

Devaki Vs. State of Kerala

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Court : Kerala

Decided On : Jun-21-1999

Reported in : 2000CriLJ477

Judge : K. Narayana Kurup and; T.M. Hassan Pillai, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302, 307 and 309; Code of Criminal Procedure (CrPC) - Sections 161

Appeal No. : Criminal Appeal No. 1007 of 1998

Appellant : Devaki

Respondent : State of Kerala

Advocate for Def. : Gracious Kuriakose, Public Prosecutor

Advocate for Pet/Ap. : T.P.M. Ibrahim Khan, Adv.

Disposition : Appeal dismissed

Judgement :

K. Narayana Kurup, J.

1. The accused in S. C. No. 53/97 on the file of the Addl. Sessions Judge, Pathanamthitta is the appellant. The appeal is directed against the judgment of the Sessions Court convicting the appellant for offences under Sections 302, 307 and

309, I.P.C. and sentencing her to undergo imprisonment for life. The prosecution case in brief is as follows :

2. The accused was married to one Harikumar (deceased). One Akhil and PW2 are born in that wedlock. After the death of Harikumar, the husband of the appellant, the appellant has been moving freely with PW. 9, one Omanakuttan who runs a provision shop near her house. According to prosecution, PW9 used to visit the house of the accused which gave rise to a gossip about the illicit relationship between the accused and P.W. 9. There were quarrels between the accused and the wife and mother of P.W. 9 about the alleged illicit relationship. This illicit relationship was also disliked by the members of the family of the accused. As a matter of fact, on the date previous to the date of occurrence there was a squabble between the accused and the mother and wife of P.W. 9 as a result of which the accused became dejected and depressed. On 30-10-1996 P.W. 2 Akhila went to school without lunch packet. In the evening of the same day on return from the school she was playing with her brother the deceased Akhil in the courtyard of their house. At that time the accused called her children viz. P.W. 2 and deceased Akhil inside the house. Thereupon, according to the prosecution, the accused supplied coffee to her children mixed with poison named Furadan, a highly toxic insecticide. P.W. 2 consumed only a small quantity since she felt the taste of coffee highly bitter. But her brother Akhil, the deceased consumed the entire coffee. The accused also consumed the very same coffee. PW 2 had signs of vomiting tendency. PW 3 resides in a portion of the same building as a rentee. When she was praying in her room, PW2 knocked the door calling her for help. She opened the door, found PW2 in a frantic and fainting mood. On being enquired, PW3 was told by PW2 that the accused gave coffee mixed with something, that the accused and the deceased Akhil consumed the same coffee and that by this time the deceased and her mother might have died. PW3 rushed to the house of the accused and saw the accused lying on a cot embracing the deceased Akhil. She made an out cry. Thereupon her father PW 4 and others in the neighbourhood reached the house of the accused. The deceased Akhil, the accused and PW2 were taken to the Medical Mission Hospital, Pandalam in an autorickshaw. On the way, the deceased Akhil breathed his last. However, the accused and PW2 who were admitted in that hospital survived. PW1, the uncle of

the accused gave F. I. Statement based on which Crime No. 317/96 of Pandalam Police Station was registered under Sections 302, 307 and 309, I.P.C. Ext. PI(a) is the F.I.R. PW14 the Circle Inspector of Police, Pandalam laid the charge after conducting investigation. The prosecution examined PWs. 1 to 14 and marked Exts. P1 to P11 and identified MOs. 1 to 4. The learned Sessions Judge on a scrutiny of the evidence brought on record found the accused guilty of the offences punishable under Section 302, IPC and sentenced her to undergo imprisonment for life and to pay a nominal fine of Rs. 100/- in default to suffer S.I. for one day, to undergo R. I. for a period of 2 years for the offence under Section 307, IPC and to suffer S. I. for one month for the offence under Section 309, IPC. All these sentences were directed to run concurrently and the period of detention already undergone was ordered to be set off. The appeal is directed against the aforesaid conviction and sentence as already noted.

