

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.T.SANKARAN
&
THE HONOURABLE MR. JUSTICE BABU MATHEW P.JOSEPH

THURSDAY, THE 8TH DAY OF JANUARY 2015/18TH POUSHA, 1936

CRL.A.No.169 of 2011 (A)

AGAINST THE JUDGMENT IN SC 1154/2009 of ADDITIONAL SESSIONS JUDGE,
THRISSUR DATED 15/10/2010.

APPELLANT/ACCUSED:

ILAYARAJA, C. NO.8888, CP, KANNUR
CONVICT NO.8888, CENTRAL PRISON, KANNUR.

BY ADV. SRI.M.T.BALAN

RESPONDENT/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SRI.ROY THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
08-01-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**K. T. SANKARAN &
BABU MATHEW P. JOSEPH, JJ.**

Crl. Appeal No.169 of 2011

Dated this the 8th day of January, 2015

JUDGMENT

Babu Mathew P. Joseph, J.

The appellant was found guilty of the offence under Section 302 of IPC by the Additional Sessions Court, Thrissur, and he was convicted for that offence. He was sentenced to undergo imprisonment for life and to pay a fine of ₹ 25,000/- and, in default of payment of fine, to undergo simple imprisonment for one year. The fine, if paid, was directed to be given to the legal heirs of the deceased in this case. Challenging the said conviction and sentence, the appellant has preferred this appeal.

2. The prosecution alleged that, out of enmity towards the deceased Chithambaranathan developed due to his refusal to advance money as requested by the appellant, the appellant had committed the murder by inflicting fatal injuries on the head and chest of the deceased with wooden logs and also by way of strangulation using MO2 piece of coir rope in between 5.30 p.m. of 16-10-2008 and 8.30 a.m. of 17-10-2008 at a temporary shed

near a partly constructed house at Kailas Nagar in Aanakkallu.

3. The workers who were engaged in the construction of the nearby house have seen the deceased lying down in a pool of blood inside the shed in the morning on 17-10-2008 and, in turn, they informed that fact to their boss PW1, the contractor for the construction of that building, at about 8.30 a.m. and on hearing that information PW1 soon reached that place and seen the deceased inside the shed lying down in a pool of blood. Soon PW1 went to Nedupuzha Police Station and has given Ext.P1 F.I. Statement to PW10, the Sub Inspector of Police of that Police Station, at 9.30 a.m. on 17-10-2008. Based on Ext.P1, PW10 registered Crime No.356 of 2008 of that Police Station under Section 174 of Cr.P.C. Ext.P9 is the F.I.R. thus drawn by PW10. PW10 soon reached the place of occurrence. The shed was seen locked. It was opened and he entered the shed. He had prepared Ext.P2 Inquest Report in the presence of witnesses. The body was removed to the Medical College Hospital, Thrissur. PW6, the Assistant Professor of Forensic Medicine and Deputy Police Surgeon of that Hospital, has conducted the autopsy on the body of the deceased Chithambaranathan on 17-10-2008 itself. He has

prepared Ext.P4 Post-mortem Certificate. After questioning PW6, PW10 submitted a report before the court incorporating the offence under Section 302 in the place of Section 174 of Cr.P.C. The preliminary investigation commenced by him has been continued till it was taken over by PW11, the Circle Inspector of Police, Cherppu, on 18-10-2008. PW11 continued the investigation by preparing Ext.P3 Scene Mahazar on that day in the presence of witnesses. He has questioned the witnesses and recorded their statements. He has arrested the appellant at 12.30 p.m. on 25-10-2008 from Kodannur in Thrissur. On the basis of the information furnished by the appellant, MO1 series clothes, allegedly worn by the appellant, were recovered from the motor shed of CW12. (CW12 could not be examined as he died). On the basis of Ext.P7(a) portion of confessional statement allegedly given by the appellant, MO2 piece of coir rope was recovered from the side of a canal (this is also the side of a road) and seized the same by PW11 under Ext.P7 Seizure Mahazar. PW11 has almost completed the investigation. Subsequently, the investigation was taken over by PW12 and he has prepared the Final Report and submitted the same before the Judicial First

Class Magistrate's Court-II, Thrissur. The learned Magistrate, committed the case to the Court of Session, Thrissur, and, from there, it was made over to the Additional Sessions Court, Thrissur.

