

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 28TH DAY OF MAY 2015/7TH JYAISHTA, 1937

CRL.A.No. 718 of 2010 ()

AGAINST THE JUDGMENT IN SC 591/2008 of ADDL.DISTRICT
COURT (ADHOC), KOZHIKODE dated 26-10-2008

APPELLANT(S) :

K.K.POULOSE ALIAS SAMKUTTY,
AGED 49 YEARS, S/O. KURIAKOSE,
KADUMKEERIYIL, KOODATHAI AMSOM
PALOTH DESOM

BY ADVS.SRI.JOHNSON ABRAHAM
SRI.NELSON ABRAHAM

RESPONDENT(S) :

STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM

BY ADV. PUBLIC PROSECUTOR SRI. RAJESH VIJAYAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 28-05-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

CR

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

Crl.Appeal No.718 of 2010 D

Dated this the 28th day of May 2015

JUDGMENT

Sudheendra Kumar J.,

The appellant is the accused in S.C. No.591/2008 on the files of the Additional Sessions Court (Adhoc -1) Kozhikode, who in this appeal challenges the judgment of conviction and sentence passed by the trial court under Section 302 I.P.C.

2. The prosecution allegation is that on 6.10.2007, at about 11.00 a.m., the deceased Paulose was beaten by the appellant with an iron pipe on his head and neck at the court yard of the house of the deceased, and as a consequence, the deceased died at or about the same time.

3. On getting information with regard to the death of the

deceased, PW1 went to the place of occurrence. Thereafter, he went to the Police station and gave Ext.P1 F.I. Statement. On the basis of Ext.P1 F.I.Statement given by PW1, PW15 Assistant Sub Inspector of Police registered Ext.P1(a) F.I.R. under section 302 I.P.C. The investigation was taken over by PW16, the then Circle Inspector of Police on 6.10.2007 itself. He conducted the inquest on the body of the deceased at 4.30 p.m. on 6.10.2007 and prepared Ext.P5 Inquest report. On 7.10.2007 at 12 Noon, PW16 arrested the appellant. In pursuance to the disclosure statement given by appellant and as led by appellant, MO1 iron pipe was recovered by PW16 as per Ext.P4 mahazar. After completing the investigation, PW16 laid the charge before the Magistrate Court concerned.

4. The learned Magistrate, after complying with the legal formalities, committed the case to the Sessions Court, Kozhikode. The Sessions Court made over the case to the court below for trial and disposal in accordance with law.

5. Since the appellant did not plead guilty, the trial was conducted. In the trial, the prosecution examined PW1 to PW16 and marked Exts.P1 to P21, besides identifying MO1 to MO6 series. After the closing of the prosecution evidence, the appellant was examined under Section 313 Cr.P.C., wherein he denied the incriminating materials appearing in the evidence of prosecution witnesses. He further filed a statement denying his involvement in the commission of the offence. Thereafter, since there was no scope for an order of acquittal under Section 232 Cr.P.C., the appellant was called upon by the court below to enter on his defence. However, the appellant did not adduce any evidence. After evaluating the evidence, the court below found the appellant guilty under Section 302 I.P.C. and convicted him thereunder and sentenced him to imprisonment for life and a fine of ₹10,000/- with a default clause for rigorous imprisonment for one year.

6. We have heard the learned counsel for the appellant,

Sri.Johnson Abraham and also the learned Public Prosecutor, Sri.Rajesh Vijayan.

7. The prosecution mainly relies on the evidence of PW2 and PW3 with regard to the extra-judicial confession made by the appellant and also the medical evidence of PW9 and Ext. P8 to connect the appellant with the commission of the offence. PW2 is a local leader of Marxist Party of India. He stated that on 6.10.2007 at about 12 noon, while he was taking rest at home, the appellant came to his house and told him that the appellant had committed murder of a person. When PW2 asked about the person whom he killed, the appellant stated that he killed the deceased in this case. After some time, he went to the bus stop, where he saw Sri. Mathew, who is a relative of the deceased. He went to the place of occurrence in the motor bike of the said Mathew. Thereafter, the said Mathew reported the matter to the police over telephone.