3. We heard learned counsel for the appellant/accused and the learned Public Prosecutor at length. On a careful re-appreciation of the evidence adduced in the case, we are of the opinion that the prosecution has succeeded in proving the guilt of the accused beyond reasonable doubt by adducing cogent evidence in proof of the charges. The prosecution mainly rested its case on the ocular testimony of PW2 and the evidence of PW3 in addition to medical evidence of PWs. 5 and 6 and the chemical analysis report evidenced by Exts. P5 and P6 proved by P.W. 14. P.W.2 who was 7 years old at the time of incident and 9 years when she was examined swears that at dusk on the fateful day she was playing in the courtyard along with her deceased brother, Akhil. When she was so playing the accused called them into the house. When they went inside the house their mother gave them coffee after adding something into it and telling them it was a medicine for cough. She adds that her brother, deceased Akhil consumed the entire coffee whereas she took only a small quantity as she felt the coffee highly bitter. The mother also consumed the coffee. Since she felt vomiting, she went to the courtyard and vomitted. Thereupon, she knocked at the door of the room which is occupied by P.W. 3 and told her as to what happened. Hearing the hue and cry the neighbours came to the house of the accused and the accused, P.W.2 and the deceased Akhil were taken to the hospital. On arrival, Akhil was found dead. The eye witness account of P.W. 2 gets further corroboration from the res gestae

evidence of P.W. 3 who is the occupant of an adjoining room in the very same building where the accused is residing. According to P.W. 3, P.W. 2 knocked at the door of the room where P.W. 3 was saying prayers. PW 3 opened the door and found PW2 in a fainting mood. On being enquired PW3 was told by PW2 that her mother gave her coffee mixed with something. The eye witnesses account of PW. 2 and the res gestae evidence of P.W. 3 is further fortified by the oral testimony of PWs. 5 and 6. PW5 is the doctor who examined PW2 and the accused and issued Exts. P2 and P3 certificates. According to PW5, PW2 and the accused went to the hospital complaining consumption of Furadan. PW6 is the Police Surgeon of the General Hospital, Pathanamthitta who conducted autopsy on the body of the deceased and issued Ext. P4 postmortem certificate. Opinion as to the cause of death discernible from Ext. P4 postmortem certificate is that 'the findings are consistent with death due to Organo Phosphate poisoning'. Ext. P6 is the F.S.L. report. On the basis of Ext. P6 report PW6 gave Ext. P7 final report stating that the cause of death of the deceased Akhil was that he died due to 'Furadan' poisoning. As per Ext. P6 report, Carbofuran, a toxic carbamate compound was detected in the MOs and Carbofuran is the active toxic ingredient of the insecticide sold under the trade name 'Furadan'. The prosecution case is further strengthened by the recovery of MO1 steel vessel as per Ext. P10 scene mahazar the contents of which, on examination was found to contain 'Carbofuran' vide Ext. P5. Thus, on a careful analysis of the evidence brought on record, we are of the opinion that the deceased died as a result of consumption of carbofuran. We are also satisfied that P.W. 2 and the accused herself also consumed coffee containing 'Carbofuran'.

4. The question now to be considered is whether the consumption of Carbofuran by the deceased, P.W. 2 and the accused is accidental, suicidal or homicidal. On the evidence placed before us, we have no doubt in our minds that the toxic substance in question was administered to the deceased Akhil and also to P.W. 2 by their mother who is the accused in this case. It is not in dispute that the coffee contained Carbofuran as disclosed by medical evidence and F.S.L. Report. The point strongly canvassed before us by learned counsel for the accused was that it was not the accused who procured and added 'Carbofuran' in the coffee. The case set up is that in the short interval when the accused went to the shop of P.W. 9 to

