

Salim Vs. State of Kerala

Salim Vs. State of Kerala

SooperKanoon Citation : sooperkanoon.com/947756

Court : Kerala

Decided On : Feb-06-2012

Judge : R. Basant & K. Vinod Chandran

Appeal No. : CRA.No. 1278 of 2007- D

Appellant : Salim

Respondent : State of Kerala

Judgement :

R. BASANT, J.

(i) Have the circumstances relied by the prosecution against the appellant/accused been proved satisfactorily?

(ii) Do the proved circumstances lead to a safe inference of guilt against the appellant?

(iii) Is the appellant entitled to the benefit of any reasonable doubt?

(iv) Does the impugned judgment warrant any interference?

These questions have been raised before us for our consideration in this appeal by the learned senior counsel Advocate Gracious Kuriakose.

2. The appellant has been found guilty, convicted and sentenced under Section 376 (2)(f) and Section 302 of the Indian Penal Code. Separate sentences of imprisonment for life have been imposed under each of those two sections. The appellant also has been sentenced to pay fine of Rs.10,000/- each for the said offences. Default sentences have also been imposed.

3. According to the prosecution, on 26.05.2005, the appellant had enticed the victim, a child aged about 11 = years, to a forest area and had committed rape and murder of the said child at some time between 9.30 a.m and 2.20 p.m.

4. Investigation commenced with registration of Ext.P1 (a) F.I.R on the basis of Ext.P1 F.I statement lodged by PW1, the father of the child. Investigation was completed and final report/charge sheet was filed by PW22. The learned Magistrate committed the case to the court of session after observing all legal formalities. The learned Sessions Judge took cognizance of the offences alleged. Charges framed against the appellant were denied by the appellant. Thereupon the prosecution examined PWs 1 to 22 and proved Exts.P1 to P21. MOs.1 to 10 were also marked.

5. The appellant/accused took up a defence of total denial. He did not examine any defence witnesses. Exts.D1 to D3 case diary contradictions were marked when PW3, PW11 and PW12 were examined.

6. The learned Sessions Judge on an anxious consideration of all the relevant inputs came to the conclusion that the appellant has committed the offences punishable under Section 376(2)(f) and Section 302 I.P.C. He was acquitted of the charges under Section 376A I.P.C and 3(1)(xi) and 3(2)(v) of the S.C/S.T Prevention of Atrocities Act. The said acquittal has now become final without challenge.

7. We have heard the learned counsel for the appellant and the learned Public Prosecutor. The learned counsel for the appellant contends that the circumstances have not been proved satisfactorily by the prosecution. The proved circumstances do not lead to a safe conclusion of guilt. At any rate, the appellant is entitled to the benefit of doubt, it is urged. The learned Public Prosecutor on the contrary asserts

that the circumstances have been well established and the circumstances lead to a safe conclusion of guilt against the appellant.

8. We have considered all the relevant inputs. An appellate judgment is; is intended to be read and must be reckoned as one rendered in continuation of the judgment of the trial court. In that view of the matter, we do not deem it necessary to re-narrate the oral and documentary evidence placed before the learned Sessions Judge by the parties. Suffice it to say that we have been taken in detail through the oral evidence of PWs 1 to 22. The contents of Exts.P1 to P21 and Exts.D1 to D3 have been read to us in detail. We have also been taken through the charges framed against the appellant by the learned Sessions Judge and the answers given by the appellant in the course of his examination under Section 313 Cr.P.C.

9. The case against the appellant rests entirely on circumstantial evidence. The prosecution has not been able to place any direct ocular testimony about the crime allegedly committed by the appellant.

10. We shall first of all have a look at the law relating to the burden of proof in a case where the prosecution rests entirely on circumstantial evidence. It is trite that the circumstances must be proved satisfactorily and beyond doubt by the prosecution. The circumstances established must constitute strong links in a chain of circumstances. The chain of circumstances must together constitute a strong chain pointing clinchingly and unerringly to the guilt of the indictee - to the exclusion of every reasonable hypothesis of innocence of the indictee. It is not the number of circumstances that matter. What is crucial is the safe inferences flowing from the circumstances proved. We remind ourselves of the oft repeated adage that the strength of the chain of circumstances is the strength of the weakest link in the chain of circumstances.

11. It is unnecessary to advert to precedents in support of the above proposition of law. We have chosen only to remind ourselves of the relevant law.

12. We shall now try to narrate the circumstances relied on by the prosecution. We shall then proceed to consider whether the circumstances have been established

satisfactorily. Subsequently we shall consider whether the chain of circumstances does unerringly and clinchingly point to the guilt of the appellant.

13. The prosecution in this case relies on the following circumstances in support of its case.

1) The victim child was raped and murdered and her dead body was abandoned at the place where it was found.

