A GOVINDASWAMY

v.

STATE OF KERALA

CRIMINAL APPEAL NOS.1584-1585 OF 2014

B SEPTEMBER 15, 2016

[RANJAN GOGOI, PRAFULLA C. PANT AND UDAY UMESH LALIT, JJ.]

Penal Code,1860 – ss.302 & 376 – Conviction of appellant-accused u/s. 302 – If justified – Appellant convicted for raping and C *murdering the victim by dropping/pushing her out of the running train – As per medical evidence, the death of deceased was occasioned by a combination of injury no.1 and 2 and complications arising therefrom including aspiration of blood into air passages resulting in anoxic brain damage on account of the deceased having* D *been kept in a supine position for purpose of sexual assault – Held: Appellant is liable for injury no.1 however not for injury no.2 which was occasioned by the fall of deceased from the running train as in terms of evidence of witnesses the deceased herself jumped out of the train – To hold an accused liable u/s. 302 an intention to cause death or knowledge, is required on his part, that his act was likely* E *to cause death – However, as deposed by the Doctor, the intention of the appellant in keeping the deceased in a supine position was only for the purpose of sexual assault – Requisite knowledge that in the circumstances such an act may cause death, also cannot be attributed to the appellant – Hence, offence u/s. 302 not made out* F *against appellant – Conviction u/s. 302 set aside and altered to one u/s. 325 along with RI for 7 years – Penal Code, 1860 – ss. 394/397/447.*

Penal Code, 1860 – s.376 – Rape – As per the DNA typing, the seminal stain on victim's vaginal swab and vaginal smear G *belonged to the appellant – Further, blood of victim found in clothing of the appellant, i.e. pants, underwear and shirt – Offence committed on deceased after she suffered extreme injuries occassioned by fall from running train – Held: There can be no manner of doubt that it is the appellant who had committed the offence u/s. 376 in a most brutal and grotesque manner – Conviction of appellant confirmed* H *u/s.376 and hence life sentence awarded by trial court and*

confirmed by High Court, upheld. A

Partly allowing the appeals, the Court

HELD: 1.1 Item 1(a) and 2(b) contained the vagina swabs of the victim whereas Item 2(a) is vaginal smear collected from the victim. Item 3(a) is a cut open garment (M.O.1) and Item 18 is a torrn lunky (M.O.5). Item No.8 is the blood sample of the B accused. According to P.W. 70 (DNA expert) as per the DNA typing the seminal stains on Item No. 1(1), 2(a), 2(b), 3(a) and 18 belonged to the accused to whom the blood sample in Item No.8 belongs. [Para 12][349-H; 350-A-B]

1.2 So far as the offence under Section 376 IPC is concerned, C from a consideration of postmortem report (Exhibit P-69), D.N.A. Profile (Exhibit P-2) and the evidence of P.W. 64 (Doctor) and P.W. 70, there can be no manner of doubt that it is the accused appellant who had committed the said offence. The D.N.A. profile clinches the issue and makes the liability of the accused explicit D leaving no scope for any doubt. The conviction of the accused is confirmed under Section 376 IPC. Having regard to the fact that the said offence was committed on the deceased who had already suffered extreme injuries on her body, it is held that not only the offence under Section 376 IPC was committed by the accused, the same was so committed in a most brutal and grotesque manner E justifying the imposition of life sentence as awarded by the learned trial Court and confirmed by the High Court. [Para 13][350-C-E]

2.1 The death of the deceased was occasioned by a combination of injury nos.1 and 2, and complications arising therefrom including aspiration of blood into the air passages F resulting in anoxic brain damage. The same, in the opinion of P.W.64, had occurred due to the fact that the deceased was kept in a supine position for the purpose of sexual assault. However, so far as injury no.2 is concerned, unless the fall from the train can be ascribed to the accused on the basis of the cogent and G reliable evidence, meaning thereby, that the accused had pushed the deceased out of the train and the possibility of the deceased herself jumping out of train is ruled out, the liability of the accused for the said injury may not necessary follow. It cannot be ignored that as per evidence of P.W 4 and P.W 40 in this regard, they

