

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

WEDNESDAY, THE 3RD DAY OF JUNE 2015/13TH JYAISHTA, 1937

CRL.A.No. 1121 of 2010 ()

AGAINST THE JUDGMENT OF CONVICTION AND SENTENCE DATED
23.1.2010 IN SC 156/2008 ON THE FILE OF THE ADDL.DISTRICT AND
SESSIONS COURT, FAST TRACK (ADHOC-I), KOZHIKODE

APPELLANT(S): ACCUSED

MOHSIN ANEES, 22 YEARS,
S/O.MOHAMMED KOYA
MOOSARIKKANDY HOUSE
KIZHAKKOTH AMSOM
PANOOR DESOM
KOZHIKODE THALUK AND DISTRICT.

BY ADV. ADV.PINKU H THALIYATH (STATE BRIEF)

RESPONDENT(S): COMPLAINANT

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1. STATE OF KERALA
REPRESENTED BY THE SHO KODUVALLY POLICE STATION
KODUVALLY.P.O., KOZHIKODE DISTRICT.
 2. DIRECTOR OF PUBLIC PROSECUTION
HIGH COURT OF KERALA, ERNAKULAM.

R1 BY ADV. PUBLIC PROSECUTOR SRI.K.K.RAJEEV

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
03-06-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

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

Crl.Appeal No.1121 of 2010 G

Dated this the 3rd day of June, 2015

JUDGMENT

Sudheendra Kumar, J.

The appellant is the accused in S.C.No.156 of 2008, on the files of the Additional Sessions Court (Adhoc-I), Kozhikode, who in this appeal challenges the judgment of conviction and sentence passed by the trial court under Sections 302 and 392 I.P.C.

2. The prosecution case is that on 7.10.2006, at about 4 a.m., the appellant with the intention to commit theft after committing the murder of the inmates of the house, entered into the house of deceased Kunhikoya Haji by removing the tiles of the roof of the house and mixed furidan with the cooked rice kept for eating in the early morning, as it was a Ramzan month. The

appellant also committed theft of MO1 to MO7 gold ornaments from the house of the deceased.

3. The deceased ate the above said cooked rice. Then, the deceased felt discomfort. Immediately, the deceased was taken to the hospital where he was declared dead by the doctor. After confirmation of the death by the doctor, the dead body was brought to the house of the deceased. When the wife of the deceased entered into the bedroom to collect a white cloth to cover the dead body, she noticed that the almarah was found opened. On further scrutiny, it was noticed that an amount of Rs.50,000/- and 9 sovereigns of gold ornaments were stolen from the almarah. Therefore, PW2 went to the police station and gave Exhibit P2 F.I. Statement to PW18, who in turn registered Exhibit P2(a) F.I.R. under Sections 457, 380 and 461 I.P.C.

4. Subsequently, it was noticed that the cooked rice kept in the house was having some yellow colour. Two packets having

yellow crystals were also found in the kitchen. Therefore, suspicion was developed with regard to the death of the deceased. In the said circumstances, PW2 went to the police station and lodged Exhibit P3 F.I. Statement. Pursuant to Exhibit P3 F.I. Statement, PW20 registered Exhibit P3(a) F.I.R. under the caption 'suspicious death'. The body of the deceased was exhumed and inquest was conducted by PW16 Tahsildar on 12.10.2006. PW16 prepared Exhibit P6 inquest report. The postmortem on the body of the deceased was conducted by PW17 at the spot. While so, the appellant was found by PW21 in a suspicious condition 17.10.2006. PW21 arrested the appellant. The appellant was found in possession of MO1 to MO7 gold ornaments with him at the time of his arrest. The investigation was conducted by PW20. After completing the investigation, PW20 laid the charge before the court.

5. After complying with the legal formalities, the learned

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

6. Since the appellant did not plead guilty, the trial was conducted. In the trial, PW1 to PW27 were examined and Exhibits P1 to P27 were marked for the prosecution, besides identifying MO1 to MO16. Exhibit D1 contradiction in the statement of PW1 and Exhibit D2 contradiction in the statement of PW2 were marked during their cross-examination. Thereafter, the appellant was examined under section 313 Cr.P.C, wherein he denied the incriminating materials appearing in the evidence of the prosecution witnesses. Thereafter, since there was no scope for an order of acquittal under Section 232 Cr.P.C., the appellant was called upon to enter on his defence. DW1 was examined for the defence. After evaluating the evidence, the court below found the appellant guilty under Sections 302 and 392

I.P.C. and convicted him thereunder and sentenced him to imprisonment for life and a fine of Rs.10,000/- with a default clause for rigorous imprisonment for one year under Section 302 I.P.C. and rigorous imprisonment for five years and a fine of Rs.5,000/- with a default clause for rigorous imprisonment for one year under Section 392 I.P.C.

7. We have heard the learned State Brief Advocate Sri.Pinku.H.Thaliath and the learned Public Prosecutor Sri.K.K.Rajeev.

8. This is a case where the prosecution relies on circumstantial evidence to connect the appellant with the commission of the offence. PW2 is the son of the deceased. PW2 was residing near to the house of the deceased. PW3, who is the son of PW2, was residing with the deceased in the house of the deceased during the relevant period. The evidence of PW2 is that he got information at about 4 a.m. that his father, the deceased

Kunhikoya Haji, had some ailment. He came to the house of the deceased and took him to the hospital. The doctor after examining declared that the deceased was dead.

