

A KANAKARAJAN @ KANAKAN

v.

STATE OF KERALA

(Criminal Appeal No. 841 of 2007)

B APRIL 21, 2017

[N. V. RAMANA AND PRAFULLA C. PANT, JJ.]

Penal Code, 1860 – ss.143, 147, 148, 342 and 302 – Murder – Infirmities in prosecution case – Benefit of reasonable doubt – Acquittal of accused – Case of prosecution was that at night, while a religious procession was going on in a Temple compound, nine accused attacked victim-deceased and when PW-2 tried to intervene, he too was beaten by the accused persons – On way to hospital, victim-deceased succumbed to injuries – Out of nine accused, one accused A-2 was found hanging from a tree on the next day and was declared dead – Trial court acquitted all accused except A-1, A-5 and convicted them u/ss.143, 147, 148, 342 and 302 – High Court acquitted A-5 and upheld the conviction of A-1 – Appellant-A-1 contended that the entire case is fabricated and he has been falsely implicated in the case – Held: The conduct of PW-2 in not accompanying the accused from one hospital to another, not giving complaint to the police and not getting injuries treated raises serious doubts and supports the case of defense that PW-2 is kingpin who has implicated the accused with the help of his brother-in-law who is in police department – Prosecution witnesses were not cogent and trustworthy to form basis to convict the appellant – Non-examination of credible independent witnesses and non-conduction of test identification parade by investigating agencies, was very fatal to the case of prosecution – Further, some witnesses turned hostile – Also, investigating agencies failed in their duty to thoroughly investigate and find out reasons for death of A-2 who is alleged to be the prime accused – Prosecution case filled with infirmities and lacunas and thus, grant of benefit of reasonable doubt extended to the appellant.

Allowing the appeal, the Court

HELD: 1. In the backdrop of the facts and circumstances a closer look at the evidence of prosecution witnesses, in particular

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PW2, PW4 PW5, PW11, PW12, PW21 and PW22, would reveal that these witnesses are not cogent and trustworthy to form basis to convict the appellant. Admittedly the incident had taken place in the midst of several hundred people and the prosecution witnesses in equivocal terms stated that the police personnel were present. There is nothing on record to show that the police constables available at the scene of offence were examined or that they have played any role in preventing the accused. The conduct of PW2 in not accompanying the accused to the second hospital, not giving the complaint to the police and not getting his injuries treated raises serious doubts and supports the case of the defense that PW2 is the king pin who has implicated the accused with the help of his brother-in-law who is in the police department. Above all when the High Court disbelieves the presence of PW2, at the scene of offence, it ought not to have taken into consideration his evidence to convict the appellant. The prosecution has not taken minimum care to examine the independent witnesses in support of their case and particularly when it is nobody's case that independent witnesses were not available. [Para 17] [84-C-F]

2. Non examination of credible independent witnesses in this case is very much fatal to the prosecution's case. Particularly when it is their own case that there were several shops and houses in the vicinity and several people were present. It is not necessary that in each and every case on the ground of non examination of independent witnesses the case of the prosecution has to be brushed aside, if the evidence of prosecution witnesses is consistent, cogent and corroborated by other evidence it can be safely relied upon, but it is not so in the case at hand. The High Court disbelieved the presence of PW2, PW3 turned hostile, statements of PW4, PW5 and PW 22 do not inspire confidence. No other independent witness is examined. PW11 the panchwitness for recovery of weapon has also turned hostile and deposed that he signed without reading the same. Moreover there is no evidence to show any results of forensic examination of the weapon so recovered. The High Court, while convicting the appellant, should have been more cautious while weighing the evidence of these prosecution witnesses. [Para 18] [84-F-H; 85-A]

A **3. In this case the High Court while convicting the accused has overlooked settled principles of criminal law and in a mechanical way based its conclusion on the premise that the injuries were not sustained in the process of the same incident. In a case of this nature, where the investigating agency utterly failed in its duty to thoroughly investigate and find out the reasons for the death of A2 who is alleged to be the prime accused in causing the death of the deceased, convicting an accused would not be safe. [Para 20] [85-D-E]**

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C **4. The other glaring aspect is that the test identification parade was not conducted. This aspect gains relevance as PW4 and PW5, who are cited as eye witnesses to the incident, deposed that they have not mentioned the names of the accused and that they did not know the accused. [Para 22] [85-H; 86-A]**

D **5. The prosecution case is filled with infirmities and lacunas, therefore the only possible and probable course left open is to grant benefit of reasonable doubt to the appellant. [Para 23] [86-B]**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 841 of 2007.