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A were told by the middle aged man standing at the door of the compartment that the girl had jumped out of the train and had made good her escape. The circumstances appearing against the accused have to be weighed against the oral evidence on record and the conclusion that would follow must necessarily be the only possible conclusion admitting of no other conclusion. Such a conclusion to the exclusion of any other, however, could not be reached in light of the facts noted above.[Paras 15, 16][350-H; 351-A-D, F-G]

2.2 Further, keeping of the deceased in a supine position for commission of sexual assault had been deposed to by P.W. 64 as having a bearing on the cause of death of the deceased. However, to hold the accused liable under Section 302 IPC what is required is an intention to cause death or knowledge that the act of the accused is likely to cause death. .The intention of the accused in keeping the deceased in a supine position, according to P.W. 64, was for the purposes of the sexual assault. The requisite knowledge that in the circumstances such an act may cause death, also, cannot be attributed to the accused, inasmuch as, the evidence of P.W. 64 itself is to the effect that such knowledge and information is, in fact, parted with in the course of training of medical and para-medical staff. The fact that the deceased survived for a couple of days after the incident and eventually died in Hospital would also clearly militate against any intention of the accused to cause death by the act of keeping the deceased in a supine position. Therefore, in totality of the facts, the accused cannot be held liable for injury no.2. Similarly, in keeping the deceased in a supine position, intention to cause death or knowledge that such act may cause death, cannot be attributed to the accused. The offence under Section 302 IPC not made out against the accused. Rather, the acts of assault, attributable to the accused would more appropriately attract the offence under Section 325 IPC. The accused appellant is accordingly found guilty of the said offence and sentenced to undergo rigorous imprisonment for seven years for commission of the same. [Para 17][351-H; 352-A-E]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 1584-1585 of 2014.

From the Judgment and Order dated 17.12.2013 of the High Court of Kerala at Ernakulam in Criminal Appeal No. 149 of 2012.

B. A. Aloor, Prasenjit Sarkar, Satheesh Nair K. R. and Rahul Gupta, Advs., for the Appellant.

Thomas P. Joseph, Sr. Advocate, Nisherajen Shonker, Ms. Anu K. Joy and Gajendra Kichi (for Jogy Scaria), Advs., for the Respondent.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. The accused appellant has been convicted under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and sentenced to death. He has additionally been convicted under Section 376 IPC and sentenced to undergo rigorous imprisonment for life. Besides, he has been found guilty of the offences punishable under Section 394 read with Section 397 IPC as well as under Section 447 of the IPC for which he has been separately sentenced to undergo rigorous imprisonment for seven years and three months respectively. The conviction of the accused appellant and the sentences imposed have been confirmed in appeal by the High Court. Aggrieved, the present appeals have been filed.

2. The case of the prosecution in short is that the deceased/victim girl, aged about 23 years, was working in Ernakulam and was engaged to one Anoop (P.W.76), who also happened to be employed in Ernakulam. Their betrothal ceremony was to be in the house of the deceased at Shornur on 2nd February, 2011. P.W.76 along with his family members were scheduled to visit the house of the deceased on that day. Accordingly, on 1st February, 2011 the deceased boarded the Ernakulam-Shornur Passenger Train at about 5.30 p.m. from Ernakulam Town North Railway Station to go to her home at Shornur. The deceased had boarded the ladies division of the last compartment. There were other passengers in the ladies division of the compartment along with the deceased. When the train reached Mulloorkara, all other lady passengers in the ladies division of the compartment had alighted and, therefore, the deceased also got down along with them and hurriedly entered the ladies coach attached just in front of the last compartment. The train reached Vallathol Nagar Railway Station, where it halted for some time.

3. According to the prosecution, the accused appellant, who is a habitual offender, noticed that the deceased was alone in the ladies

A compartment. As soon as the train had left Vallathol Nagar Railway Station and moved towards Shornur the accused entered the ladies compartment. The prosecution alleges that inside the compartment the accused had assaulted the deceased and, in fact, repeatedly hit her head on the walls of the compartment. The prosecution has further alleged that the deceased was crying and screaming. It is the case of the B prosecution that the victim was dropped/pushed by the accused from the running train to the track and that the side of her face hit on the crossover of the railway line. The accused appellant also jumped down from the other side of the running train and after lifting the victim to another place by the side of the track he sexually assaulted her. Thereafter C he ransacked her belongings and went away from the place with her mobile phone.