9. Now the question to be considered is as to whether the prosecution has established the cause of death of the deceased. After conducting the postmortem examination, PW17 issued Exhibit P12 postmortem certificate. PW17 stated in Exhibit P12 that the opinion regarding the cause of death could be expressed only after getting the chemical examination report of the viscera of the deceased. After getting the result of chemical examination of the viscera of the deceased, PW17 issued Exhibit P13 postmortem certificate stating the final opinion, which can be extracted thus :-

“Decomposition precludes a definite opinion as to the cause of death. He was having valvular heart disease and significant atherosclerosis (natural decease) of the major blood vessels and coronary arteries (blood vessels of the heart) with 75 - 90% narrowing of lumen of the coronary arteries.”

10. The evidence of PW17 coupled with Exhibit P13 would show that no poison was detected in the viscera of the deceased. The evidence of PW17 and Exhibits P12 and P13 are not conclusive with regard to the cause of death of the deceased. The deceased was aged 90 years during the relevant period. He was having serious ailments also during the relevant period. The first opinion expressed by PW17 in Exhibit P12 would indicate that the deceased died due to heart ailments. However, PW17 reserved his final opinion subject to the result of chemical examination of the viscera of the deceased, to exclude the chance of death by poison. It is also relevant to mention at this juncture that PW3, who also was hospitalised in connection with the ailment after consuming the food at about 4 a.m. on the fateful day, did not exhibit any symptom of poison like furidan. PW8, who treated PW3, opined that no symptom of poison on PW3 could be noticed by him. As per Exhibit P7, PW3 was admitted in

the hospital at 7.10 a.m. on the fateful day and he continued there till he was discharged from the hospital. The evidence of PW8 coupled with Exhibit P7 would make it clear that no poison was found in the stomach of PW3. Exhibit P27 certificate of chemical analysis shows that no poison was detected in the remanant of the cooked rice examined in the laboratory, which would also rule out the possibility of having caused the death of the deceased by poison. The evidence discussed above shows that there is absolutely no material to indicate that the deceased died due to poison. There is also no material to find that the death of the deceased was homicidal. Since the cause of death is not established by the prosecution, it is not necessary or relevant to advert to the evidence of DW1. The above discussion would make it clear that the prosecution failed to establish that the death of the deceased was homicidal and consequently, the conviction and sentence passed by the trial court under Section 302 I.P.C.

cannot be sustained.

11. Now the question to be considered is as to whether there is any material to find that the appellant committed the offence under Section 392 I.P.C. PW21 was the Sub Inspector of Police who arrested the appellant on 17.10.2006 at 11 a.m. The evidence of PW21 is that when he arrested the appellant, the appellant was found in possession of MO1 to MO5 series and MO7 gold ornaments with him. PW11 was present along with PW21 at the time of arrest of the appellant. PW11 also supported the evidence of PW21 with regard to the arrest of the appellant and the seizure of the gold ornaments from the appellant. The evidence of PW12 is that while he was working as the salesman of Atlas Fashion Jewellery, he witnessed the handing over of five gold ornaments by the owner of the shop to the police. The evidence of PW23 is that he seized MO6 series of gold ornaments from Atlas Fashion Jewellery as produced by its owner as per

Exhibit P9 seizure mahazar. The evidence of PW23 coupled with the evidence of PW12 would prove that the accused had sold the said ornaments to Atlas Fashion Jewellery. The evidence of PW11 and PW21 would show that the appellant was found in possession of MO1 to MO5 series and MO7 gold ornaments at the time when he was arrested on 17.10.2006. PW7 is the eldest son of the deceased, who identified MO1 to MO7 and stated that the said ornaments belonged to her mother. The evidence of PW2, PW5 and PW7 coupled with Exhibit P2 would show that theft was committed from the house of the deceased on 7.10.2006. The appellant was found in possession of MO1 to MO5 series and MO7 gold ornaments stolen from the house of the deceased, shortly after the commission of theft from that house. The appellant did not give any explanation, much less any plausible explanation, with regard to the possession of the above said gold ornaments by him. The evidence of PW23 coupled with the

evidence of PW12 would prove that the appellant had sold MO6 series of gold ornaments to Atlas Fashion Jewellery. Therefore, the only inference possible is that the appellant committed theft of MO1 to MO7 gold ornaments from the house of the deceased as alleged by the prosecution.

12. Section 390 of the Indian penal code provides that the theft is “robbery” if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. In this case, there is no material before the court to find that the appellant voluntarily caused or attempted to cause to any person death or hurt or wrongful restraint or fear of instant death or of instant hurt or of instant wrongful restraint while committing theft. In the said

circumstances, the offence committed by the appellant does not fall within the ambit of Section 390 I.P.C., punishable under Section 392 I.P.C. Therefore, the offence committed by the appellant falls within the ambit of Section 380 I.P.C. and consequently, the conviction and sentence on the appellant under Section 392 I.P.C. cannot be sustained.

13. In view of the above discussion, we are satisfied that the prosecution failed to establish that the appellant committed the offence under Sections 302 and 392 I.P.C. However, the prosecution succeeded in establishing that the appellant committed the offence under Section 380 I.P.C.

In the result, this appeal stands allowed in part, setting aside the conviction and sentence passed by the trial court under Sections 302 and 392 I.P.C. and the appellant is acquitted for the said offences. The appellant is found guilty under Section 380 I.P.C. and he is convicted thereunder. The appellant is sentenced

to rigorous imprisonment for five years and a fine of Rs.5,000/- and in default of payment of fine, to rigorous imprisonment for one year under Section 380 I.P.C. The appellant is entitled to set off for the period of his detention in connection with this case under section 428 of Cr.P.C. The appellant shall be set at liberty forthwith, if his detention is not required in connection with any other case, as the appellant has already undergone imprisonment exceeding the sentence awarded above. The Registry is directed to transmit the gist of this judgment to the Superintendent of the Jail concerned for compliance of the judgment.

**K.T.SANKARAN,
JUDGE**

**B.SUDHEENDRA KUMAR,
JUDGE**