2) The appellant and the deceased were seen together by several persons on the route - from the house of the appellant to the place where the dead body of the child was ultimately found on that morning, prior to the occurrence.

3) The hurried retreat from the scene of occurrence by the appellant.

4) Presence of blood stains on the clothes worn by the appellant when he was seen last in the company of the deceased;

5) The fact that the accused absconded and was not available in the locality for a period of about two weeks until he was arrested by the Investigating Officer;

6) Accused had injuries on his person when he was arrested and such injuries do tally with the case of the prosecution;

7) The extra judicial confession made by the appellant to PW16 doctor who examined him after his arrest;

8) The fact that the accused/appellant did not offer any explanation for the proved circumstances.

14. We shall now proceed to consider whether these circumstances have been proved.

15. Circumstance No.1

That the deceased was a child aged about 11 = years is proved convincingly. The incident had taken place on 26.05.2005 and as per the birth certificate Ext.P7 of the child, the child was born on 04.11.1993. This clearly establishes that the child

was less than 12 years of age on the date of her death.

16. We have the evidence of PW15 doctor and Ext.P9 postmortem certificate issued by her to throw light on the cause of death. The evidence clearly shows that the child died because of smothering and strangulation. The evidence of PW15 and Ext.P12 result of viscera examination unmistakably suggest that there was an attempt to administer ethyl alcohol to the child before its death. Ethyl alcohol to the extent of 115 mg per 100 ml was found available in the blood of the deceased child. Injuries described in Ext.P9, according to PW15, indicate the fact that there was an attempt to forcibly administer some liquid through the mouth of the deceased. Ext.P9 bears tell tale evidence of rape committed on the deceased. Ext.P13 report of the chemical examiner proved by PW17 shows that the vaginal smear and swab showed the presence of semen and spermatozoa on the body of the deceased. Virtually there is no dispute raised against these circumstances. We are, in these circumstances, of the opinion that the conclusion is safe, sound and beyond reasonable doubt that the deceased was raped and murdered. We are further satisfied that alcohol was forcibly administered to the child before the death of the child. This first circumstance is virtually not disputed. It is established beyond doubt. The challenge before the adjudicator in this case is only to ascertain the person responsible for such misdeeds. We hold that circumstance No.1 has been adequately established.

17. Circumstance No.2

The case of the prosecution is that the child was living with PW1, his wife and their younger daughter born in the wedlock. PW1 and his wife usually go for their work. They are both employed persons. The children - deceased aged 11 = and the younger child, are usually available at their residence. It is the case of the prosecution that PWs 2 and 12 had seen the appellant taking the child away from their house. PWs 3, 4, 5 and 6 had seen the child accompanying the deceased from the house of PW1 to a place near the place where the dead body was found eventually. The prosecution relies on Ext.P1 F.I statement in support of this theory that the deceased had left the house in the company of the appellant and was with him for some length of time after she left the house.

18. We shall come to the evidence of PWs 2 and 12 a little later. The evidence of PWs 3, 4, 5 and 6, according to us, is of crucial relevance. In this context it will be appropriate to refer to Ext.P8 route mahazar. That shows the track from the house of PW1 to the place where the dead body of the child was eventually found lying in the forest. PWs 3, 4, 5 and 6 are persons who have their houses/shops near the route leading from the house of PW1 to the place where the body of the deceased was found. All of them had stated that on that morning they had seen the appellant and the deceased child going together. The deceased child is said to have stated to PW3 that she was going with uncle (accused) to purchase sweets. PW5 is the shopkeeper who had sold sweets to the appellant on that morning. He had seen the appellant handing over one sweet bar to the appellant. PW6 another minor child had seen the appellant and the deceased proceeding towards the forest, inside which the dead body of the child was later found. She knew the appellant and had acquaintance with the deceased child. According to PW5 he had sold sweets/toffees to the appellant, of which the appellant had given same to the deceased child. Postmortem certificate Ext.P9 shows that recently consumed remnants of the said sweet/toffee was available in the stomach of the deceased. Though the evidence of PWs 3, 4, 5 and 6 is sought to be assailed, no specific reason is shown to explain why they are speaking falsehood against the appellant. An omnibus suggestion is seen thrown at witnesses that they are trying to shield/cover the real culprit. But no inkling about the real culprit is afforded for the consumption of the court. There is another suggestion thrown at witnesses that this being a very sensational case in the locality, they are competing with each other for a role in the action against the crime committed. These are the only suggestions traded at witnesses. The learned Sessions Judge had considered the evidence of PWs 3, 4, 5 and 6. The learned Judge felt that it was absolutely safe to place reliance on their testimony. Notwithstanding the innocuous inaccuracies in the narration at different points of time, we find absolutely no reason to disagree with the court below in its decision to place reliance on the oral evidence of PWs 3 to 6. From the house of PW1 witnesses had seen the appellant and the deceased together until they were seen together at a place near the scene described in Ext.P18 scene mahazar, where the dead body was found. The last seen alive theory is thus shown to apply convincingly. All the 4 persons had seen the

deceased and the appellant together at some time after 9.30 a.m. The dead body of the child was located in the forest before 2.30 p.m. The last seen alive theory operates squarely against the appellant. Except to deny the evidence of his having been seen with the deceased child on that day, the appellant has not chosen to offer any explanation as to how he parted with the company of the child on that morning. We are satisfied that the oral evidence of PWs 3 to 6 convincingly establishes the second circumstance and brings into operation the 'last seen alive' theory against the appellant.