E From the Judgment and Order dated 08.11.2006 by the High Court of Kerala at Ernakulam in Criminal Appeal No. 1906 of 2004.

R. Basant, Sr. Adv., Venkita Subramoniam T. R., A. Karthik, V. K. Sidharthan, Advs. for the Appellant.

C. K. Sasi, Adv. for the Respondent.

F The Judgment of the Court was delivered by

G **N. V. RAMANA, J. 1.** This appeal is directed against the Judgment dated 8th November, 2006 passed by the High Court of Kerala in Criminal Appeal No. 1906 of 2004, wherein the High Court has dismissed the appeal preferred by the accused/appellant herein and upheld the order of conviction and sentence passed by the learned Additional Sessions Judge, Fast Track Court-I, Palakkad, in Sessions Case No. 104 of 2002.

H 2. The material available on record reveals that initially there were nine accused in this case against whom an FIR was registered at 9 am

on 6.3.2000 at Kongad Police Station for causing the death of one Rajesh and injuring the complainant/Vinod (PW2), who happens to be the cousin of the deceased. Since the accused No. 2 (Ayyappankutty) was found hanging from a tree on the next day and was declared dead, charges were framed only against the remaining accused under Sections 143, 147, 148, 302, 342 and 324 r/w 149 of Indian Penal Code, 1860 [*hereafter 'IPC' for brevity*]. The Trial Court acquitted A3, A4, A6, A7, A8 and A9 of the charges and convicted A1 (Kanakarajan) and A5 (Sukumaran) for the offences punishable under Sections 143, 147, 148, 342 and 302 r/w 149 of IPC. On an appeal, the High Court acquitted A5 of all the charges but upheld the order of conviction and sentence as against A1 (Kanakarajan) who is before us in the present appeal.

3. The brief facts of the case as unfolded from the case of prosecution is that, on the intervening night of 5th and 6th March, 2000, an ox procession was going on at Kunnappully temple at Tharakassery and several people had gathered around the temple premises. At about 2 A.M, accused attacked the deceased Rajesh, with deadly weapons such as swords and sticks, as a result of which he sustained grievous injuries. When the complainant—Vinod (PW2) tried to intervene and stop the accused, he too was beaten up by the accused. While the general public started gathering at the place of incident, the accused party took to their heels. With the help of some of the people assembled there, PW2 took the injured Rajesh in his jeep to the Fort Hospital where the doctor advised to shift the injured Rajesh to the Medical College Hospital, Thrissur. On the way to the Medical College, Rajesh succumbed to the injuries at about 5.30 A.M.

4. Based on the information furnished by the complainant-Vinod/PW2 (cousin of the deceased), Sub-Inspector (PW 21) at Kongad Police Station registered the case as Crime No. 56/2000. PW22 (Circle Inspector) took up the investigation and carried it through to a larger extent and his successor, Circle Inspector (PW23) concluded the investigation and filed the charge sheet against all the nine accused persons, who pleaded not guilty and claimed trial.

