

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.T.SANKARAN
&
THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

THURSDAY, THE 9TH DAY OF JULY 2015/18TH ASHADHA, 1937

CRL.A.No. 113 of 2010 ()

AGAINST THE JUDGMENT IN SC 2490/2004 of IST ADDITIONAL DISTRICT
COURT, TRIVANDRUM DATED 23-12-2009

AGAINST THE ORDER IN CP 207/2003 of J.M.F.C.-II, NEYYATTINKARA

APPELLANT(S)/ACCUSED NO.1&2::

1. SWARNAMMA AND ANOTHER
KEEZHE KUZHINJAMVILA THOTTATHU VEEDU,
KARODU DESOM, KARODU VILLAGE.
2. SHAJI, S/O.RAJU, AGED 29 YEARS,
KEEZHE KUZHINJAMVILA THOTTATHU VEEDU,
KARODU DESOM, KARODU VILLAGE.

BY ADVS.SRI.P.VIJAYA BHANU
SRI.M.REVIKRISHNAN

RESPONDENT(S)/COMPLAINANT::

STATE OF KERALA
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. K.K. RAJEEV

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
09-07-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

**K.T. SANKARAN
&
B. SUDHEENDRA KUMAR, JJ.**

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Dated this the 9th day of July, 2015

JUDGMENT

Sudheendra Kumar, J.

The appellants are the accused in S.C. No. 2490/2004 on the file of the Addl. Sessions Court- I, Thiruvananthapuram, who in this appeal challenge the judgment of conviction and sentence passed by the trial Court under Sec. 302 and 201 read with Sec. 34 I.P.C.

2. The court below sentenced each of the appellants to imprisonment for life under Section 302 read with Sec. 34 IPC and Simple Imprisonment for six months each under Section 201 read with Sec. 34 IPC.

3. The first appellant was the paramour of deceased David Rajan. The first appellant was residing with the deceased David Rajan as husband and wife in the house of the first

accused one year prior to the incident in this case. While so, on 19-9-2002, at about 7.30 p.m. the first appellant hit on the back side of the head of the deceased with a pestle and the second appellant hit on the backside of the head and trunk of the deceased with an wooden handle of a spade causing very serious injuries on the deceased. Thereafter, they pushed down the deceased. The deceased crawled from there to the near by property. At or about the same time, the deceased succumbed to the injuries. Thereafter, the body of the deceased was brought to the house of the appellant and concealed the same in a room.

4. On the basis of Ext. P8 First Information Statement given by PW9, PW10, the Sub Inspector of Police registered Ext. P8(a) F.I.R. under section 174 Cr.P.C. The investigation was taken over by PW11, the Circle Inspector of Parassala Police Station. He conducted the inquest on the body of the deceased on 22-09-2002 and prepared Ext. P9 inquest report. Both the appellants

were arrested on 23-09-2002 at 12.30 p.m. MO1 to MO3 were discovered by PW11 at the instance of the appellants. PW11 filed Ext. P10 report before the court incorporating Sections 302 and 201 read with Section 34 IPC to the section of offences, deleting section 174 Cr.P.C. Thereafter, the investigation was taken over by PW12. He verified the records and filed the final report before the Court.

5. The learned Magistrate committed the case to the Sessions Court, Thiruvananthapuram. The Sessions Court made over the case to the trial Court for trial and disposal, in accordance with law.

6. In the trial, the prosecution examined PW1 to PW12 and marked Exts. P1 to P19, besides identifying MO1 to MO8 series.

7. We have heard the learned senior counsel for the appellants Sri. P. Vijayabhanu and the learned Public Prosecutor

Sri. K.K. Rajeev.

8. PW2 was the doctor who conducted the postmortem examination on the body of the deceased and issued Ext. P1 postmortem certificate . PW2 noticed the following ante-mortem injuries in Ext. P1 postmortem certificate:-

- “1. Lacerated wound 2x1x1 cm. oblique on the left side of face just outer to the tip of eyebrow. The tissues underneath was contused over an area 7x5x1 cm. with contusion of whole thickness of left temporal is muscle. The zygomatic arch showed fracture.
2. Contusion 14x9x1 cm. on the right side of face and adjacent part of neck just below, in front and behind the ear lobule. Underneath mandible showed fracture separation just behind the right first premolar tooth.
3. Contusion 12x4x0.5 c.m. on the right side of back of head just behind the ear.

