

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.T.SANKARAN
&
THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

WEDNESDAY, THE 4TH DAY OF MARCH 2015/13TH PHALGUNA, 1936

CRL.A.No. 2143 of 2011 (C)

(SC.NO. 419/2008 OF I ADDL.SESIONS COURT, KOZHIKODE)

APPELLANT/ACCUSED :

ABDUL NAZAR @ SUBAIR, S/O. IBRAHIM,
RAHMANIA HOUSE, KOLAPPADA.P.O., ARYANAD,
NEDUMMANGAD, THIRUVANANTHAPURAM.

BY ADV. SRI.M.R.SASITH

RESPONDENT/COMPLAINANT :

STATE OF KERALA,
CIRCLE INSPECTOR OF POLICE,
CHEVAYUR, REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SMT. PRAICY JOSEPH

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 02-03-2015 , THE COURT ON 04-03-2015 DELIVERED
THE FOLLOWING:

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K.T.SANKARAN &

A.MUHAMED MUSTAQUE, JJ.

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**Crl.Appeal No.2143 of 2011**  
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Dated this the 4th day of March, 2015

J U D G M E N T

A.Muhamed Mustaque, J.

This appeal is against the judgment of the Sessions Court, Kozhikode in S.C.No.419/2008 convicting the appellant herein, who was found guilty under Sections 302, 342, 366 and 392 IPC. The appellant was sentenced to undergo imprisonment for life under Section 302 of IPC with the rider that the appellant shall not be released from the prison for a period of 25 years in all. The appellant was also sentenced to pay fine of Rs.2,00,000/- and in default to undergo rigorous imprisonment for 4 (four) years. For offence under Sections 366 and 392 IPC sentence of 7 years imprisonment and fine of Rs.25,000/- and in default one

year rigorous imprisonment was imposed for both offences separately. For offence under Section 342 IPC, sentence was imposed to undergo imprisonment for one year. It was further ordered that substantive sentence of imprisonment shall run concurrently. The appellant was not found guilty under Sections 376 and 201 of IPC.

2. On 11/06/2001, deceased Radhika's body was found on the verandah of a shop room named Annai Arts. The shop room is having door No.VII/458 of Kunnamangalam Panchayat. The prosecution case is that the appellant, who is the occupier of room No.VII/452 made an attempt to commit rape on the deceased and committed murder by strangulation. The appellant was also chargesheeted for theft of gold chain of the deceased. Prosecution also have a case that the deceased was residing with the appellant and when deceased Radhika made an attempt to go to her house she was wrongfully confined in the house of the appellant. It is submitted by the prosecution that after commission of the offence to cause disappearance of the

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evidence, the appellant dragged dead body of the deceased to 10 mts. away from his room and kept it at the verandha of the shoproom-Annai Arts.

3. The court below ruled out the death of deceased as a suicide. PW12, a doctor who conducted the postmortem suggested that death was due to hanging

4. In this case, there is no direct evidence. The evidence relied by the court below is circumstantial evidence. The court below relied upon the evidence of PW4 and PW6 heavily, to bring home the guilt of the appellant.

5. Therefore, in the above background of the facts of the case, the first question to be decided is whether the death of the deceased was homicidal or not. To understand this, it is necessary to advert to the injuries mentioned in Ext.P7 post-mortem report. In Ext.P7, the following injuries are found:

B.Injuries (Antemortem)

1. Pressure abrasion 10x0.6 to 1 cms. (broader at right half) present on front of neck obliquely ascending from left to

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right at the level of upper border of thyroid cartilage, left end 5cm away from midline, right end at angle of jaw. A linear abrasion 1.3 cm long present 2 cm inner to the right end of the pressure abrasion at the lower jaw border in line with the pressure abrasion. Neck was dissected in a bloodless field. Soft tissues deep to the pressure abrasion was normal. Muscles, hyoid bone and cartilages intact.

