

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. 508 of 2010

AGAINST THE JUDGMENT IN S.C.NO.79 OF 2004 ON THE FILE OF THE COURT
OF THE ADDITIONAL SESSIONS JUDGE (ADHOC)-I, MANJERI DATED 11-08-2009

APPELLANT/ACCUSED:

BASHEER PALLIYALI @ VICHAPPU, 36 YEARS,
S/O.CHEKKU @ MOHAMMED, PALLIYALI HOUSE,
NOORIJIKKARA, KARUMARAKKAD AMSOM AND DESOM,
ERNAD, THALUK, MALAPPURAM DISTRICT.

BY ADVS. SRI.MANJERI SUNDER RAJ
SMT.SUSAN JACOB
SRI.B.PREMNATH (E)
SMT.K.K.PREETHA

RESPONDENTS/COMPLAINANT:

1. STATE OF KERALA, REP BY C.I.OF POLICE,
KONDOTTY POLICE STATION,
MALAPPURAM DISTRICT.
VAZHAKKAD P.S.. (CRIME NO.8/2002)
2. STATE OF KERALA,
REP.BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.RAJESH VIJAYAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
9-7-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

“C.R.”

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

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Dated this the 9th day of July, 2015

JUDGMENT

K.T.Sankaran, J.

The appellant/accused, namely, Basheer Palliyali, was living with his wife Sulekha and two children. Sulekha was his third wife. Between the midnight of 16.1.2002 and the early hours of 17.1.2002, Sulekha died. Basheer was made the accused in the case. The charge against the accused was that he forcibly administered poison (furadan) to Sulekha at about midnight on 16.1.2002 with an intention to commit murder and the victim died due to poisoning. The prosecution alleged that the accused had an intention to marry Soudabi, the younger sister of Sulekha. Soudabi was a divorcee at that time. Sulekha, the deceased, was against the idea of the accused marrying Soudabi.

2. On intimation given to the father of Sulekha, he came to the spot. At 11 a.m. on 17.1.2002, he gave Ext.P1 First Information

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Statement, on the basis of which Ext.P9 FIR was registered for unnatural death. The postmortem was conducted on 18.1.2002 by PW5 and Ext.P3 postmortem certificate was issued. On 19.1.2002, the accused was arrested by PW14. According to the prosecution, the accused made Ext.P7(a) confession statement, on the basis of which and as led by him, MO1 to MO4 were recovered from a place where they were hidden in the house of the accused. MO1 is the plastic cover containing crystalline substance, which, according to the prosecution, is furadan, a poisonous substance. MO3 is the cash bill for the purchase of the poisonous substance. MO1 to MO3 were found in MO4 shirt belonging to the accused. MO1 to MO4 were sent for chemical analysis. The viscera, liver, kidney, blood etc. taken from the body of Sulekha were also sent for chemical analysis. PW15 completed the investigation in continuation of the investigation by CW23 and submitted the final report before Court.

3. Before the trial court, PW1 to PW15 were examined, Exts.P1 to P14 were marked and MO1 to MO4 were identified. As per the judgment dated 6.12.2004, the trial court found the accused guilty of the offence under Section 302 of the Indian Penal Code and

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he was sentenced to undergo imprisonment for life and to pay a fine of ₹50,000/-.

4. The accused challenged the conviction and sentence in Crl.A.No.398 of 2005 before this Court. This Court noticed that though PW14, the Sub Inspector of Police, had produced MO1 to MO4 in Court as per Ext.P13 and made a request to send those items for chemical examination as per Ext.P14 forwarding Note dated 4.9.2002, the report of the chemical examination was not available at the time of trial. This Court called for a report from the learned Judicial Magistrate. The learned Magistrate reported that the material objects were sent for chemical examination. This Court called for the chemical examination report, which was duly forwarded by the learned Magistrate.