8. PW3 is another person to whom also the appellant made

extra-judicial confession. According to PW3, on 6.10.2007 at about 11.30 a.m., while he was tapping the rubber trees, the appellant came near to him and told him that he had given a blow to deceased Poullose. When PW3 asked the appellant as to how he inflicted the blow, the appellant told PW3 that he inflicted the blow with the pipe of a sprayer pump. The appellant also requested PW3 to take the deceased to the hospital. PW3 stated that the appellant sought the help of PW3 with the intention of taking the deceased to the hospital, as PW3 was having a vehicle. Since the quarrel between the deceased and the family members of the appellant was a routine affair, PW3 did not incline to take the deceased to the hospital or interfere in the matter. At about 3 p.m. on that day, his brother Mathew and PW2 came to his house. They told PW3 that the appellant had made extra-judicial confession to PW2.

9. PW9 is the doctor who conducted the postmortem examination on the body of the deceased and issued Ext.P8

postmortem certificate. PW9 stated that the death of the deceased was due to the injuries sustained to his head and neck. Injury Nos.1, 2, 3, 7 and 8 in Ext.P8 certificate could be caused with MO1 iron pipe. PW9 further stated that the other injuries could be also inflicted with MO1 iron pipe. The further evidence of PW9 is that injury Nos.1, 5 and 6 in postmortem certificate could not be caused by a single act. Injury Nos.1 to 6 could be caused by independent separate actions, as per the evidence of PW9.

10. The learned counsel for the appellant has argued that PW2 and PW3 had enmity towards the appellant, as the mediation talks in connection with the property dispute between the deceased and the appellant, convened at the mediation of PW2 and PW3 could not culminate in settlement, as the appellant was not amenable to the suggestions made by PW2 and PW3 and in the said circumstances, the evidence of PW2 and PW3 with regard to the extra-judicial confession, cannot be acted upon.

11. The evidence of PW2 would show that PW2 is a local

leader of Marxist Party of India. It is born out from the evidence of PW2 that the appellant had approached PW2 with the expectation that PW2 would be able to help the appellant. The evidence of PW3 would show that the appellant had approached PW3 with the intention to take the deceased to the hospital with the aid of PW3, as PW3 had a vehicle. Both PW2 and PW3 are relatives of both the accused and the deceased. The evidence of PW2 and PW3 clearly shows that both PW2 and PW3 had no enmity at all towards the appellant to falsely implicate the appellant in a case like this. That apart, the close relatives of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent person. Having meticulously gone through the evidence of PW2 and PW3, we are satisfied that the evidence of PW2 and PW3 with regard to the extra-judicial confession made by the appellant is, natural, credit worthy and hence acceptable. In the said circumstances, the argument advanced by the learned counsel of the appellant in this

regard, does not hold good.

12. The learned counsel for the appellant has further argued that since the injuries sustained by the deceased do not tally with the extra-judicial confession, the evidence of PW2 and PW3 has to be discarded on that reason alone. The learned counsel has relied on the decision of the Apex Court in **Chhittar v. State of Rajasthan [1995 Supp.(4) SCC 519]** to buttress his argument. In **Chittar's case** (supra), the extra-judicial confession was that the accused had inflicted injury on the head of the deceased. However, the doctor who conducted autopsy on the body of the deceased in that case found that there was no injury on the head of the deceased. The postmortem on the body of the deceased in that case was conducted after 20 days of the death of the deceased. In the said circumstances, the Apex Court held that since the injuries sustained by the deceased as per the postmortem certificate were

not in terms with the extra-judicial confession, the extra-judicial confession could not be acted upon. However, in the case on hand, the appellant made extra-judicial confession to PW2 that the appellant killed the deceased. The appellant did not specifically state to PW2 with regard to the overt acts made by the appellant. However, when the appellant made extra-judicial confession to PW3, the appellant had stated that he had given a blow to the deceased. The appellant did not state to PW3 that the appellant gave only one blow. The appellant further stated to PW3 that he had given a blow on the head of the deceased with an iron pipe. Ext.P8 post mortem certificate shows that there is corresponding injury on the head of the deceased. Therefore, it cannot be said that the injuries sustained by the deceased as per Ext.P8 post mortem certificate do not tally with the confession statement made by the appellant. Thus, the facts of this case are different from the facts in **Chhittar's** case (supra) and consequently, the arguments advanced

by the learned counsel for the appellant in this regard, cannot be accepted.