4. Abrasion 2.51 cm. on the back of left hand.
5. Contusion 7 x 6 x 0.5 c.m. on the back of left hand.
6. Abrasion 5 x 2 c.m. on the back of right shoulder 4 cm below its top with a contusion 16 x 10x0.5 cm around it.
7. Abrasion 16 x 1-2 cm obliquely placed on the back of trunk in the middle, its lower right end 6 cm to right of midline and 11cm. above the top of hip bone with another abrasion 14x0.2-0.3cm obliquely placed parallel to and 1.9 cm below previous injury.
8. Multiple infiltration of blood over an area 7 x 6.5 x 0.5 cm involving right sternomastoid muscle. The upper end of right sternohyoid was also infiltrated with blood (2x1.5 x 0.3 cm)".

PW2 opined that the deceased died due to head injury.

9. The evidence of PW1 is the solitary ocular testimony available before the court to prove the occurrence. Before

adverting to the evidence of PW1, we are inclined to discuss the evidence with regard to the discovery of weapons.

10. PW11 was the Circle Inspector of Police, Parassala Police Station during the relevant period. Both the appellants were arrested on 23-09-2002 at 12.30 p.m. When arrested and questioned, the first appellant had given Ext. P5 (a) disclosure statement and pursuant to Ext. P5 (a) disclosure statement and as led by the first appellant, MO1 pestle was discovered by PW11 as per Ext. P5 mahazar. When questioned the second appellant, Ext. P7 (a) disclosure statement was given by the 2nd appellant and pursuant to Ext. P7 (a) disclosure statement, MO2 handle of the spade was discovered by PW11 from the house of the appellants as per Ext. P7 mahazar. On the same day, in pursuance to Ext. P6 (a) disclosure statement given by the first appellant, MO3 bath towel was discovered by PW11 from the canal situated on the eastern side of the house of the appellant as

per Ext. P6 mahazar.

11. PW1 stated that while he was coming back to his house on the fateful day at about 7.30 p.m. after consuming toddy, he witnessed the incident. PW1 stated that he saw both the appellants beating deceased David Rajan. The second appellant was having the handle of a spade with him and the first appellant was having a pestle with her at the relevant time. The second appellant inflicted injuries on the legs and the left cheek of the deceased with the handle of a spade and the first appellant inflicted injuries on the backside of the head of the deceased with a pestle. The deceased fell down and he crawled from there to the near-by property belonging to Nalla Thambi. After four days, he came to know that David Rajan died.

12. The evidence of PW1 is that PW1 witnessed the incident while he was coming back to his house after consuming

toddy. The incident was at about 7 .30 p.m. There is absolutely no material before the court to indicate that there was light at the place of occurrence at the relevant time to witness the incident. The incident allegedly occurred on the rear side of the house of the appellants, which would mean that the incident was on the western side of the house of the appellants. PW1 witnessed the incident, which occurred at about 7 .30 p.m., from the bund road situated on the eastern side of the house of the appellants and that itself, after consuming toddy. The evidence of PW1 would show that the house of the appellants was situated ten feet above the level of the bund road. PW1 stated that the house of the appellants was having a compound wall also. In the said circumstances, it is very difficult to believe the testimony of PW1 that he could witness the incident, which had taken place on the western side of the house of the appellants, from the bund road situated at a level lower than 10 feet from the level of the

house of the appellants on the eastern side of the house of the appellants. PW1 stated that he had informed the police when the inquest was conducted on 22-9-2002 that he witnessed the incident. However, PW11 stated that he recorded the statement of PW1 only on 23-09-2002.

13. We have gone through the records and we find that the statement of PW1 recorded under section 161 Cr.P.C does not bear any date. The statement of other witnesses recorded under section 161 Cr.P.C. also does not bear any date. As per the evidence of PW11, the appellants were arrested on 23-9-2002 at 12.30 p.m. Since the time at which the statement of PW1 was recorded is not borne out from the records, it is not possible for the court to ascertain as to whether the statement of PW1 was recorded subsequent to the arrest of the appellants or not. The evidence of PW11 is also silent in this regard. It is to be noted at this juncture that Ext.P9 inquest report mentions that Lilly Bhai

D/o. Mariyamma, KeezheKuzhinjan Vilathottil Veettil witnessed the occurrence. She also identified MO1 and MO2 weapons before the police. However, the said Lilly Bhai was not cited as a witness in the charge-sheet. She was also not examined as a witness before the Court.

14. The Apex Court in *Narain v. State of Punjab* (AIR 1959 SC 484) held that if a material witness has been deliberately or unfairly kept back, then a serious reflection is cast on the propriety of the trial itself and the validity of the conviction resulting from it, may be open to challenge.