4. The court below framed a charge against the appellant alleging the offence under Section 302 of IPC. The appellant has pleaded not guilty of the charge. The prosecution examined PWs.1 to 12 and marked Exts.P1 to P16 on their side. MOs.1 and 2 were also marked. The appellant was questioned under Section 313(1)(b) of Cr.P.C. He has denied all the incriminating circumstances shown against him. He maintained that he was innocent of the charge. He has also submitted a statement explaining his innocence in the matter. The defence has not adduced any evidence. The court below, after considering the matter, found the appellant guilty of the offence under Section 302 of IPC and convicted him thereunder. He was heard on the question of sentence and imposed the sentence on him.

5. Heard Sri.M.T.Balan, the learned counsel for the appellant, and Sri.Roy Thomas, Advocate, who is representing the learned Public Prosecutor in this case.

6. Learned counsel for the appellant submits that the court

below has relied on certain circumstances in order to arrive at the conclusion that the appellant was the culprit. The circumstances thus shown cannot be relied on in the eye of law. The motive alleged against the appellant was not proved by the prosecution. A right evaluation of the evidence on record would go to show that the circumstances relied on by the court below are of no use for such reliance. The circumstances relied on do not conclusively show that the accused is the real culprit in this case. Learned counsel appearing for the respondent, on the contrary, submits that the circumstances relied on by the court below for finding the appellant guilty of the offence alleged are all true circumstances irresistibly leading to the conclusions arrived at by the court below. He further submits that in any view of the matter, the conviction entered by the court below against the appellant is not liable to be interfered with.

7. The following circumstances are relied on by the prosecution for arguing that the appellant is the person who has committed the murder of the deceased in this case:

- 1) The appellant and the deceased were closely known to each other. The deceased was staying in a shed near a

building being constructed by PW1. That fact was known to the appellant. The appellant requested a loan from the deceased. But, the deceased refused to advance the money to the appellant. Due to that reason, enmity developed and as a result of which the appellant committed the murder of the deceased.

2)The appellant, after committing the offence in the shed, locked the shed from inside and went out of that shed through the gap in between the wall and the roof of that shed. Thereafter, while he was going away at about 5.15 a.m. on 17-10-2008, he happened to appear in front of PW2, an LIC agent, who was on his usual morning walk. The place where the appellant was so seen by PW2 was only 400 metres away from the place of occurrence.

3)The appellant was staying, for about six years, in a sit-out on the terrace of the house of PW3, a retired school teacher. On 15th and 16th of October, 2008, the appellant did not go to that house for staying during night. He came to that house in the evening of 17-10-2008 and left the place saying to PW3 that he was going to his native place in

Tamilnadu as his wife fell ill. In fact, such conduct of the appellant was one leading to an inference that he wanted to abscond from the place of occurrence.

- 4)The Investigating Agency has taken all steps for ascertaining the persons who have absconded from the place of occurrence and during such investigation, the appellant was arrested at 12.30 p.m. on 25-10-2008.
- 5)On questioning the appellant, he informed the Investigating Officer about the place where the dresses which were worn by him at the time of committing the offence were kept. On the basis of that information, MO1 series shirt and dothi were seized by PW11 under Ext.P6 Seizure Mahazar. Those clothes were blood stained.
- 6)On the basis of Ext.P7(a) information given by the appellant, MO2 piece of coir rope which was used by the appellant for strangulating the deceased was recovered under Ext.P7 Recovery Mahazar.
- 7)The cellophane pressings collected by PW9, the Scientific Assistant, from the neck and hands of the deceased from the scene of occurrence were found to be similar to the

fibre that found on the dothi worn by the appellant and MO2 piece of coir rope.