5. The prosecution in order to bring home the guilt of the accused has produced 23 witnesses and the defense has produced one witness. Out of the aforesaid 23 prosecution witnesses, PW3 who was an eyewitness to the incident, turned hostile. PWs 11 and 12, who were witnesses to the recovery mahazar (Ext. P10), also turned hostile. PW11

A being the panch witness for the recovery of 'vadival', allegedly the weapon used for committing the crime, did not support the case of the prosecution. In the accused/appellant's statement under Section 313, Cr.P.C, he had stated that on the eve of Kummatti festival he went to the temple to pay respects to the deity and while having a soda drink from a roadside shop, he saw a group of people running into the temple compound and heard from someone that Haridas, Vinod (PW2) and Rajesh (deceased) were attacking Ayyappan Kutty (A2). While he was trying to see from a closer point, as to what is going on, someone among the crowd said some persons have taken away Ayyappan Kutty (A2). On the next day i.e. 7.3.2000 at about 9.30 A.M, Ayyappan Kutty was found hanging from a tree while his legs were touching the ground and there were injury marks on A2's body. When he went to the police station to report the same, the police arrested him and foisted a false case upon him, though he had nothing to do with the incident.

D * 6. The Trial Court, after a full-fledged trial has come to the conclusion that the prosecution could not prove the guilt of accused A3, A4, A6, A7, A8 and A9 beyond reasonable doubt and acquitted them by extending the benefit of doubt. However, the Trial Court found A1 and A5 guilty of the offences and sentenced them under Section 302, IPC to imprisonment for life and to pay a fine of Rs.10,000/- each and in default, to undergo rigorous imprisonment for six months. Further under Section 342, IPC, the accused were sentenced to undergo rigorous imprisonment for a period of six months under Section 143 and for a period of one year under Section 148, IPC. The sentences were however directed to run concurrently.

F 7. Aggrieved by the conviction both appellant/A1 and A5 carried the matter over to the High Court in appeal, where the High Court gave benefit of doubt to A5 and allowed his appeal by acquitting him of the offences charged. The appeal of appellant/A1 was however dismissed by the High Court as being devoid of any merit, thereby confirming the order of conviction and sentence passed by the Trial Court.

G 8. We heard the learned senior counsel Mr. R. Basant appearing for the accused/appellant. He contended that the entire case is fabricated and foisted one suppressing the real incident that had taken place in order to falsely implicate the accused/appellant. He has vehemently argued that the prosecution has concocted the story to harass the accused by taking advantage of his long standing rivalry with the deceased

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concerning cutting of some rubber trees. At the alleged place of incident, which is a temple compound, there were more than 10,000 people present in addition to the police force stationed around the temple compound. He points out that, when an incident of such grave nature had taken place amidst huge public gathering and police force, it is impossible to not have a single independent witness.

9. Another vital aspect pointed out by the learned senior counsel is that making PW2 a witness to the alleged incident is an afterthought of prosecution. PW2—the author of FIR and being cousin of deceased, in connivance with his brother-in-law who was a Sub-Inspector of Police in the same district, is the mastermind in implicating the accused. As a matter of fact, on the night of the said incident, it was PW2 and the deceased Rajesh who attacked A2 (the brother of A1) and kidnapped him, due to their past enmity over cutting rubber trees belonging to another brother of A1 and A2. On the next day, the dead body of A2 was found hanging from a tree under mysterious circumstances with his feet touching the ground. Sixteen (16) ante mortem injuries were found in his body and some greenish poisonous substance was found oozing from his mouth. When A1 visited the police station to report the mysterious death of A2, instead the police arrested him in the present case. In order to save PW2, his brother-in-law being Sub-Inspector of Police, concocted the prosecution story and falsely implicated A1 in the case. On A2's mysterious death, the police had merely registered a case of unnatural death and no proper investigation was conducted and no person was prosecuted or arrested.

10. Learned senior counsel further submitted that there was an inordinate delay of 24 hours on the part of police in presenting the FIR before the court and no reason has been given by the prosecution for such delay. He further contends that the motive behind the crime, as alleged by the prosecution, is so trivial and unbelievable, would not be a sufficient reason for the accused to settle with such a heinous crime. Further he submits that it was well known fact among the people living in the vicinity that the deceased Rajesh was known to be a person of bad character in the locality as he has previously indulged in various illegal activities and had disputes with several people. According to learned senior counsel this fact stands corroborated with the evidence of PW's 2 and 4. Doubting the reliability of prosecution witnesses, it is submitted that out of the 23 prosecution witnesses, PW3 (eyewitness) turned hostile.

