

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

MONDAY, THE 1ST DAY OF JUNE 2015/11TH JYAISHTA, 1937

CRL.A.No. 1903 of 2010 (C)

AGAINST THE JUDGMENT IN SC 142/2005 OF ADDL.SESIONS COURT
(ADHOC-II)KASARAGOD

APPELLANT(S):

K.RAMA,C.NO.7860,
CENTRAL PRISON, KANNUR.

BY ADV. PRAVEEN K. JOY [STATE BRIEF]

RESPONDENT(S):

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

R, BY ADV. PUBLIC PROSECUTOR SRI.K.K.RAJEEV
R BY ADV. SMT.PRAICY JOSEPH, SPL. GOVERNMENT PLEADER

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
01-06-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

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

Crl.Appeal No.1903 of 2010

Dated this the 1st day of June, 2015

JUDGMENT

Sudheendra Kumar, J.

The appellant is the accused in S.C.No.142 of 2005 on the files of the Additional Sessions Court (Adhoc-II), Kasaragod, 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 21.2.2003, at about 9 a.m., the appellant inflicted stab injuries on his wife

Sumathi with MO1 knife at a place in Kuthingala–Machavu mud road in Coppalamoola and as a consequence, Sumathi died at or about the same time. On the basis of Exhibit P9 statement given by PW1, CW24 (not examined) registered Exhibit P22 F.I.R. The investigation was taken over by CW25 (not examined). CW25 arrested the appellant on 21.2.2003. He also went to the place of occurrence and prepared Exhibit P2 scene mahazar. When arrested and questioned, the appellant had given Exhibit P17 disclosure statement to CW25 and in pursuance to the said disclosure statement and as led by the appellant, MO1 knife was recovered as per Ext.P3 seizure mahazar at the instance of the appellant. The investigation was taken over by PW18 on

17.2.2004. After completing the investigation, PW18 laid the charge before the Magistrate Court concerned.

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

4. In the trial, the prosecution examined PW1 to PW18 and marked Exhibits P1 to P22, besides identifying MO1 to MO30. 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 the prosecution witnesses. Thereafter, since there was no scope

for an order of acquittal under Sec. 232 Cr.P.C., the court below called upon the appellant to enter on his defence. However, no evidence was adduced on the side of the appellant. After evaluating the evidence, the court below found the appellant guilty under Section 302 IPC and convicted him thereunder and sentenced him to imprisonment for life and a fine of Rs.10,000/- with a default clause for simple imprisonment for one year.

5. We have heard the learned counsel for the appellant Sri.Praveen K.Joy. We have also heard the learned Public Prosecutor Sri.K.K.Rajeev.

6. PW13 is the doctor, who conducted autopsy on the body of the deceased and issued Exhibit P10 postmortem certificate. In

Exhibit P10 postmortem certificate, the following ante-mortem injuries were noted by PW13.

“1. Gaping chop wound 10x5.5x6 cm. slightly oblique on the right side of neck, the front end being in the midline, 4 cm. below the adam's apple. Underneath the muscles and major blood vessels were found severed. Body of 6th cervical vertebra was found cut into two. Air embolism was demonstrated in the heart.

2. Chop wound 7.5x1x2 cm. on the right side of neck, 1 cm. above and parallel to injury No.1.

3. Chop wound 12 x 6 cm., bone deep, on the left side of neck, extending from the ear to the midline at the back. The ear was

found cut into two. Muscles and blood vessels were cut underneath.

4. Chop wound 8.5 x 5.5 cm. on the tip of right shoulder, with removal of soft tissues up to the bone.

5. Incised wound with contused margins. 5x2.5 cm. horizontally placed on the front of right forearm 9 cm. above the wrist (muscle deep).

6. Incised wound with contused margins, 2x1 cm., on the back of right wrist.

7. Chop wound 8x2.3 cm., horizontally placed on the back of left shoulder, cutting the spine of shoulder blade into two.

8. Incised stab wound 4.5x1.5 cm.

obliquely placed on the left side of back of chest, its inner lower split end being in the midline 8 cm. below the root of neck. Margins of the wound were contused. From the outer upper sharply cut end, there was a tailing (3 cm.) directed towards the left shoulder. The wound was directed forwards, downwards and inwards for a depth of 5 cm. The wound terminated by cutting the thorasis vertebra.”

PW13 stated that the deceased died due to chop injuries sustained by her. There is nothing on record inconsistent with the finding of PW13 that the deceased died due to chop injuries sustained by her.