8. Whether these circumstances, pointed out by the prosecution, can legally be relied on for finding the appellant guilty of a serious charge under Section 302 of IPC? The court below relied on some of the circumstances so pointed out by the prosecution and arrived at the conclusion that the appellant was guilty of the offence under Section 302 of IPC and convicted him thereunder. We shall evaluate the evidence.

9. It is in the evidence of PW1 that he is a building contractor and the deceased was regularly working for him for the last about four years. The deceased hailed from a village in Tamilnadu. Occasionally, the appellant was also engaged by PW1 in his work as brought him by the deceased. The appellant also hails from Tamilnadu. This Court does not find anything wrong in the friendship of the appellant with the deceased or the suggestion made by the deceased to PW1 for engaging the appellant occasionally in his work. The friendship or such transactions do not indicate any culpable mind on the part of the appellant against the deceased.

10. The prosecution specifically alleged that the deceased requested a loan from the appellant which he had not given. That incident developed enmity in the mind of the appellant towards the deceased which culminated in the murder. Apart from raising such a motive for the commission of offence by the appellant, the prosecution miserably failed in proving such a motive against the appellant. The motive alleged is an important circumstance in a prosecution which is based on circumstantial evidence. If it is alleged and not proved, that is a strong circumstance against the prosecution version of occurrence. In this case, a clear motive has been alleged, but the prosecution miserably failed to prove the same. Here, we do not forget the fact that PW11, the Investigating Officer, while he was in the witness box deposed before the court that on questioning the appellant, he understood that the motive for committing the offence by the appellant was non-giving of the loan demanded by the deceased. This statement so made by the Investigating Officer cannot be acted upon as a piece of evidence as it is hit by the provisions of the Evidence Act. The claim so made by PW11 before the court is not at all admissible in evidence. Therefore, no value can be attached to

such a statement made by PW11 in respect of the motive alleged against the appellant.

11. PW2 is an LIC agent. He is a relative of the owners of the building being constructed by PW1 near the shed where the occurrence took place. PW2 deposed that it was his practice to have morning walks regularly. While he was thus walking in the morning of 17-10-2008, he had seen the appellant coming from the opposite side at about 5.20 a.m. He stated that he had noticed that person because that person was not usually seen during his morning walk. At once, we have to add here the evidence of PW2 that he did not feel anything untoward by seeing the accused. According to PW2, the appellant was thus seen by him 400 metres away from the place of occurrence. The fact that PW2 has seen the appellant as stated by him itself cannot be a circumstance for finding the appellant guilty of a serious charge under Section 302 of IPC. It is an admitted case that the appellant is a worker usually working in Thrissur area. There is nothing strange in the appellant walking along the road. He had not shown any signs of fear seeing PW2. More important is that the claim made by PW2 that he had seen the appellant at that time

cannot be simply swallowed because the time claimed was about 5.15 a.m. and 5.20 a.m. No normal light will be available then. Unless there was some specific reason for PW2, there was no chance or reason for PW2 to identify that person at that time. Because absence of light will stand in the way of PW2 to ascertain the identity of such a person then. Therefore, in view of these facts, the circumstance so relied on by the prosecution cannot be accepted for finding the appellant guilty in this case.

12. The appellant left for Tamilnadu on the evening of 17-10-2008 after coming to the residence of PW3 is another circumstance relied on by the prosecution. According to the appellant, he had not gone to Tamilnadu as claimed by the prosecution on 17-10-2008 or thereafter. He stated that it was his practice to go to Tamilnadu in connection with Deepavali and he would return only after Deepavali. It is also his case that Deepavali was on 27-10-2008. The absence of the appellant on 15th and 16th of October, 2008 from the residence of PW3 also cannot be safely relied on as a circumstance against the appellant for different reasons. The evidence of PW3 itself shows that the appellant used to be absent from her house occasionally even