5. Thereafter, this Court set aside the conviction and sentence and remanded the case to the trial court to record further evidence in the light of the observations made in the judgment. This Court in Crl.A.No.398 of 2005 held thus:

“ 12. PW14, investigating officer wanted the material objects to be tested in the chemical examiner's laboratory obviously to ascertain whether the polythene packet (MO1), among other things, contained trace of Furedan and made a request to the learned Magistrate as per Ext.P14 to send the material objects referred therein for chemical examination. When such a request was made, it was the responsibility of the jurisdictional Magistrate to consider that request. If the request was accepted and the material objects were sent to the laboratory, learned Magistrate ought to have ensured that report is obtained and forwarded to the sessions court. We have gone through the report of the chemical examination forwarded by the learned Magistrate and find that material objects were sent to the laboratory as per letter dated 4.9.2002. It is true that when the case came up for trial before learned Additional Sessions Judge, that report was not available before that court. But then, noticing from Ext.P14 that a request had been made by the investigating officer as aforesaid to send the material objects for chemical examination, learned Additional Sessions Judge ought to have ascertained whether report of chemical examination was available and if not, summon the same from the office concerned. It is not as if the report of chemical examination was not

available. It is only that it was not summoned at the appropriate time either by the law officer who conducted the prosecution or by the courts concerned. In the circumstances, we do not think that giving prosecution an opportunity to prove the said report would amount to filling up any lacuna.”

6. After remand, some of the witnesses were examined again and Ext.P15 and MO5 to MO8 were marked. Subsequently, the Additional Public Prosecutor filed a petition to recall PW5 and to summon the chemical examiner. The Additional Public Prosecutor also filed a petition to receive the certified copy of the chemical analysis report with respect to the internal organs of the deceased Sulekha which were collected at the time of her autopsy. Those applications were allowed by the trial court. That order was challenged by the accused before the High Court in Crl.M.C.No.1307 of 2009. This Court confirmed the order passed by the trial court and dismissed Crl.M.C.No.1307 of 2009. Thereafter, PW5 was examined further and PW16 was also examined. On the side of the defence, DW1 and DW2 were examined and Ext.D1 was marked. The certified copy of the chemical examination report with respect to

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the internal organs of the victim was proved through PW16 and it was marked as Ext.P16.

7. After remand, the trial court found the accused guilty, as per the judgment dated 11.8.2009 and he was sentenced to undergo imprisonment for life and to pay a fine of ₹25,000/-. The said conviction and sentence are under challenge in Crl.A.No.508 of 2010 filed by the accused.

8. The prosecution mainly relies on the evidence of PW1 - the father of the deceased, PW3 - the minor daughter of the deceased, PW4 - the mother of the deceased and PW13 - the sister of the deceased as well as the chemical examination report and the medical evidence in the case.

9. The prosecution also relies on the evidence of PW9, who sold the poisonous substance to the accused, as well as the discovery of MO1 to MO4 under Section 27 of the Evidence Act as per Ext.P7 seizure mahazar.

10. PW1, the father of the deceased, stated that at the time of the marriage of the deceased with the accused he was working in a gulf country and sufficient dowry was given. After one year of the marriage, PW1 came to the native place. On 17.1.2002, PW1 got information that his daughter was hospitalised. While proceeding to the hospital, he was taken to the house of the accused where he found his daughter lying dead. He found that froth had oozed out from the mouth of the deceased. He gave information to the police and the FIR was registered.

11. PW3 was aged seven years at the time of occurrence. Her statement was recorded under Section 164 of the Code of Criminal Procedure. PW3 stated in evidence that on the date of the incident, she and her mother and sister went to bed after dinner. Her father (the accused) was in another room. He came to the room where the deceased was lying and enquired whether she was having pain. She told him that she had severe headache. At that time, the accused brought a black crystalline medicine and administered the same to the deceased. The accused pressed on

both sides of the cheek of the deceased and he also poured water into the mouth of the deceased. After some time, the deceased told PW3 “എന്റെ മോളെ, ഉപ്പച്ചി പറ്റിച്ചല്ലോ” (meaning thereby 'my daughter, father had cheated'). PW3 stated that her father insisted on her to go to bed stating that she had to go to the 'Madrassa' on the next day morning. The deceased insisted on going to the hospital, but the accused refused. Even though the deceased cried aloud, the accused stated that her illness would be cured by the next day morning. On the next day morning, PW3 found her mother dead. The accused told PW3 that her mother was dead. She also stated that the accused took the key of the door from the almirah and opened the door.