purchase sugar and coffee powder, somebody else, probably the wife and mother of P.W. 9 might have sneaked into the house of the accused through the backdoor and mixed the kettle containing boiled water with Carbofuran in order to do away with the accused and her children on account of the illicit intimacy between the accused and P.W.9. We are afraid we are unable to accede to this contention. According to us, the contention is too far-fetched to receive acceptance by this Court. Had it been the case that the wife and mother of P.W. 9 were residing very close to the house in which the incident took place, we would have been inclined to accept this version given by the accused. Apart from the fact that a piece of land belonging to P.W. 9 is located in close proximity to the house of the accused, there is no material to suggest that either P.W.9 or his wife or mother is staying anywhere near the house of the accused. That being the position, we find it highly unrealistic to believe that within a short span of few minutes when the accused went out to purchase sugar and coffee powder from the nearby shop of P.W.9, they would have succeeded in gaining entry into the house of the accused and mixing the kettle containing water with Furadan without anybody noticing it. That apart, the eye witness account furnished by P.W. 2 to the effect that she saw the accused adding something to the coffee cuts at the root of the defence version. The conduct of the accused in giving coffee to their children after telling them that it is a medicine for cough is a strong indicia pointing the needle of suspicion and guilt towards her. There is no explanation as to why she offered coffee to the children as if it were a medicine for cough. It was further submitted by the defence that in a case of causing death by administering poison, the prosecution has necessarily to establish the circumstances that the accused had a strong motive, that she had procured the poison in question and had the opportunity to administer the same to the deceased and the victim died of the particular poison. We are quite aware of the well settled legal proposition that if there is failure on the part of the prosecution to establish any one of these essential elements, no irresistible inference of guilt can be drawn and a conviction sustained against the accused. But, then, it has to be remembered that the ingredients narrated above are attracted only where there is no direct evidence and the entire case rests on circumstantial evidence. In other words in a case of death caused by poisoning where prosecution case rests on ocular testimony of a witness who in our opinion

is a witness of truth the prosecution will be relieved of its burden to prove that the accused had a strong motive, that she had procured the poison in question and had the opportunity to administer the same to the deceased and that the victim died of the particular poison. Here, the position is quite different. There is an eye witness to the entire incident, viz. P.W. 2. No doubt, P.W.2 is a child witness and for that reason we have carefully scrutinised her evidence with more caution. P.W. 2 is none other than the daughter of the accused and being the daughter of the accused, she will be the last person to implicate her own mother by giving false evidence. The prosecution case is not liable to be thrown out merely for the reason that the ingredients applicable in a case of circumstantial evidence are not fully established and that it relies upon the evidence of P.W.2 who is a child witness. Even if the rules of circumstantial evidence are applied in the instant case we are of the opinion that the prosecution has succeeded in proving the various ingredients/conditions necessary to sustain a conviction. Necessary motive on the part of the accused to do away with her children and to commit suicide is well established by her abject poverty and illicit connection with P.W. 9 which rocked the locality. The fact that the accused had the opportunity to administer poison is self evident and lends further credence from the version spoken to by P.W. 2 in that she has categorically deposed that the accused gave them coffee mixed with something. The fact that the deceased died due to consumption of the particular poison is proved by medical evidence and F.S.L. Report. In the aforesaid view, the prosecution case is not liable to be thrown overboard solely for the reason that it has not succeeded in proving the source from which the accused obtained possession of the poison. As regards P.W. 2 from a perusal of the evidence we find that as already noted, P.W. 2 was 9 years at the time of rendering evidence. She was studying in the 5th standard at that time. The learned Sessions Judge has put some questions to P.W. 2 to ascertain her competency to give evidence. The learned Sessions Judge having been satisfied about the competency of P.W. 2 to give intelligent answers to the incident she has witnessed, was perfectly right in treating her as a competent witness and accepting her testimony and the argument to the contra is accordingly rejected. Even though P.W. 2 was subjected to cross-examination at length, nothing has been brought out to discredit the substratum of the prosecution case. The defence would contend that P.W. 2 would

say that she has not seen anything being added to the coffee by the accused. Having bestowed our anxious consideration on the point, we find no merit in the same as immediately after the incident she rushed to P.W. 3 and told her that her mother gave her coffee with something added to it and the accused also consumed it. The aforesaid piece of res gestae evidence is complete answer to the contention of the defence in this regard. P.W. 2 herself has deposed in the box that the accused gave coffee with something added to it.

5. It was then contended by the defence that the prosecution having cited P.W. 11 as the person who is alleged to have sold the poison to the accused, has abandoned the witness which will make the entire prosecution case unbelievable. In our considered opinion P.W. 11 having been given up the prosecution should have confronted him with his statements under Section 161, Cr. P.C. and thereafter got him declared hostile and, cross-examined. Admittedly, this has not been done. This may be a lapse on the part of the prosecution not going to the root of the prosecution case. In conclusion, we would say that in a case where the prosecution case is supported by direct eye witness evidence, the rules applicable to a case where death is caused by administering poison and where the fate of the case rests entirely on circumstantial evidence are not applicable. So much so, even if the prosecution fails to establish the mode by which the accused procured the poison in question --the other ingredients having been fully proved -- it will not have the effect of nullifying the entire prosecution story. The necessary motive has been brought on record. It has come out in evidence that the accused was living in utter poverty and was in the midst of a scandal that broke out about the illicit relationship between her and P.W.9. We are therefore satisfied that sufficient motive has been established by the prosecution for the commission of the offence. It is also proved that the accused had the opportunity to administer the poison and she did in fact administer it as spoken to by P.W. 2 and corroborated by res gestae evidence of P.W. 3. There is no explanation as to why the accused supplied coffee misleading the children as a cough medicine which is highly incriminatory. Thus, on the whole we are satisfied that the prosecution has succeeded in proving the guilt of the accused beyond reasonable doubt and the learned Sessions Judge was right in entering order of conviction and imposing the sentence. There is no question of accidental death as regards the deceased. It is a clear case of murder.