15. The Apex Court in *Habeeb Mohammed v. State of Hyderabad* (AIR 1954 SC 51) held in paragraph 11 thus:

“In this situation, it seems to us that Biabani who was a top ranking police officer present at the scene was a material witness in the case and it was the bounden duty of the prosecution to examine

him, particularly when no allegation was made that if produced, he would not speak the truth; and in any case, the court would have been well advised to exercise its discretionary powers to examine that witness. The witness was at the time of the trial in charge of the Police Training School and was certainly available. In our opinion, not only does an adverse inference arise against the prosecution case from his non-production as a witness in view of illustration (g) to S. 114 of the Indian Evidence Act, but the circumstance of his being withheld from the court casts a serious reflection on the fairness of the trial. It seems to us that the appellant was considerably prejudiced in his defence by reason of this omission on the part of the prosecution and

on the part of the Court”.

16. The Apex Court in *State of U.P. and another v. Jaggo and Others* (AIR 1971 SC 1586) held as follows:-

“It is true that all the witnesses of the prosecution need not be called but it is important to notice that the witness whose evidence is essential to the “unfolding of the narratives” should be called”.

17. The Apex Court in *Sawal Das v. State of Bihar* (1974 CrL.J. 664) quoted with approval the principle in *Stephen Seneviratne v. The King* (AIR 1936 PC 289) that the witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.

18. The Apex Court in *Ishwar Singh v. The State of Uttar Pradesh* (AIR 1976 SC 2423) also held that the witnesses

essential to the unfolding of the narrative on which the prosecution is based must be examined.

19. In Ishwar Singh case (*supra*), several witnesses were named in the FIR . Out of the witnesses named in the FIR, only two of them were examined before the court. The Apex Court found that the evidence of the said two witnesses were unbelievable. Since the said witnesses were not truthful witnesses and since there was material discrepancy between FIR and the version of the occurrence given by the said witnesses, the Apex Court held that the non-examination of other witnesses to the occurrence was fatal to the prosecution.

20. In Takhaji Hiraji v. Thakore Kubersing Chamansing and Others [(2001) 6 SCC 145], a three Judge Bench of the Apex Court held thus:-

“It is true that if a material witness, who would unfold the genesis of the incident or an essential

part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand, if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other

witnesses may not be material. In such a case the court ought to scrutinize the worth of the evidence adduced”.

21. In this case, Lilly Bhai was cited as an occurrence witness in Ext. P9 inquest report. Lilly Bhai was residing very close to the house of the appellants. Ext. P13 scene mahazar would show that it was Lilly Bhai who had shown the place of occurrence to the police. MO1 and MO2 weapons were said to have been identified by Lilly Bhai before the police. Even then, the prosecution did not incline to cite her as a witness in the final report. Lilly Bhai was also not examined before the court as a witness. No explanation has been given by the prosecution as to why Lilly Bhai was neither cited as a witness nor examined before the Court.

22. The learned Public Prosecutor has submitted that Lilly Bhai is a close relative of the appellant and hence, the

prosecution did not incline to cite her as a witness in the final report filed by the police. It has been further submitted by the learned Public Prosecutor that even though the name of PW1 is not reflected in the earlier records like FIR, inquest report or scene mahazar, PW1 being an independent witness who witnessed the occurrence, the prosecution decided to cite PW1 instead of Lilly Bhai as a witness in the final report filed by the police. However, the above reasons submitted by the learned Public Prosecutor cannot be said to be convincing reasons for not having cited Lilly Bhai as a witness in the charge-sheet or examined her as a witness. If a material witness is deliberately or unfairly kept back, then a serious reflection is cast on the propriety of the trial itself and the validity of the conviction resulting from it, may be open to challenge. On the other hand, if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already

adduced, non-examination of such other witnesses may not be material. In this case, we find no justification for the prosecution in withholding Lilly Bhai from the court. Since Lilly Bhai was not examined by the prosecution, it was not possible to unfold the genesis of the incident and consequently, we are of the view that the withholding of Lilly Bhai from the court is fatal to the prosecution case. In the said circumstances, the evidence with regard to the recovery of MO1 to MO3 is of no consequence.

23. In view of the above discussion, we are satisfied that the prosecution has failed to establish that the accused committed the offences under sections 302 and 201 IPC and consequently, the verdict of guilty, conviction and sentence passed by the court under sections 302 and 201 read with 34 IPC cannot be sustained and accordingly, we set aside the same.

In the result, this Appeal stands allowed, setting aside the conviction and sentence passed by the trial Court under section

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302 read with 34 I.P.C. and section 201 read with 34 I.P.C and the appellants are acquitted for the said offences. The appellants shall be set at liberty forthwith if their continued detention is not required in connection with any other case.

Dated this the 9th day of July, 2015.

Sd/-K.T. SANKARAN,
JUDGE.

Sd/-B. SUDHEENDRA KUMAR,
JUDGE.

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P.S. to Judge