A PW 11 (panch witness) did not support the prosecution case on recovery of alleged weapon. The presence and conduct of PWs 4 and 5 (eyewitnesses) at the place of occurrence is highly doubtful because despite being close friends of the deceased, even after witnessing the incident, neither did they accompany the injured to the hospital nor did they take effort to register a case with the police. Their statement was recorded by the police five days after the incident. Even PW4 in his evidence did not mention the name and presence of PW5 at the alleged scene of offence. Learned senior counsel has finally submitted that though the High Court discarded the statement of PW2 as his presence at the place of offence was doubtful but the High Court still believed the story of prosecution and convicted the appellant while discharging other accused by giving them benefit of doubt. Hence, he prayed that the judgment of the High Court is perverse and that it is based on wrong reasoning, and therefore needs to be set aside by this Court.

D 11. On the other hand, learned counsel appearing for the State supported the prosecution case on all aspects and submitted that the reasoning given by the High Court in convicting the accused is based on settled legal principles. The High Court clearly recorded the finding that though no reliance is placed on the testimony made by the prime witness (PW2), it may not make any difference in fastening the liability of the accused. Hence, the impugned judgment does not call for interference by this Court.

F 12. Having heard learned counsel for both side and after carefully analyzing the material available on record, the following point falls for our consideration is (1.) "Whether the High Court is justified in convicting the accused (A1) and (2.) Whether the prosecution could prove the guilt of the accused beyond reasonable doubt"?

G 13. Looking at the evidence on record we find that there are certain pivotal issues where the prosecution has failed to provide a satisfactory explanation. The facts on hand reveal that the incident took place at 2 AM on the night of 5th and 6th March 2000. The place of occurrence is in the compound of the temple. On that day an ox procession was going on, there was a huge gathering of people and also several police personnel were present to maintain law and order. Moreover PW2-the eye witness, who happens to be the cousin of the deceased, basing on whose information the criminal law was set into

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motion. According to his statement a police constable was present when the incident was taking place. Further he had tried to stop the accused and was injured in the process. He carried the injured to the hospital at Pallakkad in his own jeep. Later he did not accompany the deceased to the Medical College Hospital Thrissur, where on the way deceased succumbed to the injuries. He came to know about the death at 7:30 AM, he neither chose to go to the police nor to the doctor for treatment and kept quiet till the police came to him. According to PW2 there are several houses and shops in the vicinity of the place where the incident took place, PW3 who is cited as eye witness turned hostile.

14. The prosecution then relied upon the evidences of PW4 and PW5; both of them have stated to have witnessed the incident and are cited as the independent witnesses. It is to be noted that the witness statements of PW 4 and PW 5 were recorded five days after the incident. PW4 deposed that he is a friend of deceased and got acquainted with PW2 after the incident. He did not mention about the presence of PW5 at the time of incident. Admittedly no test identification parade was conducted and he did not know the names of accused persons as on the date of occurrence. PW11, the panchwitness for recovery of the weapon, has turned hostile. He deposed that he signed the document without even knowing the contents of it.

15. As per PW21 the Sub Inspector of Police, several policemen were on duty at temple premises. As per PW22 the C.I of police PW4 told him that there were 3 constables present at the scene of crime. Neither PW4 nor PW5 disclosed to him that they knew the accused before the incident. They also did not mention the names of any of the accused. In clear terms, he admitted that though he had interrogated the people near the place of occurrence, he did not include them as witness. PW6 is the doctor who conducted post mortem on the deceased. PW18 is the doctor who examined the dead body of deceased Ayyappan Kutty (A2). According to him the cause of death was due to hanging. In the report he mentioned that in the stomach portion there were few unidentified food particles in a brownish fluid medium emitting an insecticide smell. He also expressed the view that there can be death of the person or unconsciousness after consuming insecticide. Evidently there were 16 ante mortem injuries on his body and was found hanging from a tree with his feet touching the ground. There is no investigation or explanation put forth by the prosecution for these injuries.