2. Multiple contused abrasion over an area 5x5 cm at back of left elbow.

3. Abrasion 2.5x1cm transverse at outer aspect of left wrist, 5 cm above wrist.

4. Abrasion 0.5x0.5cm on front of left knee.

5. Transverse graze abrasion 5x5 cm on back of left chest, 5 cm away from midline, 2 cm below shoulder blade.

6. Transverse graze abrasion 3x2 cm at back of left knee.

7. Transverse graze abrasion 8x2 cm, front and outer aspect of right thigh, 15 cm above knee (injuries 5, 6 & 7 had a pale base).

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6. PW12 Doctor while examined, deposed that injury No.1 is suggestive of hanging. In the scene *mahazar*, among the material objects, a table is noted in Room No.452 and a towel as well as a dhothi on the table. It is also seen from the scene mahazar that there is an hacksaw blade and frame with remnants of cloth. A towel is also found hanging from the beam on the western side of the room.

7. The death occurred due to injuries referred 1 to 4 as noted above. In the absence of conclusive medical evidence to prove homicidal death, the question is whether the injuries noted as above are suggestive of homicidal death or not. The court below came to the conclusion to rule out suicide with circumstances. In Modi's Medical Jurisprudence and Toxicology 23rd edition, Chapter 18 defines 'hanging' as follows:

“Hanging is a form of death, produced by suspending the body with a ligature round the neck, the constricting force being the weight of the body (or a part of the body weight).

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Hanging can be defined as the ligature compression of the neck by the weight of one's own body due to suspension.”

In the same text, difference between hanging and strangulation is referred. The ligature mark found on the injuries is crucial to determine whether death was by hanging or by strangulation. Ligature mark when obliquely found is presumed to be caused by hanging. However, in same text it is stated as follows:

“Ligature Mark:The mark may be oblique as in hanging, if the victim has been dragged by a cord after he has been strangled in a recumbent posture, or if the victim was sitting and the assailant applied a ligature on the neck while standing behind him, thus using the force backward and upward. The base of the mark, which is known as a groove or furrow, is usually pale with reddish and ecchymosed margin. It becomes dry, hard and parchment-like, several hours after death, if the skin has been excoriated. The pattern of the ligature may also be seen. Very often, there are abrasions and ecchymoses in the skin adjacent to the marks. In some cases, the

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mark in the neck may not be present at all, or may be very slight, if the ligature used is soft and yielding like a stocking or scarf, and if it is removed soon after death. A careful search of the neck may reveal minute fibres and any other material from the ligature."

There is nothing on record indicating otherwise existence of aspects referred as above to medically suggest death by homicide. PW12 doctor in answer to court question deposed that the injuries Nos.5 to 7 noted in the aforesaid paragraph are post-mortem injuries and they are shown as ante-mortem injuries in the post-mortem certificate by mistake. Court also specifically asked to PW12 how the distinction between death by strangulation and death by suicide is made. It was deposed that the mark and the internal neck findings are suggestive of hanging. While answering the court question, the Doctor opined that injury No.1 is suggestive of hanging and there is possibility of homicidal hanging as well. It is to be noted that the deceased was having the weight of 48 kgs at that time.

The weight of the appellant was 61 kgs. The court below by relying on circumstantial evidence came to the conclusion that death has been caused by strangulation. The court below ruled out possibility of homicidal hanging considering the weight of appellant and that of the deceased.

8. The death occurred within 18 hours prior to post-mortem examination. The post-mortem was conducted at about 12.30 pm on 11/06/2001. PW4 was a 9th standard student at that point of time. He deposed that the day before the incident he saw a lady lying in the premises along with the appellant and appellant had told him that the lady was his wife and she was having fever and PW4 was asked to bring rice soup. This was around afternoon. Therefore, PW4 might have seen the appellant and the lady on 10/06/2001, around noon. The body was found lying in the premises on early morning on 11/06/2001. The evidence of PW1 was relied to disbelieve the case of suicidal hanging as the occurrence of death might be around the time when PW4

might have seen the appellant along with the deceased. PW4 identified the deadbody and deposed that the it was the body of same lady, whom he had seen. Therefore, death might have occurred sometime around 06 p.m. or before, on 10/06/2001. Except the above circumstances, no other circumstances can pin point the death of deceased to conclude that it was a homicidal death.