19. We have deliberately not considered the evidence of PWs 2 and 12 earlier while discussing the evidence of PWs 3 to 6. PW1 is the father of the deceased child. PW2 is the father of PW1. PW12 is the sister in law of PW1. Both of them stated on oath that the child had left the house along with the appellant on that morning. According to them the appellant was a friend of PW1 and his brother. They knew each other. The appellant was available in the house of PW1 on that morning. He had asked for a loan of Rs.30/- from the husband of PW12 (ie. the brother of PW1). He had decided to give that loan of Rs.30/-. But unfortunately there was only a Rs.50/- note with PW12. The appellant agreed to go to the nearby shop, take Rs.30/- for himself and return the balance with the deceased child. That is how, according to PWs 2 and 12, the child went with the appellant from the house.

20. Inherently and on broad probabilities there is nothing to doubt the version of PWs 2 and 12. They are not shown to have any animosity against the appellant, which could have persuaded them to speak any falsehood against the appellant. However the learned counsel for the appellant argues that the contents of Ext.P1 F.I statement do not justify the claim of the prosecution that PWs 2 and 12 were available in the house on that morning. Ext.P1 is subjected to meticulous hair splitting. It is argued that according to PW1 in Ext.P1 on that morning when he and his wife went for work from his house, two minor female children alone were available in the house. In short the argument is that PW2, PW12 and the husband of PW12 are sought to be introduced in evidence as persons available in the house of PW1 falsely, maliciously and with deliberate intent. At the outset we do not find any reason for PWs 1, 2 or 12 or the mother of the child to invent any false

story to implicate the appellant. No reasons are shown to exist for them to resort to such a course. We looked into the contents of Ext.P1 closely and carefully. It would be myopic for a court not to appreciate the mind set of PW1, an unfortunate father, at that point of time. When we read Ext.P1 carefully it is very evident that PW1 was not narrating the state of events on that morning when he left his house. He was only narrating the usual practice. Usually he and his wife go for work leaving the children in the house. Of course it is true that the presence of PWs 2, 12 and PW12's husband on that day in the house is not specifically referred to in Ext.P1. But that, to our mind, cannot be reckoned as crucially relevant or significant. Ext.P1 clearly shows that the child had left the house along with the appellant on that morning and that enquiries made by the local persons could not locate the child and the appellant immediately after the child was found missing. Long later only, they located the dead body in the forest.

21. Reliance is placed on the contents of the case diary statements of witnesses incorporated in Ext.P17 inquest report. A direct access to such statement is impermissible in law. But even assuming that the statement of the brother of PW1, the husband of PW12, in Ext.P17 inquest report did not narrate the presence of PW12 and her husband in the house on that morning, that cannot, according to us, be of any crucial significance.

22. It is in this context that we go to the evidence of PW11. PW11 is the mother of the appellant. In her evidence she states clearly that people had come to her house on that day enquiring about the deceased child and the appellant. The evidence of disinterested PW11, according to us, is the best assurance to safely accept the oral evidence of PWs 2, 12 and 3 to 6 that the child was last seen in the company of the appellant and when the child was found missing the inquisitive locality had gone to the house of PW11 to contact the appellant and ascertain from him the details of the child. To this extent, we are satisfied that the evidence adduced by the prosecution that the deceased child was last seen alive with the appellant can safely be accepted. We find no reason to disbelieve PWs 2 and 12 notwithstanding the absence of specific statements in Ext.P1 about the presence of PW2, 12 and her husband in the house of PW1 on that morning. That innocuous omission cannot arouse any inherent distrust in our mind against the

oral evidence of PWs 2 and 12. The court below had adverted to this aspect in detail in the impugned judgment. The evidence of PW11 clearly tells us that people of the locality had rushed to her house to contact her and the appellant to ascertain the whereabouts of the child with whom the child was allegedly seen earlier on that morning. The second circumstance is established convincingly, according to us.