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A 16. The crucial evidence of DW1 is that on the evening of
5.3.2000, he saw Rajesh (deceased) scuffling with an Auto Rickshaw
driver when A2 interfered and separated them taking the side of Auto
Rickshaw driver. Later in the midnight, Rajesh (deceased) holding a
liquor bottle in one hand and knife in the other hand, attacked A2. At that
B point of time, when people started gathering, 2-3 people had taken away
Ayyappan Kutty (A2) from there. The next day at 9.30 am the body of
A2 was found hanging from a tree with his legs touching the ground.

C 17. In the backdrop of these facts and circumstance a closer look
at the evidence of prosecution witnesses, in particular PW2, PW4 PW5,
PW11, PW12, PW21 and PW22, would reveal that these witnesses are
not cogent and trustworthy to form basis to convict the appellant.
Admittedly the incident had taken place in the midst of several hundred
people and the prosecution witnesses in equivocal terms stated that the
police personnel were present. There is nothing on record to show that
the police constables available at the scene of offence were examined
D or that they have played any role in preventing the accused. The conduct
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raises serious doubts and supports the case of the defense that PW2 is
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disbelieves the presence of PW2, at the scene of offence, it ought not to
have taken into consideration his evidence to convict the appellant. The
E prosecution has not taken minimum care to examine the independent
witnesses in support of their case and particularly when it is nobody's
case that independent witnesses were not available.

F 18. We feel that non examination of credible independent witnesses
in this case is very much fatal to the prosecution's case. Particularly
when it is their own case that there were several shops and houses in
the vicinity and several people were present. It is not necessary that in
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No other independent witness is examined. PW11 the panchwitness for
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recovery of weapon has also turned hostile and deposed that he signed without reading the same. Moreover there is no evidence to show any results of forensic examination of the weapon so recovered. In our considered opinion the High Court, while convicting the appellant, should have been more cautious while weighing the evidence of these prosecution witnesses.

19. It is to be noted that the High Court has undertaken a scientific hypothesis to conclude that the difference of time of death, between the deceased A2 and Rajesh, were not connected. High Court's reliance on conjectural premise built upon the timing of rigor mortis, when the surrounding circumstances were suspicious, would not be safe to be followed. The next important aspect which requires our consideration is non-explanation of the injuries on the body of deceased A2. The death of deceased A2 as per ocular and medical evidence appears to be under suspicious circumstances. It is a clear case of laches on the part of prosecuting agency in conducting investigation goes to the root of the matter. Non-explanation of the serious injuries on the body of the accused A2 by the prosecution is fatal in this case.

20. In this case the High Court while convicting the accused has overlooked settled principles of criminal law and in a mechanical way based its conclusion on the premise that the injuries were not sustained in the process of the same incident. In a case of this nature, where the investigating agency utterly failed in its duty to thoroughly investigate and find out the reasons for the death of A2 who is alleged to be the prime accused in causing the death of the deceased, convicting an accused would not be safe.

21. The other ground put forth by the learned senior counsel is in respect of motive. According to him the motive attributed to the accused is that he had cut the rubber trees belonging to the brother of the accused four (4) years prior to the incident and it is not a sufficient motive to commit such a heinous crime. Needless to say that in this case the motive is a double edged sword, as it can be a reason for crime and at the same time a reason for false prosecution specially when the motive alleged is of ill-will and bad blood. In the present case evidence on record does not inspire confidence. Therefore, reliance on the motive would not be safe and as such serves no purpose.

22. The other glaring aspect is non-conduction of the test identification parade. This aspect gains relevance as PW4 and PW5,

A who are cited as eye witnesses to the incident, deposed that they have not mentioned the names of the accused and that they did not know the accused.

23. Therefore we find that the prosecution case is filled with infirmities and lacunas, therefore the only possible and probable course left open is to grant benefit of reasonable doubt to the appellant herein. Resultantly, the impugned judgment is set aside and the appeal is allowed. The bail bonds of the appellant stands discharged.

Ankit Gyan

Appeal allowed.