7. It has been argued by the learned counsel for the appellant that the evidence given by PW10 and PW11 is

conflicting and not consistent and in the said circumstances, it is not safe to rely on the evidence of PW10 and PW11 to bring home the guilt of the appellant. PW10 stated in her examination-in-chief that she was informed by PW11 just before the incident that the deceased and the appellant were found quarrelling near to the place of occurrence. After some time, PW10 came to the spot. Then, she found Nirmala (Sumathi) lying dead with chop injuries on her neck and shoulder. Since she denied to have seen the appellant running away from the place of occurrence, the learned Public Prosecutor put questions to the witness under Section 154 (1) of the Evidence Act. PW10 stated that she was told by PW11 that the appellant was carrying

a knife while the appellant was running away from the place of occurrence. PW10 also stated that what she had stated before the Magistrate was true. However, in further cross-examination, she stated that she was terrorised by the police to give statement before the Magistrate. PW11 is the son of PW10. PW11 stated in his examination-in-chief that he had seen the appellant with the deceased. However, in the cross-examination, he stated that he could not state as to whether the person found talking to the deceased was the appellant or not. He admitted to have given statement before the Magistrate. However, he also stated that he was terrorised by the police and it was only because of that he had given statement before the Magistrate as suggested by the

police. At the time when he was giving statement before the Magistrate, PW11 was aged only 13 years. Now, the question to be considered is as to whether the evidence of PW10 and PW11 can be relied upon to find the appellant guilty. It is settled law that even if a witness does not support the prosecution case fully, the court can accept that part of his evidence which can be safely acted upon. However, in this case, the evidence of PW10 is found to be not consistent. The evidence of PW11 is also not consistent. The court below convicted the appellant mainly relying on the statement given by PW10 and PW11 before the learned magistrate under Sec. 164 Cr.P.C. It is settled law that a statement under Sec. 164 Cr.P.C is not substantive evidence and

it can be used only to corroborate or contradict the witness vis-a-vis statement made in the court. PW10 did not give evidence before the court stating that she had direct knowledge with regard to any matter connecting the appellant with the offence. The evidence of PW10 is that she had given statement before the magistrate only because she was terrorised by the police. PW10 was having only hearsay information regarding the involvement of the appellant in the commission of the offence in this case. PW11 also did not give any evidence before the court connecting the appellant with the crime. Even though PW11 initially stated that he had seen the appellant talking to the deceased on the fateful day, he stated in his cross-examination that he could not

state as to whether the person with whom the deceased was found talking was the appellant. PW10 and PW11 were also not confronted with their statement recorded by the learned magistrate under Sec. 164 Cr.P.C Having meticulously gone through the evidence of PW10 and PW11, we are of the view that their evidence is not consistent and credible and in the said circumstances, it is not safe to rely on the evidence of PW10 and PW11 to bring home the guilt of the appellant. The trial court grossly erred in placing reliance on the statement recorded under Sec. 164 Cr.PC as substantive evidence to convict the appellant. It is true that there is strong suspicion with regard to the involvement of the appellant with the commission of the offence.

However, it is settled law that suspicion, however grave, cannot take the place of legal proof.

8. We will now consider the evidence regarding the recovery of MO1 knife pursuant to the disclosure statement allegedly given by the appellant. CW25 was the police officer who arrested and questioned the appellant. However, CW25 was not examined before the court as he was stated to be laid up seriously. PW18 stated that the appellant had made Exhibit P17 disclosure statement before CW25 and in pursuance to the said statement, MO1 knife was recovered at the instance of the appellant as per Exhibit P3 mahazar. PW18 did not state that he heard the appellant making the disclosure statement to CW25. It

is settled law that when a disclosure statement is made to a police officer, the police officer has to record the said statement in the words of the accused and that should find a place in the recovery mahazar. The police officer, to whom the confession was made, must depose before the court in the words of the accused with regard to the disclosure statement made by the accused.

9. A Full Bench of this Court in State v. Ammini & others (1987(1)KLT 928) held thus:-

“The contention of the defence counsel was that the investigating officer should have deposed as to the information received by him from the accused which led to the discovery. In strict compliance of

Section 27 of the Evidence Act, the investigating officer should have deposed to the words of the accused which distinctly led to the fact discovered.

The words attributed to the accused must find a place in the deposition of the witness.”

10. In this case, the police officer, who recorded the disclosure statement, was not examined before the court. In the said circumstances, we are of the view that Exhibit P17 disclosure statement stated to have been made by the appellant before CW25, which led to the discovery of MO1 knife, cannot be admissible under Section 27 of the Evidence Act. It is also very relevant to note at this juncture that MO2 shirt and MO3 lunki

worn by the appellant at the relevant time did not contain human blood as per Exhibit P15 report. There is no other material before the court to bring home the guilt of the appellant.

11. The above discussion would make it clear that there is absolutely no convincing material to bring home the guilt of the appellant as alleged by the prosecution. In the said circumstances, the verdict of guilty, conviction and sentence passed by the trial court under Section 302 I.P.C. cannot sustain and consequently, we set aside the same.

12. In the result, this appeal stands allowed, setting aside the conviction and sentence passed by the trial court under Section 302 of the Indian Penal Code and the appellant is

acquitted for the offence under Section 302 I.P.C. The appellant shall be set at liberty forthwith, if his detention is not required in connection with any other case.

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

csl