23. Circumstance No.3

Ext.P8 route mahazar shows that from the spot where the deceased was found lying dead one can reach the house of the appellant, ie. the house of PW11, his mother. PW11 and the appellant reside along with a sister of the appellant in that house. En route there is the shop of PW7 - a local lady, who runs a tea shop. It is the evidence of PW 7 that on that day at about 12 noon, she found the appellant in a state of panic running towards the house of PW11. He was panting. He reached there; took his clothes and left the scene hurriedly; conveying to PW11 that he cannot continue to remain in the house. It is thereafter that people came to the house of PW11 enquiring about the appellant in their attempt to trace the child. The evidence of PW13, an autorickshaw driver, also shows that the appellant had left the locality hurriedly after the incident. PW13 is also related to the appellant. He also speaks of the appellant trying to leave the locality hurriedly after the incident. The evidence of PWs 7, 11 and 13 are attempted to be assailed. But we have to mention that there is no reason worth the name to approach the evidence of PWs 7, 11 and 13 with any amount of distrust, suspicion and doubt. We repeat that PW11 is none other than the mother of the appellant. Ext.D2 case diary contradiction is seen marked by the accused in the course of cross examination of PW11. But Ext.D2 can only show that the mother PW11 was only attempting to support the appellant to the extent possible by deviating from her earlier statement Ext.D2 before the police. Evidence of PWs 7, 11 and 13 was rightly accepted by the court below and their evidence clearly reveals the state of panic in the mind of the appellant and his hurried attempt to leave the locality after the death of the deceased took place. This circumstance is also clearly established by the prosecution.

24. Circumstance No.4

MOs.7 and 8 are the cotton lungi and shirt which the appellant was wearing on the date of occurrence when he was seen with the child. After the appellant was found to be missing, the police effected recovery of MOs.7 and 8 from the house of the appellant in the presence of his mother PW11 under Ext.P2 seizure mahazar. PW11, we note, was not specifically asked about the said recovery. That indeed is a lapse on the part of the prosecutor. The fact that PW11 did not in her evidence speak specifically of the accused changing his dress before he hurriedly left the house of PW11 is not significant or vital, according to us. The fact remains that PW11 is described in Ext.P2 as a person present at the time of seizure in Ext.P2. PW21 who effected the seizure under Ext.P2 as also the evidence of PW4, an attester to Ext.P2, eminently support the evidence of PW21 about the recovery of MOs.7 and 8. The scientific evidence available from Ext.P16 forensic science laboratory report shows that both MOs.7 and 8 had human blood on it. The shirt MO.8 had human blood stains of group B, which is the blood group of the deceased. The blood group of the appellant is found to be A group. Thus the recovery of MOs.7 and 8 worn by the appellant on the date of occurrence from the house of the appellant is proved. Both had blood stains on it. Both had human blood stains. One of them contained blood of B+ group, which was different from the blood group of the appellant. The blood on the clothes of the accused was of the same blood group as that of the deceased. This circumstance is thus firmly established and we reckon the same as a formidable circumstance against the appellant.

25. Circumstance No.5

The incident took place on 26.05.2005. The appellant was not available in the locality and he was absconding thereafter. He was arrested only on 10.06.2005. PW11's evidence shows that he did not return to her after he left the house on the date of occurrence. According to the prosecution for the period from 26.05.05 to 10.06.05, the appellant was absconding from the locality. Absconding itself may not be a clinching indication of culpability. But the fact of absconding is certainly relevant and is another link in the chain of circumstances against the appellant.

This circumstance is thus eminently established by the prosecution.

26. Circumstance No.6

At the time of arrest of the appellant, the appellant had personal injuries on his person. After arrest, he was sent to PW16, who examined him and issued Exts.P10 and P11 medico legal certificate. In Ext.P10 the injuries found on the person of the appellant are described. In Ext.P11 it is reported that he was sexually potent. The injuries described in Ext.P10 on the person of the appellant are, according to the prosecution, suffered by him in the course of the incident in which he physically and sexually assaulted the deceased. According to the prosecution the injuries described in Ext.P10 are defensive injuries allegedly inflicted on the appellant by the helpless deceased when he assaulted her physically and sexually. The evidence of PW16 and Ext.P10 leave not a trace of doubt in our mind that the appellant had suffered such injuries and those injuries could have been suffered on the date of the occurrence, ie. 26.05.2005. Exact date on which the injuries were suffered cannot be medically established. But the fact remains that the appellant had injuries on his person. Those injuries could have been suffered by him in the manner alleged by the prosecution on 26.05.05. So much is evident from the evidence tendered by the expert. This circumstance is also convincingly established by the prosecution.