4. It is the further case of the prosecution that P.W. 4 - Tomy Devassia and P.W. 40 - Abdul Shukkur were also traveling in the general compartment attached in front of the ladies compartment. According to D the prosecution, the said witnesses heard the cries of the deceased. P.W. 4 wanted to pull the alarm chain to stop the train but he was dissuaded by a middle-aged man who was standing at the door of the compartment by saying that the girl had jumped out from the train and escaped and that in these circumstances he should not take the matter any further as the same may drag all of them to Court. However, when E the train reached Shornur Railway Station within a span of 10 minutes, P.W.4 and P.W.40 rushed to P.W.34 – Joby Skariya, the guard of the train and complained about the incident which triggered a search, both, for the deceased and the accused. Eventually, the deceased was found in a badly injured condition lying by the side of the railway track and the F accused was also apprehended soon thereafter in circumstances which need not detain the Court. According to the prosecution, the deceased was removed to the local Hospital whereafter she was taken to the Medical College Hospital, Thrissur where she succumbed to her injuries on 6th February, 2011. It is in these circumstances that the accused was charged with the commission of crimes in question for which he has G been found guilty and sentenced, as already noticed.

5. A large number of witnesses (83 in all) had been examined by the prosecution in support of its case and over a hundred documents were exhibited. For the present it would suffice to notice the evidence of P.Ws.4, 40, 64 and 70. The Postmortem report (Exhibit P-69) and

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D.N.A. Profile (Exhibit P-2) would also require a specific notice and the relevant part thereof may also require to be reproduced.

6. P.W.4 and P.W.40, as already mentioned, were traveling in the general compartment which was attached just in front of the ladies compartment. According to both the witnesses, they heard the sounds of a woman crying and wailing coming from the ladies compartment and though P.W. 4 wanted to pull the alarm chain of the train he was dissuaded by a middle-aged man who reported to them that the issue should not be carried any further as the woman had alighted from the train and had made good her escape. According to P.W. 4 and P.W.40, they brought the matter to the attention of P.W.34, the guard of the train as soon as the train had reached Shornur railway station. The recovery of the deceased and the apprehension of the accused followed thereafter.

7. P.W. 64 – Dr. Sherly Vasu who was then working as Professor and Head of Department of Forensic Medicine, M.C.H. Thrissur conducted the postmortem examination of the deceased with the assistance of five other doctors (who were also examined). According to P.W. 64, he had noted 24 antemortem injuries on the body of the deceased, details of which have been mentioned by him in the postmortem report (Exhibit P-69). While it will not be necessary to notice the details of each of the injuries sustained/suffered by the deceased, the evidence of P.W. 64 so far as the injury Nos.1 and 2 is concerned, being vital, would require specific notice and, therefore, is extracted below:

> "Injury No.1 is sufficient to render her dazed and insensitive. It is capable of creating dazeness to head and rendering incapable to respond. These wounds may not be of the nature of exclusive cause of death. This injury will be caused only if the head is forcefully hit to backward and forward against a hard flat surface. Need not become total unconscious. But can do nothing. The injury described in No.1 is caused by hitting 4-5 times against a flat surface holding the hair from back with a right hand. These injuries are photographed in detail in Ext. P.70. CD. This is my independent findings. I have also checked the matters listed in the requisition from an independent evaluation what I understand is that after hitting the head on a flat and hard substance several times and rendering insensitive dropped.

A (Q) If hit against the wall (of train) holding hair from behind it will occur? (A) Yes. It will occur so.

Injury No.2. It is the injury sustained from beneath the left eye upto chin bone. Further below and on lips. There are fractures on maxilla and mandible. About 13 teeth have
B gone severed. The left cheek bone is pulverized. A vertically long mark of rubbing chin bone and cheek is seen. So it is added in remarks that fall on to smooth surface of a rail and gliding forward (upward) (gliding). The gliding mark on lower chin is seen 5 cm. (Gliding movement) In post mortem request it is pushed down from running train. So
C though it was a running train it had only negligible speed. In inflicting this injury the speed of the train had only a negligible role. The speed ignorable. Since she was rendered insensitive as a result of injury No.1 in the absence of natural reflex the face had to bear the full force of the
D descent, it is seen. In case she was not dazed and had alert reflexes and fallen in such a condition she would have moved hands forward and the hands would have showed the force of the fall to some extent. There was no injuries of fall on elbows, wrists and inner boarders of fore arms. There was no reflexes in this fall. No.2 are injuries that may have been
E caused by fall of a person having the weight of this person (42 kg.) from a height of 5 to 8 feet. These injuries will be sustained if this portion (left cheek bone crosswise) hits against train tract. I have visited this scene on 9-2-2011 with C.I. Chelakkara.