without informing her. Initially, it was the practice of the appellant to inform if he was not coming there. But, subsequently, he discontinued that practice and absented himself. Therefore, absenting himself from the residence of PW3 on 15th and 16th of October, 2008 is not an exception to the regular attitude of the appellant. This fact does not clinchingly prove any adverse circumstance against the appellant. Moreover, the evidence of PW3 shows that the appellant came in the evening on 17-10-2008 to her residence. Then, she wanted him to climb up the coconut tree and pluck the coconut. Accordingly, he climbed up the coconut tree and plucked the coconuts for her. He also received money from her and told her that he had to go to his native place as his wife is suffering from illness. It is also in her evidence that he came to that house in a busy mood. When the entire evidence of PW3 is analysed in its right perspective, this Court does not find any unusual thing in relation to the behaviour of the appellant at her residence on 17-10-2008.

13. The evidence of PW11 itself shows that the appellant was here on the 16th and 17th of October, 2008 and he had gone for his work. According to him, the appellant was arrested by him

at 12.30 p.m. on 25-10-2008. We have ascertained from the Government Calendar for the year 2008 that Deepavali of that year was on 27-10-2008. Therefore, one thing is clearly emerging. The appellant, as contended by the prosecution, did not abscond from the place on 17-10-2008. He was arrested by PW11 on 25-10-2008 while, according to PW11, he was walking through the road. The prosecution could not prove to the satisfaction of the court that the appellant was absconding from the place after the occurrence. But, the evidence available shows that he was here on 17-10-2008 and 25-10-2008. So, the circumstance so shown by the prosecution has no legs to stand.

14. It is the case of the prosecution that at the instance of the appellant, MO1 series shirt and lunki worn by the appellant at the time of the occurrence were seized by PW11 under Ext.P6 and they were subjected to chemical analysis. Ext.P16 is the report of chemical analysis which shows that both the shirt and lunki were stained with blood. Can this be taken as a clear circumstance pointing at the guilt of the appellant? Admittedly, the appellant was only a worker in connection with construction of buildings. It is quite probable that the dresses worn by such people would be

stained with parcels of blood by so many reasons. The prosecution does not have a case that the blood stains appeared on the clothes of the appellant belonging to the blood group of the blood of the deceased. Ext.P16 relied on by the prosecution also does not show that such a grouping was possible. Ext.P16 shows that for the reason of insufficient quantity, grouping of the blood could not be ascertained. It also shows that owing to the inconclusive test result, the grouping of blood appeared on the lunki was also not possible. Therefore, the test results, even if it is acted upon, would not prove that the clothes had the blood stains of the deceased. Mere presence of blood stains on the clothes is not a sufficient circumstance for drawing adverse inference against an accused. Moreover, in this case, there is no legally admissible proof for showing that the clothes contained blood stains. Because, there is no assurance by way of evidence that the clothes noted in Ext.P16 are the clothes seized by the Investigating Agency under Ext.P6. No forwarding note is marked in order to ascertain properly the identity of the material objects subjected to chemical analysis.

15. It is the prosecution case that MO2 piece of coir rope

was discovered on the basis of Ext.P7(a) information furnished by the appellant while he was in the custody. On the basis of that information, PW11 and the appellant went to the place where MO2 was kept and the appellant had taken and produced the same before PW11 and, in turn, he had seized the same under Ext.P7 Recovery Mahazar in the presence of witnesses. Can this recovery of MO2 be treated as a discovery attracting Section 27 of the Evidence Act? It can be concluded by the evidence of PW8, an attester to Ext.P7 Recovery Mahazar, and the evidence of PW11 itself that MO2 coir rope was placed within the vicinity of all persons going through the road on the side of which that MO2 was remaining. It was on the side of a canal as well as on the side of a public road. PW11 categorically admitted that the place where MO2 was remaining was an open space. That place was near Ollur centre. Railway Station is nearby. Commercial institution is also existing nearby. During day and night vehicles and people are coming and going through that road. In short, it was a very open space which anybody could access. It is an open busy area. So, there is no question of concealing MO2 at that place by the appellant. If that be so, Section 27 of the Evidence