27. Circumstance No.7

According to the prosecution, the appellant, when he was taken in police custody to PW16, allegedly gave a narration to PW16 as to how he had suffered the injuries. The prosecution reckons this as an extra judicial confession made by the appellant to PW16. This extra judicial confession recorded by PW16 in Ext.P10 wound certificate is consistent with the case of the prosecution and the other circumstances pointing to the culpability of the appellant, argues the learned Prosecutor. The learned counsel for the appellant on the contrary contends that the extra judicial confession has not been proved in a manner known to law. That alleged extra judicial confession is recorded when the appellant was in police custody. The alleged extra judicial confession cannot be introduced in evidence in view of the clear bar under Section 26 of the Evidence Act, contends the learned

counsel. In any view of the matter, the contents of Ext.P10, which is not specifically spoken to by PW16 when he tendered evidence, cannot be reckoned as substantive evidence against the appellant, contends counsel. We shall now proceed to consider whether reliance can be placed on the alleged cause recorded in Ext.P10 allegedly narrated by the appellant to PW16.

28. Secs.24 to 27 of the Indian Evidence Act deal with confessions - the bar of admitting confessions and the exceptions under which a confession can be admitted into evidence. The confession in the instant case is allegedly made to P.W.16 - a medical practitioner to whom the appellant was taken in police custody admittedly. The alleged confession has not led to discovery of any fact also. In these circumstances, Secs.24, 25 and 27 of the Evidence Act have no relevance in the controversy.

29. Under Sec.25 of the Evidence Act, there is an omnibus embargo against proof of confession made to a police officer. Such confession cannot be proved against a person accused of any offence.

30. Sec.26 mandates that not only confessions to police officers are proscribed, confessions by accused persons while in custody of police are also not to be proved against an accused. We extract Sec.26 of the Evidence Act below:

"26. Confession by accused while in custody of police not to be proved against him.-- No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person." (emphasis supplied)

31. While Sec.25 of the Evidence Act speaks of a confession made to a police officer, Sec.26 of the Evidence Act does not refer to the person to whom the confession is made. The embargo against proof of confession is against confessions made by any person while he is in the custody of the police officer. The embargo stands lifted if it is shown that such confession is made in the immediate presence of a Magistrate. There are well settled procedures to be followed by a Magistrate before recording such a confession statement.

32. Was the confession in the instant case made by the appellant while he is in the custody of a police officer? This is the first and the most important question to be considered. It is certainly not made in the immediate presence of a Magistrate. Therefore, going by the plain language of Sec.26 of the Evidence Act , the embargo must apply if the appellant was in the custody of a police officer when he made the alleged confessional statement.

33. Undoubtedly, the appellant was arrested by P.W.21. The appellant was sent to P.W.16 by P.W.21 in the custody of police officials. The arrest had already been effected. The consequent detention and custody have not been terminated. There can be no doubt or dispute on the question that the appellant was not a free bird. He could not evidently move about on his own will. In these circumstances, whether there was immediate presence of any police official or not near the appellant, according to us, is not crucial or determinative. It has got to be held that he who was arrested was in the custody of the police and continued to be under the custody of the police. If that be so, according to us, the language of Sec.26 makes it crystal clear that a confession made by him in the custody of the police officer cannot be proved against the appellant. We need not advert to the decisions which make out a distinction between 'custody' and 'formal arrest', as in this case, the formal arrest has already been made, admittedly. The mere fact that no police official was standing near the appellant at the time when he made the alleged extra judicial confession cannot and shall not detract against the fact that he continued to be in the custody of the police officer. In that view of the matter, it appears to us to be evident that the so-called confession cannot be admitted in evidence.

34. The learned counsel for the appellant places reliance on two decisions of the Supreme Court in which it is held categorically that the mere fact that the police personnel were temporarily absent when the confession was allegedly being made shall not lift the bar under Sec.26 of the Evidence Act. The decision in *Kishore Chand v. State of H.P.* (AIR 1990 Supreme Court 2140) and *Ram Singh v. Sonia* (AIR 2007 Supreme Court 1218) are relied on by the counsel.

35. In Kishore Chand the accused was apprehended from his village and taken for identification. After identification he was brought back and kept in the company of the Village Pradhan while the Investigating Officer allegedly left for further investigation. The extra judicial confession to the Village Pradhan was disbelieved by the Supreme Court in paragraph 8:

"The question, therefore, is whether the appellant made the extra-judicial confession while he was in the police custody. It is incredible to believe that the police officer, P.W.27, after having got identified the appellant by P.W.7 and P.W.8 as the one last seen the deceased in his company would have left the appellant without taking him into custody. It is obvious, that with a view to avoid the rigour of Sections 25 and 26, P.W.27 created an artificial scenario of his leaving for further investigation and kept the appellant in the custody of P.W.10, the Pradhan to make an extra-judicial confession. Nothing prevented P.W.27 to take appellant to a Judicial Magistrate and had his confession recorded as provided under S.164 of the Cr.P.C. which possesses great probative value and affords an unerring assurance to the Court. It is too incredulous to believe that for mere asking to tell the truth the appellant made voluntary confession to P.W.10 and that too sitting in a hotel."