9. The point that arises for consideration in law is when medical evidence is uncertain as to the cause of death whether the circumstances could be relied to prove cause of death.

10. In **C.K.Ravendran v.State of Kerala [(2000) 1 SCC 225]** it was held by the Hon'ble Supreme Court that when the doctor himself has not been able to give a definite opinion as to the injuries found on the dead body, it is difficult to sustain the conclusion that death was only homicidal and that the last seen theory of the deceased with the appellant in such circumstances would not lead to the conclusion that the death was homicidal.

11. In **Ramesh Bhai and another v. State of Rajasthan [(2009) 12 SCC 603]** also the Hon'ble Supreme Court laid down the principle that last seen together would not establish a guilt. In that case, the doctor opined that he was not able to state the cause of death because the body was decomposed.

12. In **Ananda Poojary v. State of Karnataka [2014 SCC online SC 822]** it was held by the Hon'ble Supreme Court that when there is uncertainty regarding the cause of death, benefit of doubt should be given to the accused and in para.21 it is stated as follows:

“In the aforesaid scenario, it cannot be said with certainty as to whether Dorathi died of smothering or being a heart patient, the actual cause of death was cardiac arrest. In such circumstances, when there was a possibility of both the causes of death, in the absence of clear certainty about the cause, we are of the opinion that High Court committed an error in not giving benefit of doubt to the accused person.”

13. In **Kanhaiya Lal v.State of Rajasthan [(2014) 4 SCC 715]** it was held by the Hon'ble Supreme Court that mere non-explanation of being last seen together with deceased person on part of accused, by itself cannot lead to proof of guilt against him.

14. The concept of corpus delicti refers to foundation or substance of the crime. The proof of crime is necessary for conviction and not the proof of dead body. The corpus delicti is established if the evidence shows another has committed homicide. The proof of guilt may be circumstantial evidence. The commission of crime must be established beyond a doubt. The prosecution must be able to establish commission of a crime. There must be credible evidence to rule out suicide. When medical evidence is suggestive of suicide, it is the bounden duty of the court to rule out suicide by reliable evidence. Suicide is a selfish act often attributable to the mental state of affairs of the person in a given circumstance. Fact as seen from the records would indicate evidence of

suicide. The scene *mahazar* shows the hacksaw blade with remnants of cloth and towel hanging on the beam on the western side of the room. The possibility of appellant removing hanged body of the deceased from the beam cannot be ruled out. Non suggestive of such defence by the appellant is not the factor to rule out such possibility. The poor quality of the defence is not an anchor to rope in guilt of the appellant. The court below committed error in relying circumstantial nature of the evidence to find commission of a crime. The cause of death must be certain to give rise to a presumption of guilt by circumstances. If the cause of death is uncertain, no amount of circumstantial evidence would be complete to find a guilt of the appellant having committed offence of homicide. Thus, based on the discussions as above, we are of the view that conviction of the appellant under Section 302 IPC is liable to be set aside.

15. The court below convicted the appellant for the offence under Sections 342 and 366 of IPC. The

evidence of witnesses clearly show that the deceased was freely roaming around with the appellant. PW3 deposed that three days before the incident the deceased came to her house along with the appellant during midnight at 2.30 a.m. asking about her husband. PW4 also deposed that he has seen the deceased with the appellant in his room and the deceased was lying in the room. In such circumstances, it is not safe to hold that the appellant has committed offence under Sections 342 and 366 of IPC. In fact, the court below did not discuss any evidence in the judgment to convict the appellant under Sections 342 and 366 of IPC. Accordingly, we set aside the conviction and sentence imposed upon the appellant for these offences.