Act cannot be attracted to the facts of such a recovery. It is common knowledge that coir ropes of that type can be seen at many places in our state. Many of them may be similar also. So, the recovery of MO2 coir rope is only a weak piece of evidence. It should also be noted here that it is the case of the prosecution that the appellant has used MO2 for the purpose of strangulating the deceased. In that case, it was the duty of the prosecution to bring that material object to the notice of the Doctor, PW6, who had conducted the autopsy on the body of the deceased and to ask whether such a rope can cause the ligature mark appeared on the neck of the deceased. It is noted in Ext.P4 Post-mortem Certificate that an injury that appeared to PW6 as a ligature mark. If it was a ligature mark by using MO2, definitely, MO2 should have been brought to the notice of PW6 and sought for his answer whether such an injury can be caused by using that ligature. Unfortunately for the prosecution, such a thing did not happen in this case.

16. The prosecution relies on the result appearing in Ext.P16 issued from the Chemical Examiner's Laboratory in order to show that the lunki worn by the appellant had fibres similar to the fibres

of MO2 and also similar fibres were appearing on the body of the deceased. Ext.P16 cannot be acted upon as a proved document for the reason that there is no evidence to connect the entries made in Ext.P6 with the entries in the Forwarding Note or the Seizure Mahazar prepared after seizing those items by PW9. For this reason also, this evidence relied on by the prosecution cannot be acted upon.

17. Therefore, for the reasons already stated, the circumstances relied on by the prosecution cannot be accepted for finding the appellant guilty of the offence under Section 302 of IPC. In a case depending upon circumstantial evidence, there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that, in all human probability, the act must have been done by the accused where various links in the chain are in themselves complete. In this case, such a finding is impossible based on the circumstances shown by the prosecution. Therefore, the reliance placed by the learned Sessions Judge on the circumstances for finding the appellant guilty of the offence under Section 302 of IPC cannot sustain in

the eye of law.

18. Before parting with the matter, we would like to advert to a few other important aspects of the matter. According to the prosecution, after committing the offence, appellant closed the door from inside with a lock. Thereafter, he went outside through the gap in between the wall and the metallic roof of the shed. PW11, the Investigating Officer, deposed also to that effect. But, the prosecution has not adduced any cogent evidence to show that it was possible for a culprit to go outside through the gap in between the wall and the metallic roof of the shed after committing the offence.

19. It is the definite case of the prosecution that the footprints of the offender were present on the wall inside and outside. The footsteps were so printed, according to the prosecution, while the offender was getting outside the shed after committing the offence. Moreover, according to the prosecution, the appellant had locked the shed from inside after committing the offence. Therefore, it was quite possible for the Investigating Agency to collect the footprints and subject them to scientific analysis in order to ascertain whether the footprints were that of

the appellant or not. The Investigating Agency used the services of PW9, the Scientific Assistant. She also did not choose to collect the footprints for that purpose. What was the reason prevented the Investigating Agency from collecting the footprints for that purpose? No answer was forthcoming. The prosecution was duty bound to explain why such a scientific step for ascertaining the offender was not adopted? This is a very important factor going in favour of the appellant. The Investigating Agency has failed in conducting a proper scientific investigation in a case of this nature.

20. For the foregoing reasons, finding the appellant guilty of the offence under Section 302 of IPC is unsustainable. The appellant, at least, is entitled to the benefit of doubt. Therefore, he is entitled to an order of acquittal.

In the result,

(a) The conviction and sentence passed against the appellant/accused are set aside.

(b) The appellant/accused is found not guilty of the offence alleged against him. He is acquitted of the offence under Section 302 of the Indian Penal Code.

(c) A copy of this judgment shall forthwith be communicated by the registry to the court below and to the prison concerned.

(d) If further detention of the appellant/accused is not required in connection with any other case, he shall be set at liberty forthwith.

(e) The Registry is directed to issue the release order forthwith.

This Criminal Appeal is allowed.

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

**Sd/-
BABU MATHEW P. JOSEPH
JUDGE**

kns/-

//TRUE COPY//

P.A. TO JUDGE