36. Ram Singh followed Kishore Chand and while the extra judicial confession made by one of the accused to an alleged stranger was believed, the extra judicial confession made by the very same accused to the person who conducted polygraph test on him was disbelieved on the following words:

"57. Indisputably, A-2 was arrested on 19th September, 2001 and on 24th and 25th September when he was taken for the LDT he was in police custody and it was at that point of time he made extra-judicial confession to P.W.17 at which point of time police personnel went away from the scene temporarily. Therefore, in the light of the decision rendered in Kishore Chand (supra), we are of the opinion that extra- judicial confession made by A-2 to P.W.17 is hit by Section 26 of the Evidence Act. It having been made by A-2 while in police custody and consequently, cannot be admitted into evidence and, therefore, has to be eschewed from consideration."

On a plain reading of the section also it appears to us that the crucial question is not whether any police officer was present with the accused or not while he made the confession. If he is in the custody of a police officer, the confession of an accused person will be inadmissible in evidence unless it be made in the immediate presence of a Magistrate.

37. The learned Public Prosecutor submits that notwithstanding the fact that the appellant was arrested and he was in custody when he was taken to P.W.16 for examination, it must be held that the statement was made to a respectable person like P.W.16 - a medical officer who has no axe to grind against the appellant. In fact the learned Public Prosecutor points out that there was no cross-examination worth the name directed against P.W.16 when he proved Ext.P10 wound certificate which, in turn, contains the alleged extra judicial confession. The learned Public Prosecutor points out that the Supreme Court in *M.A. Antony v. State of Kerala* (2009 (6) SCC 220) and *B.A. Umesh v. State of Karnataka* (2011 (3) SCC 85) have taken up the position that an extra judicial confession made to a doctor while in the custody of the police officer is not inadmissible. Our attention has particularly been drawn to paragraphs-29 and 30 of *M.A. Antony* (supra) and paragraph-44 of *B.A. Umesh* (supra). We extract the relevant paragraphs from *M.A. Antony* (supra):

"29. PW.60, Dr. Anila Kumari has supported the case of extra-judicial confession (Ext.P-48) which records the history of injury and also records the said confession. The statement made by the independent witness Dr. Anila Kumari has been accepted by both the courts below. In her examination-in-chief, she has stated that "I had examined Antony as per the request of Dy. Superintendent of Police of Aluva.

30. There is no material to show that the said Dy. Superintendent of Police (PW 59) was present at the time when the statement was recorded. Dy. Superintendent of Police (PW 59) does not state that he had accompanied the accused to doctor's house. Secondly, there is no material on record nor is there any suggestion made to PW 60 that when she had recorded the said confessional statement, any police person was present with the appellant-accused. Thus, the criticism of the defence

that the said statement is not fit to be accepted as it has been recorded in the presence of the police officers is without any material on record."

Para.44 of B.A. Umesh (supra) is extracted below:

"44. On the question of the extra- judicial confession said to have been made by the appellant before PW 26, Ms Shenoy referred to the decision of this Court in M.A. Antony v. State of Kerala, in which, in a similar situation the extra- judicial confession made to a doctor was accepted upon the rejection of the defence claim that such confession had been made in the presence of police officers. This Court held that there was no evidence at all to suggest that any policeman was present when the appellant made the confessional statement before the doctor, whereupon such confession could have been kept out of consideration. Ms Shenoy submitted that even in the instant case there is nothing on record to indicate that the confessional statement said to have been made by the appellant before PW 26 Dr. Somashekar was made in the presence of any police personnel. There was also no suggestion in cross-examination of PW 26 that at the time of examination of the appellant for evidence of sexual intercourse either any force was used or any police personnel was present when he is said to have made the confessional statement to PW 26."

Reliance was placed by the learned counsel for the State on M.A. Antony (supra) to support the extra-judicial confession made by the accused to the doctor, in the said case. The same appears to have been accepted by the Bench. In para-45 of B.A. Umesh (supra) Ram Singh v. Sonia (supra) was also noticed, but only for the acceptance of the extra judicial confession to a stranger. However the specific question as to the sustainability and acceptance of extra judicial confession while in police custody to a non-police official was not raised or answered. In para-74, while dealing with the circumstances the Supreme Court did notice the extra judicial confession made to the Doctor while in police custody with approval:

"74. The trial court has also relied upon the extra-judicial confession made by the appellant to Dr. Somashekar (PW 26), who examined him as to his sexual capacity, to the effect that he had pushed down the victim, removed her clothes, tied her hands and committed theft in the house."

In paragraph-44 of B.A. Umesh (supra), we find that there is specific reference to M.A. Antony (supra) also. All the four decisions are rendered by two Judge Benches. We do further note that the two earlier decisions in Kishore Chand and Ram Singh (supra) are not specifically referred to in M.A. Antony. Though B.A. Umesh (supra) notices Kishore Chand, the issue of extra judicial confession while in police custody and the dictum laid down by the earlier Benches were not considered or noticed.

