased. P.W.5 stated that the accused was shown to him on the next day of the incident. P.W.5 stated as follows:

During cross-examination he stated as follows:

Therefore, rightly there were doubts in the depositions of P.Ws.3, 5 and 6 or recording of the arrest by the police is not correct. Accused was with the police and the police shown the accused to these witnesses earlier and therefore much reliance cannot be placed on these witnesses. It was held by the Apex Court that when accused is shown to witness or victim before trial, his identification in Court is valueless *Mohanlal v. State of Maharashtra*, AIR 1982 SC 839. In Phipson on evidence (15th edition at page 300) it is written that 'Experience has shown that even honest and convincing witness can makes mistakes in identification'. Since P,Ws.3, 5 and 6 have seen the accused only on the date of alleged incident and not before, test identification parade ought to have been conducted before showing the accused by the police to the witnesses. Even though test identification parade is not necessary in all cases and identification can be made by other methods, identification by witnesses who had seen the accused only on the date of incident without any special circumstance to remember him, that too after seven years of the incident is unacceptable in the absence of a test identification parade, See *State (Delhi Admn.) v. V.C. Shukla*, AIR 1982 SC 1382. Therefore, evidence that P. Ws.5 and 6 saw a person identified as the accused along with the deceased on the date of occurrence cannot be accepted as such. As held by the learned Sessions Judge, lack of identification parade to the witnesses who had no earlier acquaintance with the accused, makes the identification doubtful. On such a doubtful identification, a person can be convicted on the ground of last seen theory alone. Even otherwise, last seen theory can be used only as one of the circumstances, if there are other circumstances supporting the prosecution case. In *Lakhanpal v. State of M.P.*, AIR 1979 SC 1620, it was held by the Supreme Court that the mere fact that the accused and the deceased were seen together on

the date of the incident cannot lead to irresistible inference that the accused must have murdered the deceased. P.W.7 was a private bus conductor. He also deposed that the accused travelled in the bus from Manimala early morning on the next day of the incident. But, he also did not say anything about the identification marks of the accused. Lot of passengers are travelling and he stated that he was not able to identify all the persons who travelled. When the accused was shown to P.W.7 is also not stated in the deposition. There is no circumstance to connect the accused with the crime on the evidence of P.W.7.

4. The last circumstance relied on by the prosecution is the Section 27 recovery. When P.W.2 was examined, during cross-examination she stated that a blue kaily was taken from her house along with a knife. The blue kaily (M.O.1) was shown to her and she identified the same as the one taken from her house. It is true that, according to the Investigating Officer, on the basis of the confession a kaily was recovered from the courtyard of Devasia near the place of incident and recovery was also attested by P.W.8 Panchayat Member. We are unable to accept the same as P.W.2 deposed that M.O.1 was recovered from her house by the police and that part of the evidence is unchallenged. M.O.1 and M.O.8 were recovered under the same mahazar. Veracity of the recovery is doubtful as M.O. 1 was recovered early by the police from the house of P.W.2. M.O.9 label and M.O.21 stone were taken from the open place. No mahazar witnesses were examined for the recovery of M.O.22 chisel (cobbler's knife), M.O.6 watch and strap. It is stated that they were recovered on the confession of the accused from a wooden box kept beside a footpath near Thirunakkara. There is no evidence to show that who owns the box. The mahazar witnesses were not examined. In the alleged confession statement proved by the Investigating Officer authorship of the concealment is not mentioned. With regard to recovery of M.O.21, it was stated by the accused to the Investigating Officer as follows:

With regard to M.O.6 (series) watch and strap and M.O.22 chisel it is stated as follows:

Who kept M.O.6, M.O.21 and M.O.22 at the places from where they were recovered were not mentioned in the alleged confession statements proved by the

Investigating Officer. He also stated that the chisel and watch were kept in an old box kept by the side of a tarred road to the Thirunakkara temple near the railings. Who owns this box was not investigated at all. Apart from these evidences, there is no other evidence to connect the accused with the incident. There is no dispute to the proposition that it is a clear case of homicide that the deceased was killed in a very brutal manner and medical evidence will support the same. But, that will not connect the accused with the crime. In any event, prosecution failed to prove the case against the accused beyond reasonable doubt. It cannot be stated that the view of the Sessions Judge in acquitting the accused is perverse. Acquittal of the accused requires no interference in the appeal.

The appeal is dismissed.

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