12. PW4, the mother of the deceased, stated about the ill-treatment meted out by the parents of the accused towards the deceased. She stated that the deceased was pregnant and the accused insisted on aborting the pregnancy. But the deceased was not willing for the same. The deceased told that her husband had brought a medicine and it was a black crystalline one. The deceased asked PW4 whether there is such a medicine. PW4 also stated that

the accused expressed his desire to marry the younger sister of the deceased.

13. PW13, the sister of the deceased, stated in evidence that on the previous week of the death of Sulekha, she met her. The deceased said that she was pregnant and the accused had brought a medicine for aborting the pregnancy. The deceased was not willing for abortion. On getting information, PW13 went to the house of the deceased. The deceased was about to be taken to the hospital in a cot. By the time, the doctor came to the place and the doctor stated that Sulekha was dead.

14. The trial court believed the evidence of PW3, PW4 and PW13. On a careful re-appraisal of the evidence of these witnesses, we do not find any ground to take a view different from the view taken by the trial court.

15. The evidence of PW9 would clearly establish that he sold furadan to the accused as per MO3 bill. PW9 identified MO1, the packet containing furadan. PW10 is the witness to the discovery of

MO1 to MO4. The accused took those articles from a heap of metal kept in one of the rooms of his house, in the presence of the Sub Inspector of Police and the witnesses. The court below, after analysing the facts and circumstances of the case, came to the conclusion that the recovery of MO1 to MO4 based on the information given by the accused is reliable.

16. PW5 stated in Ext.P3 postmortem certificate that the stomach of the deceased contained about 200 ml of pale violet fluid, few cooked rice and about two teaspoon full of purple crystalline substance. The postmortem certificate also indicates that the deceased was pregnant. The opinion as to cause of death is stated in Ext.P3 as follows: "Postmortem findings were consistent with death due to poisoning." PW5 stated in evidence that from his experience, he could say that the poison was furadan, an insecticide. PW5 stated that viscera and blood of the deceased were sent for chemical examination. According to PW5, 50 to 500 mg. of furadan per 1 kg of weight of a person is required to cause death. If one consumes furadan, symptoms will start by half an hour and a person will die within few hours.

17. PW16 stated that he prepared Ext.P16 and that he verified Ext.P16 with the original, namely, the office copy signed by him. The evidence of PW16 shows that Ext.P16 certified copy was prepared from the manuscript office copy. Ext.P16 shows that the internal organs were received with reference to letter PM No.82/02 dated 18.1.02 from Dr.K.Prasannan, Department of Forensic Medicine, Medical College, Kozhikode (PW5). Ext.P16 report shows that carbofuran, a poisonous carbamate compound, was detected in item Nos.1, 2 and 3, those items being the stomach and part of intestine, part of liver and one kidney and blood. Ext.P16 also shows that carbofuran is the active ingredient of the insecticide usually sold under the trade name 'furadan'.

18. Ext.P16 and the evidence of PW16 would clinchingly establish that the deceased died of consuming carbofuran, a poisonous carbamate compound which is usually sold under the trade name 'furadan'. The finding of the court below in this regard is beyond challenge.