38. Going by the rationale prompting Sec.26 of the Evidence Act, it appears to us that the embargo against admission of confessions, while a person is in the custody of a police officer, has a laudable purpose to serve. The possibility of extortion of confession by means, foul and not fair, is certainly the reason of reasons that prompted the legislature to place an embargo on the admission of confessions of accused persons while in the custody of the police officer. If the view canvassed by the learned Public Prosecutor were accepted, it would be possible for police officers to temporarily withdraw themselves and facilitate extra judicial confessions to be made to 'respectable individuals' even while the accused continues in custody, thus effectively throwing to the winds the safeguard of immediate presence of a Magistrate insisted by Sec.26 of the Evidence Act. In that view of the matter, we feel persuaded to follow the decisions in Kishore Chand and Ram Singh (supra) which have not been specifically referred to and considered in M.A. Antony. Though B.A. Umesh (supra) noticed Kishore Chand, the dictum laid down regarding extra-judicial confession while in custody was not noticed. Given the option, we would certainly prefer to follow the dictum in Kishore Chand and Ram Singh (supra) which have not been referred to specifically in the later decisions in M.A. Antony and B.A. Umesh. Kishore Chand and Ram Singh (supra), which, according to us, lay down the binding law on this aspect.

39. We do not think it necessary for us to delve deeper into the controversy. Inasmuch as P.W.16 has not tendered substantive evidence of the confession made before him by the appellant, it is unnecessary for us to deeply consider whether such alleged confession extracted in Ext.P10 of which no substantive evidence is available, need be admitted, accepted and acted upon. The learned counsel for the appellant points out that the prosecution, before the learned

Sessions Judge, does not appear to have intended to place reliance on the alleged confession statement. That is why no specific attempt was made to rely on such alleged confessional statement. That is why substantive evidence was not introduced about such alleged confessional statement.

40. The learned counsel for the appellant further points out that the learned Sessions Judge also does not appear to have reckoned such evidence of extra judicial confession as constituting incriminating material against the appellant and this is indicated by the fact that no specific question on the extra judicial confession was put to the appellant when he was examined under Sec.313 Cr.P.C. We take note of that circumstance also. We are, in these circumstances, satisfied that the alleged extra judicial confession recorded by P.W.16 in Ext.P10 of which no specific substantive evidence is tendered can be ignored and need not be reckoned as relevant probative material against the appellant in the adjudication of guilt against him. We do however take note that the learned Sessions Judge has listed the alleged extra judicial confession also as a circumstance against the appellant.

41. The learned Public Prosecutor contends that the statement of the appellant extracted in Ext.P10 need not necessarily be reckoned as an extra judicial confession and the same can be reckoned as an admission - though a crucially incriminating admission against the appellant. Reliance is placed on the observations in the decision in *State of Kerala v. Ammini* (para-45) [AIR 1988 Kerala 1 (FB)] which have been confirmed by the Supreme Court in *Ammini v. State of Kerala* (AIR 1998 Supreme Court 260) (see para-17). Here again, we are of the opinion that it is not necessary to go into that question in further detail as the circumstance has not been put to the appellant either as an extra judicial confession or as an admission in the course of his examination under Sec.313 Cr.P.C. Suffice it to say that we have gone through the alleged statement made to the doctor P.W.16 by the appellant extracted in Ext.P10. We find it difficult to accept that the rubicon has not been crossed from the domain of an admission to the domain of an extra judicial confession. To ascertain where the admission ends and confession commences is indeed a difficult and onerous task. Too liberal an approach to distinguish between admissions and confessions in favour of the

prosecution, would virtually render ineffective the protection against custodial compulsion and self-incrimination provided by Sec.26 of the Evidence Act. We leave matters there as we do not, at any rate, propose to place any reliance on the said statement allegedly made by the appellant to P.W.16 recorded in Ext.P10 of which no substantive evidence is tendered before court and which has not been put to the accused in his examination under Sec.313 Cr.P.C. We eschew this circumstance altogether from the consideration of guilt. This circumstance, we hold, has not been proved.

42. Circumstance No.8: The learned Public Prosecutor heavily relies on the circumstance that the appellant has not offered any explanation for the circumstances proved against him. It is trite, and it is unnecessary to refer to specific precedents on this aspect, that the absence of explanation offered for a proved circumstance by the appellant can itself be reckoned as a circumstance against the appellant. In this case, we have already noted that the second circumstance that the deceased was last seen alive with the appellant has been proved. The appellant resorts to a blanket denial of the facts proved; but does not at all explain how the appellant and the deceased parted company on that date. The absence of explanation on that aspect is crucial. Similarly, he does not offer any explanation for the evidence tendered by P.Ws.7, 11 and 13 that he hurriedly left the locality after the time when the deceased must have met with her death. P.W.11's evidence clearly shows that he left the locality all on a sudden without offering any convincing reasons. The appellant before court has not chosen to explain why he went to P.W.11 on that morning and left the locality all on a sudden without giving any satisfactory explanation.