13. It has been further argued by the learned counsel for the appellant that even though the extra-judicial confession was made to PW2 by the appellant at about 12 noon on 6.10.2007, PW2 disclosed the matter to the police only on 7.10.2007 and in the said circumstances, the extra-judicial confession stated to have been made by the appellant cannot be acted upon to find the appellant guilty. It is true that PW2 stated that the extra-judicial confession was made by the appellant to PW2 at about 12 Noon on 6.10.2007. PW2 is a local leader of Marxist Party of India. Therefore, he is a prominent person in the locality. In the said circumstances, it cannot normally be expected that such a person would come forward to testify falsely before the court. The evidence on record would show that PW2 had reported the matter to the police immediately when he was interrogated by the police for the first time. PW3 is also a prominent person in the locality. PW3 had

also given statement to the police immediately when he was interrogated by the police for the first time. In the said circumstances, we do not find any delay on the part of PW2 or PW3 in giving statement to the police with regard to the extra-judicial confession made by the appellant. Having gone through the facts and circumstances of the case, as discussed above, we do not find any reason to disbelieve the evidence of PW2 and PW3, particularly when no material contradiction or omission had been brought in their evidence during their examination before the court. For the said reasons, the argument advanced in this regard, cannot be accepted.

14. The learned counsel for the appellant relying on the decisions in **State of Orissa v. Arjun Teli [2011 Crl.L.J.798]** and **C.K.Raveendran v. State of Kerala [AIR 2000 SC 369]**, argued that since the appellant had consumed alcohol, the extra-judicial confession alleged to have been made by the appellant under

intoxication cannot be accepted. In **Arjun Teli's** case (supra), the accused had given extra-judicial confession under the influence of alcohol. In **C.K.Raveendran's** case (supra), the accused had consumed arrack with the witness and thereafter, he made extra-judicial confession to the witness. The facts of the case on hand are different from the facts in the above said decisions. In the case on hand, there is no material, apart from the oral testimony of PW2, to indicate that the appellant had consumed alcohol. The evidence of PW2 itself is only to the effect that he had felt the smell of alcohol from the appellant. There is absolutely no material before the court to indicate that the appellant was under the influence of alcohol at the relevant time. That apart, after visiting the house of PW3, the appellant proceeded to the house of PW2 without any difficulty. This would also indicate that the appellant was in a fit state of mind and not under the influence of alcohol at the relevant time. For the said reasons, we are unable to

accept the argument of the learned counsel for the appellant in this regard.

15. The Apex Court in **Baskaran and another v. State of Tamil Nadu** [2014(5) SCC 765] held in paragraph 17 thus:-

“It is no doubt true that this Court time and again has held that an extra-judicial confession can be relied upon only if the same is voluntary and true and made in a fit state of mind. The value of the evidence as to the confession like any other evidence depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. But it is not open to any court to start with the presumption that extra-judicial confession is insufficient to convict the accused even though it is supported by the other circumstantial evidence and corroborated by independent witnesses, which is the position in the instant case. The courts cannot be

unmindful of the legal position that if the evidence relating to extra-judicial confession is bound credible after being tested on the touchstone of credibility and acceptability it can solely form the basis of conviction.”

16. In **State of Rajasthan v. Raja Ram** [2003(8) SCC 180], the Apex Court held thus:-

“An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession

was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility.”

17. In **Kulvinder Singh and another v. State of Haryana**

[2011 (5) SCC 258], the Apex Court quoted the ratio in **Raja Ram's** case (supra) with approval.

18. The Apex Court in **Podyami Sukada v. State of Madhya Pradesh** (AIR 2010 SC 2977) observed thus:-

“Law does not contemplate that the evidence of an extra-judicial confession should in all cases be corroborated. It is not an inflexible rule that in no case conviction can be based solely on extra-judicial confession. It is basically in the realm of appreciation of evidence and a question of fact to be decided in the facts and circumstances of each case.”

19. In the decision in **Sansar Chand v. State of Rajasthan** [2010(10) SCC 604], the Apex Court observed that there is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material.

20. The Apex Court in **Aftab Ahmad Anasari v. State of Uttaranchal** (AIR 2010 SC 773) observed thus:-

“The suggestion made by the defence that the police used to visit house of this witness daily or that the witness used to go to the police station daily, is denied by the witness. The manner in which this suggestion is made to the witness indicates that the appellant was entertaining a notion that the witness would be in a position to help him because the witness that the witness was going to the Police Station daily and policemen were also visiting him.”