19. The accused was examined as DW1. He denied the allegations made against him and also the confession and discovery of MO1 to MO4. He denied of having purchased furadan from the shop of PW9. DW1 stated in evidence that on 17th morning, he found Sulekha in a serious condition and she had vomited. He took her to the hospital of Dr.Dinesan at Vazhakkala and thereafter, to the Medical College Hospital. The death of Sulekha was declared at the Medical College Hospital. Thereafter, steps were taken for the postmortem examination. In cross examination, he stated that he did not remember whether Sulekha was examined by Dr.Ayishabi in the morning; that he got information that Sulekha died when she was taken to Dr.Dinesan's hospital by about 7 a.m. and that the Doctor stated that Sulekha died just then. He stated that there would be documents to show that Sulekha was examined by Dr.Dinesan. DW1 stated that Sulekha was taken to the Medical College Hospital as directed by Dr.Dinesan. According to DW1, only himself, his seven year old daughter (PW3) and Sulekha knew what transpired in the house on the date of occurrence. He stated that there is no reason why PW3 should state a falsehood against him. DW1 admitted that he poured a greenish coloured Ayurvedic medicine to

the mouth of Sulekha after pressing her cheeks. This was done since she was reluctant to take medicine. He stated that he does not know whether Sulekha exhibited restlessness after taking the medicine. Dr.Ayishabi, who examined Sulekha at about 7 a.m. on 17.1.2002, stated in evidence as DW2 that a few people came in a jeep and requested to attend a pregnant lady who was ill, at her house. DW2 accompanied them. DW2 saw a few men carrying a cot on which a lady was lying covered with bed sheet. On seeing DW2 (Dr.Ayishabi), they kept the cot down in front of the doctor. DW2 examined the lady and declared that she was dead. The father-in-law of the deceased asked DW2 whether the dead body could be buried immediately, which occurred very strange to the doctor. She also noticed that only one young lady was found weeping.

20. The evidence of DW1 and DW2 is irreconcilable with each other. If DW2 declared that Sulekha was dead, it cannot be believed that the accused would have taken her to Dr.Dinesan's hospital and thereafter, to the Medical College Hospital. It is clear from Ext.P2 inquest report that the inquest was conducted on 17.1.2002 at 2.45

p.m. If the evidence of DW1 is believed, the dead body of Sulekha must have been at the Medical College Hospital, Kozhikode at that time. DW1 admitted that he had administered medicine to Sulekha on the fateful night and he applied pressure on her cheeks to do so.

21. In the house of the deceased, the deceased, her minor daughters and the accused were the only inmates. Sulekha went to bed after taking food. She was found dead in the morning. It is clear from the medical evidence that Sulekha died as a result of consuming a poisonous substance. There is no case for the accused that Sulekha committed suicide or that the poisonous substance was available with her. On the other hand, there is clinching evidence that the accused purchased furadan from the shop of PW9 and he kept the same secretly. That he administered a substance as medicine to Sulekha is not in dispute. He did not disclose as to what that substance was. The violet coloured substance found in the stomach of the deceased was a poisonous substance called furadan. The evidence of PW3 is clear and cogent. There is no reason why PW3, the daughter of the accused, should tell a falsehood against him.

22. The motive alleged by the prosecution is also established by the evidence of PW4, the mother of the deceased, and PW13, the sister of the deceased.

23. The learned counsel for the appellant/accused submitted that in the nature of the evidence available in the case, the accused is entitled to the benefit of doubt. He also relied on the decisions of the Supreme Court in **Ramgopal v. State of Maharashtra** (AIR 1972 SC 656), **Jaipal v. State of Haryana** (AIR 2002 SC 3447), **State of U.P. v. Charles Gurmukh Sobhraj** (AIR 1996 SC 3473) and **Sharad Birdhichand Sarda v. State of Maharashtra** (AIR 1984 SC 1622). He submitted that the decision in **Anant Chintaman Lagu v. The State of Bombay** (AIR 1960 SC 500) cited by the learned Public Prosecutor was distinguished in **Sharad Birdhichand Sarda v. State of Maharashtra** (AIR 1984 SC 1622).

24. In **Anant Chintaman Lagu v. The State of Bombay** (AIR 1960 SC 500), the Supreme Court laid down the principles with respect to proof as to murder by poison and held thus:

“58. In these cases, the Court referred to three propositions which the prosecution must establish in a case of poisoning: (a) that death took place by poisoning; (b) that the accused had the poison in his possession; and (c) that the accused had an opportunity to administer the poison to the deceased.