16. The appellant has been found guilty for the offence under Section 392 IPC. It has come out in evidence that the appellant had pledged the gold chain of the deceased on 11/06/2001. PW8 corroborates with a recital in Exts.P20 and P21 which are gold loan card and receipt. PW7 identified the gold chain belonging

to the deceased. PW7 is the sister of the deceased. There is sufficient evidence on record to establish that the gold chain was pledged by the appellant. However, the court below concluded that the appellant has committed robbery based on the conviction of the appellant under Section 342 of IPC. The commission of offence of robbery has to be ruled out in view of the finding made as above in respect of offence under Section 342 of IPC. The appellant was in custody of the gold ornaments belonged to the deceased. He has no plausible explanation how the gold ornaments happened to be in his custody. In the absence of plausible explanation by the appellant as to the custody of the gold ornaments, which he otherwise is not entitled to keep in his possession, the offence under Section 379 IPC is made out against the appellant. Thus the appellant is guilty of offence under Section 379 IPC.

17. We are of the view that conviction of the appellant under Section 392 IPC is liable to be altered under Section 379 IPC. Appellant was not charged for

the offence under Section 379 IPC. Generally, no accused can be convicted for an offence for which he was not charged. There is an exception to this general rule through a judicially evolved principle. This principle of law lays down that when an accused is charged for an offence, he can be convicted for same kind of offence for which he was not separately or specifically charged, provided, the ingredients which required to be satisfied must exist in both the offences.

18. In **Rafiq Ahmed Alias Rafi v.State of Uttar Pradesh [(2011) 3 SCC 300]** the Hon'ble Supreme Court held as follows:

“With the development of criminal jurisprudence, the law has recognized the concept of cognate charges besides alternative charges. The differentiation between the offences from the same family in contradistinction to the offences falling in different categories have persuaded the courts to apply the principle of ‘cognate offences’ and punish the offender for a less grave

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offence because the offence of greater gravity has not been proved beyond reasonable doubt. This principle is to be applied keeping in view the facts and circumstances of a given case and notwithstanding the fact that no charge for such less grave offence had been framed against the offender.....

.....A person charged with a heinous or grave offence can be punished for a less grave offence of cognate nature whose essentials are satisfied with the evidence on record. Usually an offence of grave nature includes in itself the essentials of a lesser but cognate offence."

In the above case, the accused was chargesheeted for the offence under Section 396 (*dacoity* with murder) and under Section 201 of IPC. However, conviction was under Section 302 of IPC. The Hon'ble Supreme Court found that the ingredients of Section 302 IPC became an integral part of Section 396 of IPC and therefore, no prejudice is caused to the accused for his conviction under Section 302 of IPC.

19. In the case in hand, the appellant was convicted for robbery with theft on account of finding under wrongful restraint under Section 342 of IPC. Robbery is aggravated form of theft. Therefore, to prove robbery, theft has to be proved. Thus, theft is an integral part of offence under Section 392 IPC. Thus, we find that no prejudice would be caused to the appellant if he is convicted under Section 379 of IPC. We find imprisonment of two years would be appropriate sentence to be imposed upon the appellant. Accordingly, we impose sentence of rigorous imprisonment of two years on the appellant for the offence under Section 379 IPC.

20. Since the appellant is undergoing imprisonment from 16/07/2008 onwards, we are of the view that the substantive sentence imposed under Section 379 IPC shall be set off as against the imprisonment undergone by the appellant.

21. Accordingly, the Criminal Appeal is allowed in part and the conviction and the sentence of the

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appellant for the offences under Sections 366, 342, 302 and 392 are set aside. The appellant is found guilty for the offence under Section 379 IPC and he is sentenced to undergo rigorous imprisonment for two years thereunder. Since the appellant has already undergone imprisonment for more than two years, he shall be released from jail forthwith unless his detention is otherwise required as per law.

Sd/-

K.T.SANKARAN, JUDGE

Sd/-

A.MUHAMED MUSTAQUE, JUDGE

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P.S to Judge