As regards P.W. 2 it is a case of attempt to commit murder. As regards the accused it is a case of attempt to commit suicide.

6. Learned counsel for the defence cited the following decision to buttress his contentions : (1) AIR 1984 SC 1622 : 1984 Cri LJ 1738 (Sharad Birdhichand Sarda v. State of Maharashtra); (2) 1996 Cri LJ 771 (Kant) (M. V. Mahesh v. State of Karnataka); (3) 1992 Cri LJ 606 : AIR 1992 SC 669 (Swinder Singh v. State of Punjab); (4) 1992 Cri LJ 2192 (P&H) (State of Punjab v. Narinder Kumar); (5) 1996 Cri LJ 506 (All) (Maharaj Deen v. The State); (6) 1996 Cri LJ 256 (Bom) (State of Goa v. Pedro Lopes) and (7) 1991 Cri LJ 2976 (All) (Ramesh v. State of U. P.). The observations made by the Supreme Court in Sharad's case was in the context of circumstantial evidence and hence it may not be of any assistance to the defence in this case where there is an eye-witness to the incident supported by res gestae evidence. Mahesh v. State of Karnataka 1996 Cri LJ 771 (Kant) is a case which rests entirely on circumstantial evidence and there was no eye-witness to connect any of the accused/appellants with the offence alleged against them and in that view the observations made by the Court therein is of no assistance to the defence in the present case where the incident is witnessed by an eye-witness. In Swinder Singh v. State of Punjab 1992 Cri LJ 606 : AIR 1992 SC 669 the entire edifice of the prosecution case rested only on circumstantial pieces of evidence. That was a case where there was no evidence to indicate that the accused administered the poison and in that view the Court held that the accused could not be convicted on the basis of grave suspicion against him. The facts of the present case are clearly distinguishable. In State of Punjab v. Narinder Kumar 1992 Cri LJ 2192 (P&H;) the Court observed that the conduct of the solitary child witness at the time of occurrence was inconsistent with natural human conduct. The Court also found that the deceased in her dying declaration had not implicated the accused in the case. In that view the Court held that it seems quite probable that the witness because of her tender age had been tutored or prevailed upon to depose against the accused who is not her father. The factual situation here is entirely different. In Maharaj Deen v. The State 1996 Cri LJ 506 (All) there is no eye-witness account of the incident and the prosecution has merely relied upon circumstantial evidence and therefore the aforesaid decision will not be of any assistance in furthering the defence case. State of Goa v. Pedro Lopes 1996 Cri

LJ 256 (Bom) relates to a case of criminal trespass and dispute regarding possession of property pending in civil suits. We do not know how the observations contained therein can help the defence in the present case. In *Ramesh v. State of U.P.* 1991 Cri LJ 2976 (All) the Court observed that the prosecution has failed to establish the origin of incident as alleged. According to the Court, the origin of incident appears to be shrouded by mystery in view of the unexplained number of injuries on the accused/appellant. It was in that context that the Court came to the conclusion that the evidence on record is not sufficient to bring home the guilt of the appellants therein beyond reasonable doubt. The factual matrixes of the present case are clearly distinguishable. None of the decisions cited by learned counsel for the defence is of any assistance in advancing his case before this Court. The principles laid down in those decisions are confined to the facts of those cases. Accordingly, we have no hesitation in repelling the contentions based on the aforesaid decisions.

In the result, we confirm the conviction and sentence passed against the accused/appellant by the Sessions Judge for the offences punishable under Sections 302, 307 and 309, IPC and dismiss this Cri. Appeal.

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