59. If the evidence in a particular case does not justify the inference that death is the result of poisoning because of the failure of the prosecution to prove the fact satisfactorily, either directly or by circumstantial evidence, then the benefit of the doubt will have to be given to the accused person. But if circumstantial evidence, in the absence of direct proof of the three elements, is so decisive that the Court can unhesitatingly hold that the death was a result of administration of poison (though not detected) and that the poison must have been administered by the accused person, then the conviction can be rested on it.

.....

65. A case of murder by administration of poison is almost always one of secrecy. The poisoner seldom takes another into his confidence, and his preparations for the commission of the offence are also secret. He watches his opportunity and administers the poison in a manner calculated to avoid its detection. The greater his

knowledge of poisons, the greater the secrecy, and consequently the greater the difficulty of proving the case against him. What assistance a man of science can give he gives; but it is too much to say that the guilt of the accused must, in all cases, be demonstrated by the isolation of the poison, though in a case where there is nothing else such a course would be incumbent upon the prosecution.”

25. In **Sharad Birdhichand Sarda v. State of Maharashtra** (AIR 1984 SC 1622), the Supreme Court considered the mode and manner of proof of cases of murder by administration of poison and held thus:

“164. So far as this matter is concerned, in such cases the Court must carefully scan the evidence and determine the four important circumstances which alone can justify a conviction :

- (1) there is a clear motive for an accused to administer poison to the deceased.
- (2) that the deceased died of poison said to have been administered.
- (3) that the accused had the poison in his possession.
- (4) that he had an opportunity to administer the poison to the deceased.”

On facts, it was held that two ingredients have been proved while two other ingredients were not proved. The decision in **Anant Chintaman Lagu v. The State of Bombay (AIR 1960 SC 500)**, was referred to in para 170 of the judgment and it was distinguished on facts. We do not think that the Supreme Court in **Sharad Birdhichand Sarda v. State of Maharashtra (AIR 1984 SC 1622)**, has laid down something different from what has been held in **Anant Chintaman Lagu v. The State of Bombay (AIR 1960 SC 500)**.

26. In **Ramgopal v. State of Maharashtra (AIR 1972 SC 656)**, the Supreme Court held thus:

“15. Further, this court, in *Dharambir Singh v. State of Punjab*, Cri App. No. 98 of 1958, D/- 4-11-1958 (SC) dealing with a case of poisoning observed that where the evidence is circumstantial the fact that the accused had motive to cause death of the deceased though relevant, is not enough to dispense with the proof of certain facts which are essential to be proved in such cases. Three questions arise in such cases, namely (firstly), did the deceased die of the poison in question. (secondly), had the accused the poison in

question in his possession? And (thirdly), had the accused an opportunity to administer the poison in question to the deceased? It is only when the motive is there and these facts are all proved that the court may be able to draw the inference, that the poison was administered by the accused to the deceased resulting in his death.”

27. The learned counsel for the appellant relied on the decision in **Jaipal v. State of Haryana (AIR 2002 SC 3447)** and contended that when there is a conflict between the medical evidence and chemical analysis report, conviction cannot be sustained and the accused is entitled to the benefit of doubt. On going through the judgment of the Supreme Court, we do not find any such dictum having been laid down. In the present case, there is no conflict between the medical evidence and the Chemical Analysis Report. In Jaipal's case, the Supreme Court, after referring to the four ingredients to constitute murder by poisoning stated in *Birdhichand Sarda v. State of Maharashtra (AIR 1984 SC 1622)*, held thus:

“28. We may hasten to add that the availability of the third piece of evidence as necessary to establish the case of murder by poisoning has been doubted in some of the later decisions. To wit, in Bhupinder Singh v. State of Punjab, AIR 1988 SC 1011 it has been held that there may be very many facts and circumstances proved against the accused which may call for tacit assumption of the factum of possession of poison with the accused, and therefore, the insistence on proof of presence of poison with the accused is neither desirable nor practicable. Anant Chintaman Lagu v. State of Bombay, AIR 1960 SC 500 is a case peculiar to its own facts and this Court by a majority of 2:1 held that even in the absence of a decisive finding as to the exact cause of death and on a finding that the death of the victim was the result of the administration of some unrecognised poison or drug which would act as a poison, a finding as to guilt can be arrived at based on circumstantial evidence. It was the case of extreme cunning and pre-meditation. The conduct of the accused after the death of his wife was unusual and abnormal and was so knit together as to make a network of circumstances pointing only to his guilt. Still the majority opinion observed:

"Circumstantial evidence in this context means, a combination of facts creating a network through which there is no escape for the accused, because the facts taken as a whole do not admit of any inference but of his guilt."

28. We do not think that the decision in **State of U.P. v. Charles Gurmukh Sobhraj (AIR 1996 SC 3473)** would apply to the facts of the present case.

29. In the present case, all the four circumstances stated by the Supreme Court in **Sharad Birdhichand Sarda v. State of Maharashtra (AIR 1984 SC 1622)** have been established. The trial court arrived at the finding on these aspects after carefully analysing the evidence on record. On re-appraisal of the evidence, we do not find any reason to interfere with the said finding of fact.

30. For the aforesaid reasons, we are of the view that the conviction and sentence passed by the trial court do not justify any interference in the Criminal Appeal. The Criminal Appeal lacks merit and it is, accordingly, dismissed.

31. Before parting of the case, we find it expedient to note that in respect of a murder which took place on 17.1.2002, the High Court could finally dispose of the Criminal Appeal only in 2015. The only reason for this delay was the non-availability of the chemical analysis report before the trial court. It is seen that the samples were sent to the Regional Chemical Examiners Laboratory, Kozhikode on 18.1.2002. It is also seen that the chemical examination report was prepared and signed in March, 2004. But, when the case was disposed of by the trial court on 6.12.2004, the chemical examiner's report was not made available before the Sessions Court. This Court, while dealing with Crl.A.No.398 of 2005 called for the chemical analysis report and by that time, Ext.P15 was made available. Even after remand, Ext.P16 was brought on record much later. Ext.P16 is the document which would show the results of chemical analysis with respect to internal organs of the deceased. In this context, we would like to refer to the judgment of the Supreme Court in Crl.A.No.259 of 2009 (*Joshinder Yadav v. State of Bihar*) wherein the Supreme Court issued the following directions:

“24. Having noticed that, in several cases where poisoning is suspected, the prosecuting agencies are not taking steps to obtain viscera report, we feel it necessary to issue certain directions in that behalf. We direct that in cases where poisoning is suspected, immediately after the post-mortem, the viscera should be sent to the FSL. The prosecuting agencies should ensure that the viscera is, in fact, sent to the FSL for examination and the FSL should ensure that the viscera is examined immediately and report is sent to the investigating agencies/courts post haste. If the viscera report is not received, the concerned court must ask for explanation and must summon the concerned officer of the FSL to give an explanation as to why the viscera report is not forwarded to the investigating agency/court. The criminal court must ensure that it is brought on record.”

The Supreme Court also directed the Registry to send a copy of the order to all the High Courts with a direction to circulate the same to all the subordinate Criminal Courts, to the Director of Prosecution, to the Secretary, Ministry of Home Affairs, to the Secretary, Home Department and to the Director, Forensic Science Laboratory within the jurisdiction of the respective High Courts.

The evidence of PW16 shows that there was pressure of work in the Regional Chemical Examiners Laboratory and that the Laboratory caters to the needs of five Districts. The accused relied on Ext.D1 newspaper report. Ext.D1 report shows that the internal organs of the victims in about 2000 cases were waiting examination at the Chemical Examination Laboratory, Kozhikode. Taking into account the directions issued by the Supreme Court as quoted above, we only add that the State Government shall do the needful to avoid delay in the matter of examination of samples at the Regional Chemical Examiners Laboratories and Forensic Science Laboratories.

(K.T.SANKARAN)
Judge

(B.SUDHEENDRA KUMAR)
Judge

ahz/