F These 5 tracks were seen. They are seen as intercoin (cross). So understood that it can happen when fallen from a moving train into the next near cross tract. Usually two tracks go Parallel. This is not such a place. Left cheek bone has been thoroughly pulverized. The bone was
G pulverized as there are air cells inside maxilla. By the force of the fall as there are air cells inside maxilla.

8. The opinion of P.W. 64 as to the cause of death mentioned in the postmortem report is as follows:

"The decedent had died due to blunt injuries sustained to

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head as a result of blunt impact and fall and their complications including aspiration of blood into air passages (during unprotected unconscious state following head trauma) resulting in anoxic brain damage. She also showed injuries as a result of assault and forceful sexual intercourse. She had features of multiple organ disfunction at the time of death.

9. P.W.64 in his evidence had also explained that the aspiration of blood into the air passage could have been due to the victim being kept in a supine position, probably, for sexual intercourse which may have resulted in anoxic brain damage.

10. There are other parts of the postmortem report and the evidence of P.W. 64 which would also require a specific notice insofar as the offence under Section 376 IPC alleged against the accused appellant is concerned. The relevant part of the postmortem report is extracted below:

"Pelvic Structures: Urinary bladder was empty. Uterus and its appendages appeared normal, the cavity was empty; endometrium showed congestion and the cervical os was circular. The right ovary showed polycystic changes. Spine was intact.

Vaginal introitus and wall showed contusion all around, most prominent just behind urethral meatus. Hymen showed a recent complete tear at about 5'O clock position and partial recent tear at about 7'O clock positions (as suggested by edema and hyperemia of edges) and a natural indentation at 1'O clock position.

(Remark – recent sexual intercourse)"

11. The evidence of P.W. 70 – Dr. R. Sreekumar, Joint Director (Research) holding charge of Assistant Director, D.N.A. in the Forensic Science Laboratory, Trivandrum and the report of examination (Exhibit P-2) may now be noticed.

12. P.W. 70 in his deposition has stated that after examination following results were recorded at pages No.19 and 20 of Exhibit P-2:

Item 1(a) and 2(b) contain the vagina swabs of the victim

A whereas Item 2(a) is vaginal smear collected from the victim. Item 3(a) is a cut open garment (M.O.1) and Item 18 is a torn lunky (M.O.5). Item No.8 is the blood sample of the accused.

According to P.W. 70, as per the DNA typing the seminal stains on Item No. 1(1), 2(a), 2(b), 3(a) and 18 belonged to the accused to B whom the blood sample in Item No.8 belongs.

Furthermore, from the evidence of P.W. 70 it is evident that the blood of the victim [Item 1(b)] was found in the clothing of the accused i.e. pants [Item No.13 (M.O.8)], underwear [Item No.14 (M.O.21)]; Shirt [Item No.17 (M.O.6)].

C 13. So far as the offence under Section 376 IPC is concerned, from a consideration of the postmortem report (Exhibit P-69) D.N.A. Profile (Exhibit P-2) and the evidence of P.W. 64 and P.W. 70, there can be no manner of doubt that it is the accused appellant who had committed the said offence. The D.N.A. profile, extracted above, clinches the issue D and makes the liability of the accused explicit leaving no scope for any doubt or debate in the matter. We, therefore, will find no difficulty in confirming the conviction of the accused under Section 376 IPC. Having regard to the fact that the said offence was committed on the deceased who had already suffered extreme injuries on her body, we are of the view that not only the offence under Section 376 IPC was committed by E the accused, the same was so committed in a most brutal and grotesque manner which would justify the imposition of life sentence as awarded by the learned trial Court and confirmed by the High Court.

14. Insofar as the offence under Section 394 read with Section 397 IPC is concerned, there is also adequate evidence on record to F show that the accused after committing the offence had taken away the mobile phone of the deceased and had, in fact, sold the same to P.W.7 – Manikyan who again sold the same to P.W.10 – Baby Varghese from whom the mobile phone was seized by the Police.