21. It is now well settled that an extra-judicial confession can be relied upon if the same is voluntary and made in a fit state of mind. The value of the evidence as to the extra-judicial confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra-judicial confession is insufficient to convict the accused eventhough it is supported by other circumstantial evidence,

which is the position in the instant case. It is basically in the realm of appreciation of evidence and a question of fact to be decided on the facts and circumstances of each case. It is clear from the evidence of PW2 that the appellant had approached PW2 with the expectation that PW2 would be able to help the appellant, as PW2 was the local leader of the Marxist Party of India. The evidence of PW3 would show that the appellant had approached PW3 with the intention to take the deceased to the hospital in the car of PW3, to save the life of the deceased. Thus, the evidence on record shows that there were specific reasons for the appellant to approach PW2 and PW3 after the incident. In the said circumstances, it cannot be said that the extra-judicial confession made by the appellant to PW2 and PW3 is not voluntary. There is absolutely no material before the court to indicate that PW2 and PW3 were biased and in inimical terms with the appellant. PW2 and PW3 are prominent persons in the locality. There is nothing on record to show that PW2 and PW3 had any motive for attributing

an untruthful statement to the appellant. Having gone through the evidence of PW2 and PW3, we are satisfied that PW2 and PW3 are credible witnesses and hence, their evidence can be safely acted upon.

22. The learned counsel for the appellant, relying on the decision in **Jackaran Singh v. State of Punjab (1995 Crl.L.J.3992: AIR 1995 SC 2345)**, argued that since the signature or the thumb expression of the appellant was not obtained in the disclosure statement of the appellant under Sec. 27 of the Evidence Act, the recovery of MO1 iron pipe as per Ext.P4 mahazar is vitiated.

23. There is no dispute with regard to the fact that no signature of the appellant was obtained in the confession statement of the appellant under Section 27 of the Evidence Act. Now, the question to be considered is as to whether the failure on the part of PW16, in not getting the signature of the appellant in the

confession statement of the appellant under Section 27 of the Evidence Act, would affect the authenticity or reliability of the disclosure statement. The Apex Court in **Jackaran Singh's Case (supra)** observed in para 8 as follows:

“The absence of the signatures or thumb impression of an accused on the disclosure statement recorded under Section 27 of the Evidence Act detracts materially from the authenticity and the reliability of the disclosure statement”.

The above judgment was pronounced by the Apex Court on 20-4-1995. The said judgment was reported in **1995 CrL LJ 3992 and AIR 1995 SC 2345**. Thereafter, the Apex Court suo motu found that the above observation in Para 8 of the judgment was erroneous. Therefore, the Apex Court directed the Registry as per order dated 24-4-1996 to post the case before the same Bench on 25-4-1996. The order of the Apex Court dated 24-4-1996 is

extracted below:-

“We have come across the judgment in Criminal Appeal No. 472 of 1985 decided on April 25, 1995 reported in 1995 CrL.J. 3992. Some of the observations made in para 8 of the said judgment appear to be erroneous. Let the file of the case be put up for suo moto review before this Bench tomorrow i.e. 5-4-1996”.

Thereafter, on 25-4-1996, the Apex Court suo motu reviewed the above said judgment and issued a corrigendum. The order dated 25-4-1996 of the Apex Court is extracted hereunder:-

“We have examined the judgment in Cr.Appeal No. 472/1985 decided on April 25 1995, reported in 1995 Cr.L.J.3992. The following corrigendum be issued:-

Instead of

“does not bear the signatures or the thumb impression of the appellant. Even, the recovery memo of the revolver and the cartridges, Ext. P-9A, which is also attested by Yash Pal and Sukhdev Singh, ASI does not bear either the signatures or the thumb impression of the accused. The absence of the signatures or the thumb impression of an accused on the disclosure statement recorded under Section 27 of the Evidence Act detracts materially from the authenticity and the reliability of the disclosure statement”

Read

“was made long time after the appellant was taken into custody by the investigating agency and it is doubtful whether the same was voluntarily made by the appellant”.

Eventhough the Apex Court issued the above said corrigendum indicating that the view of the Apex Court with reference to the failure to obtain signature of the accused in the confession statement, had been reviewed and held to be erroneous, the publishers who had published the original judgment in **Jackaran Sing's Case** (supra) were not inclined to publish the corrigendum

issued by the Apex Court. Subsequently, the Judgment in **Jackaran Sing's Case** (*supra*) was reported in 1997 SCC(Cri) 651. However, it is unfortunate to note that the corrigendum whereby the Apex Court suo motu reviewed its order dated 20-4-1995 was not published in the said journal. The only journal in which the above said corrigendum was published is the Kerala Judicial Vision (1998 J.V. (1) Page 1 to 5). The decision in **Jackaran Singh's Case** (*supra*) along with the order of the Apex Court suo motu reviewing its order dated 20-4-1995 had been published in the said journal. Referring to the corrigendum whereby the Apex Court reviewed its order on 25-4-1996, the Division Bench of the Madras High Court in **Natarajan v. Union Territory of Pondicherry** (2003 Crl.L.J. 2372 expressed its anguish regarding the non-publication of the corrigendum in the journals having circulation through out India. The Madras High Court also noticed that the only journal wherein the aforesaid Judgment of the