43. For presence of blood stains on his clothes M.Os.7 and 8 also, the appellant has not offered any explanation. They were found to be stained with human blood. One of them had blood of B+ive group which is different from the blood group of the appellant and is the blood group of the deceased. No explanation is seen offered for such presence of human blood including the blood of group B+ive in the clothes of the appellant. Similarly, he has not offered any explanation for the healing injuries found on his person when he was arrested. He has preferred to take up a defence of blanket denial of all circumstances. He has also not offered

any explanation for the proved circumstance as spoken to by P.W.11 that he absconded after the date of the occurrence. The non-explanation of these circumstances is heavily relied on by the prosecution. We find such reliance to be most justifiable. We take note of the absence of explanation on the part of the appellant for the proved circumstances.

44. Do the proved circumstances lead us safely to an unerring and clinching conclusion about the culpability of the appellant? This is the last question to be considered. We have already noted that the challenge/mission of the adjudicator in this case is to identify the person who had committed rape and murder against the deceased. That the deceased was seen alive last in the company of the appellant and the appellant does not offer any explanation is according to us crucial and vital. That forms a formidable circumstance against the appellant. Why and under what circumstances he hurriedly retreated from the scene of the crime to his house and started absconding thereafter is also not explained and that constitutes the next crucial link in the chain of circumstances. Presence of blood stains on his clothes including human blood stains of blood group B+ive and the absence of any explanation for the injuries suffered by him clinches the issue so far as the culpability of the appellant is concerned.

45. To sum up, there is not a semblance of even a remote doubt about the complicity of the appellant on the basis of the circumstances proved against the appellant. Of course, still better evidence could have been adduced. The vaginal smear and swab could have been sent to an expert for conducting a DNA test and the DNA test, if done properly, would have offered unfailing scientific evidence about the person who may have committed rape on the deceased. That such evidence is not made available to the court does not and cannot lead the court to a conclusion that that generates any reasonable doubt. Criminal trial cannot get deteriorated into a mere attempt to assess the efficiency and competence of the investigating authority. We would certainly have been much happier if such evidence of a DNA test were also available in this case. But that such evidence is not available cannot justify a contention that we must concede any benefit of doubt to the appellant. We are, in these circumstances, satisfied that the chain of circumstances has been adequately established. The links are strong in

themselves. They have been established beyond doubt. Together they form a chain of circumstances which points clinchingly and unerringly to a safe conclusion of guilt against the appellant. No reasonable hypothesis of innocence of the appellant remains to be excluded. We do, in these circumstances, concur with the conclusion of fact recorded by the court below that the deceased was raped and murdered by the appellant.

46. We now come to the nature of offences proved. That the deceased was a girl aged below 12 years is established convincingly. That she had been raped is also established beyond controversy. That the appellant was responsible for such rape on her is also established. The appellant, in these circumstances, is certainly liable to be convicted under Sec.376 (2)(f) of the Penal Code.

47. Coming to the allegation of murder, we have satisfactory evidence to show that the deceased died of smothering and strangulation. Intention to cause death is evident from the circumstances. The offence committed by the appellant would fall squarely under Clause Firstly of Sec.300 IPC. The offence of murder defined under Sec.300 IPC and punishable under Sec.302 IPC is thus clearly established.

48. The learned counsel for the appellant argues that the sentence imposed under Sec.376(2)(f) is excessive. A sentence of imprisonment for life need not necessarily be imposed on the appellant. Leniency may be shown. The sentence imposed on the appellant under Sec.376(2)(f) may be modified to any specified term of imprisonment in accordance with law, argues the learned counsel for the appellant.

49. We are unable to agree with the learned counsel for the appellant. The totality of circumstances have got to be taken into account. The offence of rape and murder have been committed against a child aged less than 12 years. The child as per the evidence adduced had accompanied the appellant in trust. The child evidently was one who succumbed to the lure/ inducement of a toffee being offered to her. The appellant, who had acquaintance with the parents of the child and the family of the child, had evidently taken advantage of that relationship to commit the offences against the deceased. In any view of the matter, we are not persuaded to agree that the sentence imposed on the appellant under

Sec.376(2)(f) and Sec.302 IPC deserve or warrant interference. The challenge against the sentence imposed must also, in these circumstances, fail.

50. We do, in these circumstances, concur absolutely with the conclusions of the court below. We are satisfied that this appeal only deserves to be dismissed.

51. In the result, this appeal is dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com