15. This will bring the Court to a consideration of the culpability of G the accused for the offence punishable under Section 302 IPC and if the accused is to be held so liable what would be the appropriate punishment that should be awarded to him. The evidence of P.W. 64, particularly, with reference to the injury No. 1 and 2, details of which have been extracted above, would go to show that the death of the deceased was H occasioned by a combination of injury no.1 and 2, and complications

arising therefrom including aspiration of blood into the air passages resulting in anoxic brain damage. The same, in the opinion of the doctor (P.W.64), had occurred due to the fact that the deceased was kept in a supine position for the purpose of sexual assault. In a situation where death had been certified and accepted to have occurred on account of injury Nos. 1 and 2 and aspiration of blood into the air passages on account of the position in which the deceased was kept, the first vital fact that would require consideration is whether the accused is responsible for injury No.2 which apparently was occasioned by the fall of the deceased from the running train. Before dealing with Injury No.2 we would like to observe that we are of the opinion that the liability of the accused for Injury No.1 would not require a redetermination in view of the evidence of P.W.4 and P.W.40 as to what had happened in the ladies compartment coupled with the evidence of P.W.64 and the Postmortem report (Exhibit P-69). However, so far as Injury No.2 is concerned, unless the fall from the train can be ascribed to the accused on the basis of the cogent and reliable evidence, meaning thereby, that the accused had pushed the deceased out of the train and the possibility of the deceased herself jumping out of train is ruled out, the liability of the accused for the said injury may not necessary follow.

16. In this regard, the learned counsel for the State has referred to injury No.1 sustained by the deceased, as deposed to by P.W.64, and has contended that in view of the impaired mental reflexes that the deceased had at that point of time it may not have been possible for her to take a decision to jump out of the train. While the said proposition need not necessarily be incorrect what cannot also be ignored is the evidence of P.W. 4 and P.W. 40 in this regard which is to the effect that they were told by the middle aged man, standing at the door of the compartment, that the girl had jumped out of the train and had made good her escape. The circumstances appearing against the accused has to be weighed against the oral evidence on record and the conclusion that would follow must necessarily be the only possible conclusion admitting of no other possibility. Such a conclusion to the exclusion of any other, in our considered view, cannot be reached in the light of the facts noted above.

17. Keeping of the deceased in a supine position for commission of sexual assault has been deposed to by P.W. 64 as having a bearing on the cause of death of the deceased. However, to hold that the accused

A is liable under Section 302 IPC what is required is an intention to cause death or knowledge that the act of the accused is likely to cause death. The intention of the accused in keeping the deceased in a supine position, according to P.W. 64, was for the purposes of the sexual assault. The requisite knowledge that in the circumstances such an act may cause death, also, cannot be attributed to the accused, inasmuch as, the evidence B of P.W. 64 itself is to the effect that such knowledge and information is, in fact, parted with in the course of training of medical and para-medical staff. The fact that the deceased survived for a couple of days after the incident and eventually died in Hospital would also clearly militate against any intention of the accused to cause death by the act of keeping C the deceased in a supine position. Therefore, in the totality of the facts discussed above, the accused cannot be held liable for injury no.2. Similarly, in keeping the deceased in a supine position, intention to cause death or knowledge that such act may cause death, cannot be attributed to the accused. We are, accordingly, of the view that the offence under Section 302 IPC cannot be held to be made out against the accused so D as to make him liable therefor. Rather, we are of the view that the acts of assault, etc. attributable to the accused would more appropriately attract the offence under Section 325 IPC. We accordingly find the accused appellant guilty of the said offence and sentence him to undergo rigorous imprisonment for seven years for commission of the same.

E 18. Consequently and in the light of the above discussions, we partially allow the appeals filed by the accused appellant. While the conviction under Section 376 IPC, Section 394 read with Section 397 IPC and Section 447 IPC and the sentences imposed for commission of the said offences are maintained, the conviction under Section 302 IPC F is set aside and altered to one under Section 325 IPC. The sentence of death for commission of offence under Section 302 IPC is set aside and instead the accused is sentenced to undergo rigorous imprisonment for seven years. All the sentences imposed shall run concurrently. The order of the learned Trial Court and the High Court is accordingly modified.

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Divya Pandey Appeals partly allowed.