Supreme Court along with the corrigendum was published was the **Kerala Judicial Vision (1998 JV (1) Page 1 to 5).**

24. Since the other journals failed to publish the corrigendum, many of the members in the legal fraternity were in darkness regarding the corrigendum issued by the Supreme Court.

25. The Supreme Court in **State of Rajasthan v. Teja Ram [1999 CrL.L.J. 2588 (SC)] = AIR 1999 SC 1776** observed thus:

“The resultant position is that the investigating officer is not obliged to obtain the signature of an accused in any statement attributed to him while preparing seizure-memo for the recovery of any article covered by S. 27 of the Evidence Act. But if any signature has been obtained by an investigating officer, there is nothing wrong or illegal about it”

Thus, now it is settled that it is not necessary to get the signature of an accused in any statement attributed to him while preparing mahazar for the recovery of any article covered by Sec. 27 of the

Evidence Act. However, even if the Investigating Officer obtains the signature of the accused in the seizure mahazar for the recovery of any article under Section 27 of the Evidence Act, there is nothing wrong or illegal in it. In view of the above discussion, the argument in this regard advanced by the learned counsel for the appellant fails.

26. In this case, there is evidence of PW2 and PW3 with regard to the extra-judicial confession made by the appellant. The evidence of PW16 would show that he arrested the appellant on 7.10.2007 at 12 Noon and when questioned, the appellant had given disclosure statement and pursuant to the disclosure statement and as lead by the appellant, MO1 iron pipe was recovered by PW16 as per Ext. P4 mahazar. The relevant portion of the disclosure statement of the appellant finds place in Ext. P4 mahazar. The recovery of MO1 iron pipe at the instance of the appellant is corroborated by the evidence of PW4. The evidence of PW16 regarding the discovery of MO1 iron pipe pursuant to the

disclosure statement of the appellant, is no doubt, admissible under section 27 of the Evidence Act. MO1 iron pipe was found to be stained with human blood as per Ext.P21 chemical analysis report. The blood stains detected on MO1 iron pipe fastens the culpability of the appellant. Thus, apart from the evidence regarding the extra-judicial confession made by the appellant to PW2 and PW3, there is convincing evidence with regard to the recovery of blood stained MO1 iron pipe at the instance of the appellant pursuant to the disclosure statement given by the appellant. The evidence of PW1 to PW3 would show that the deceased had property dispute with the appellant and his father. The evidence of PW2 and PW3 clearly shows that they tried to settle the above said dispute. It is in the evidence of PW1 to PW3 that there was frequent quarrels by the appellant and his father with the deceased Poulouse in connection with property dispute. The evidence on record would show that the appellant and his father were in inimical terms with the deceased. Thus, the evidence on

record as discussed above, would make it clear that the enmity of the appellant with the deceased, in connection with the property dispute, was the motive for the incident. Thus, the prosecution has established the motive as well.

27. The evidence of PW2 and PW3 shows that after inflicting injuries on the deceased, the appellant wanted to get the deceased admitted in the hospital, to save the life of the deceased. This itself would show that the appellant did not have the intention to commit the murder of the deceased. Therefore, the appellant can be imputed with the knowledge that by the acts of the appellant, he was likely to cause the death of the deceased. The facts and circumstances of the case, as discussed above, in our view give rise to the offence of culpable homicide not amounting to murder punishable under Part II of Section 304 I.P.C.

28. In view of the above discussion, we are satisfied that the prosecution has succeeded in establishing that the appellant committed the offence under Section 304 Part II I.P.C. and not the

offence under Section 302 I.P.C. In the said circumstances, we set aside the conviction and sentence passed by the court below under Section 302 I.P.C. and convict the appellant under Section 304 Part II I.P.C. The appellant is sentenced to rigorous imprisonment for 8 years under section 304 Part II I.P.C., which in our view, is sufficient to meet the ends of justice.

In the result, this appeal stands allowed in part as above.

**Sd/- K.T.SANKARAN,
JUDGE**

**Sd/-B.SUDHEENDRA KUMAR,
JUDGE**

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P.S. to Judge