

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.M. SHAFFIQUE
&
THE HONOURABLE MR. JUSTICE P. SOMARAJAN

THURSDAY, THE 30TH DAY OF NOVEMBER 2017/9TH AGRAHAYANA, 1939

CRL.A.No. 988 of 2011 (C)

AGAINST THE JUDGMENT IN S.C.NO.472/2008 OF THE COURT OF THE
ADDITIONAL SESSIONS JUDGE (ADHOC) III, PALAKKAD DATED 30-11-2010

APPELLANT: ACCUSED:

MUHAMMED, S/O. AALASAN,
C.NO.9043,
CENTRAL PRISON, KANNUR.
CENTRAL PRISON, KANNUR.

BY ADVS. SRI. SHABU SREEDHARAN
SRI. P.R. VIBHU
SMT. NIDHI RAVINDRAN
SRI. M. YOHANNAN
SRI. V. SURESH KUMAR (HARIPAD)
SMT. T.M. NINITHA

RESPONDENT: COMPLAINANT:

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

BY ADV. SMT. AMBIKA DEVI S., SPL. PUBLIC PROSECUTOR FOR
ATROCITIES AGAINST WOMEN AND CHILDREN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 22-11-2017,
THE COURT ON 30-11-2017 DELIVERED THE FOLLOWING:

A.M.Shaffique & P. Somarajan, JJ.

Crl.Appeal No. 988 of 2011

Dated this the 30th day of November, 2017

JUDGMENT

P. Somarajan, J.

Appeal is against the judgment of conviction and order of sentence under Section 302 of the Indian Penal Code against the appellant/accused in S.C.No.472 of 2008, dated 30.11.2010, of the Additional Sessions Judge, Palakkad Division.

2. The prosecution case is that on 27.8.2008 at about 10.00 a.m., the accused throttled his wife and strangled her using a ligature (shawl), identified as MO1, and thereby committed murder of his wife.

3. There is no eye witness to the alleged incident. Hence, the prosecution mainly relied on the circumstantial evidence brought out through PW1 to PW14, Exts.P1 to P14 and MO1. It was brought out through PW1, PW2 and PW3 that the accused was very much there in the place of occurrence, a rental house, in and around the time in which the alleged incident happened. The victim is none

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else, the wife of the accused. PW1 is the next neighbour who had given Ext.P1 FIS regarding the alleged incident. PW2 is the son of the victim and the accused. PW3 is another neighbour of both the victim and the accused. PW9 is the owner of house No.1/70 situated at Thrithala Panchayat in which the alleged incident happened. It was taken on rent by the accused and the victim and they were residing together there along with their two minor children. PW3, a sterling witness, had deposed what actually happened on the ill-fated day, though she is not an eye witness to the alleged incident. She deposed that just before the commission of the offence, the victim came to her house and disclosed that she was locked in a room by her husband. PW2, the son of the accused, gives sufficient corroboration to the oral testimony of PW3 that the victim was locked in a room by her husband, the accused herein, just before the commission of the offence. PW2 had testified the presence of the accused in the house when he went to school along with his younger sister. At that time, the victim was seen locked in a room by her husband, the father of PW2. It is after that, the victim came to the house of the next neighbour, PW3, and told her that the accused had locked her in a room. It was at that time,

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the accused called her back to the rental house under the pretext that there is a telephone call from the school of PW2. Thereafter, the accused left the place in an autorickshaw to the school of PW2 and brought both the children back to his rental house under the guise that their mother is having some ailment. PW6, the autorickshaw driver, who brought the accused from the place of occurrence to the school, was examined by the prosecution and testified that the accused took his autorickshaw to the school and brought his two children back in the same autorickshaw to the rental house by 11 a.m. on the date of incident. PW5, the Headmaster of the School, was also examined to prove that the accused came to the school and took his two children back by 11 a.m. on the ill-fated day. The untainted oral testimony of PW5 and PW6 stood as corroborated by the oral testimony of PW2, the son of the victim and the accused. According to him, on the ill-fated day, the accused came to the school and brought back both the children under the guise that their mother is not well. When they came to the house, their mother was found lying unconscious. Though she was removed to the hospital, she was declared dead by the Doctor who attended her. Thereon, PW1 gave Ext.P1 FIS before the police.

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PW6 autorickshaw driver, though turned hostile to the prosecution, had admitted that the accused took his autorickshaw on the ill-fated day to the school by 11 a.m. and brought the children back to the rental house. He did not support the prosecution case that thereafter the accused went away from the rental house in the very same autorickshaw to Thrithala. As discussed earlier, the oral testimony of both PW5 and PW6 would give sufficient corroboration to the oral testimony of PW2.

4. One of the incriminating circumstances relied on by the prosecution is the presence of fibre on MO1 shawl as that of the fibres found both in the ligature mark found on the neck of the victim as well as the fibres taken from the palms of the accused. Ext.P14 is the chemical analysis report and Ext.P9 is the mahazar by which PW13 Circle Inspector of Police had seized the packet containing fibres collected from the palms of the accused using cellophane tape. Item No.6 is the ligature used for strangulation, item No.7 is the fibre found in the hands of the accused and item No.5 is the fibres collected from the ligature mark found on the neck of the victim. Ext.P13 is the forwarding note.

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5. It is an admitted case that the accused and the victim were husband and wife and they were living together in the rental house wherein the alleged incident happened. Since they were husband and wife, the test applied by using cellpohane tape and collection of fibres both from the ligature mark found on the neck of the victim and from the hands of the accused cannot be taken as an incriminating circumstance as there may be chances of having very same fibres on the hands of the accused and the shawl used by the victim. But at the same time, the fact that fibres were found in the ligature mark similar to that of the shawl identified as MO1 would sufficiently show that it is the ligature used for strangulating the victim. But, presence of the very same fibres in the hands/palms of the accused cannot be brought under the umbrella of an incriminating circumstance though it may be relevant in a case wherein the accused involved is a total stranger, not a person residing along with the victim.

6. But the fact that the accused was alone in the house of the victim and the alleged incident has happened inside the building

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under the secrecy of their rental house, would bring the matter within the sweep of S.106 of Evidence Act.

7. The Apex Court in **Trimukh Maroti Kirkan v. State of Maharashtra (2006 KHC 1469)** settled the application of Section 106 of the Evidence Act and the circumstance which would attract its application. Paragraph 12 of the above said judgment is extracted below for reference:

“12. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirlahd v. Director of Public Prosecution (1944 AC 315)* quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh 2003 (11) SCC 271*. The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such

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evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

(b.) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him.”

Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of S.106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.”

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8. The Apex Court in **State of West Bengal v. Mir Mohammad Omar and Others [(2000) 8 SCC 382]**, in paragraphs 31 to 34, held thus:

“31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact

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otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when S.114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

34. When it is proved to the satisfaction of the court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the court what else happened to Mahesh at least until he was in their custody.”

9. Earlier, this principle was approved and followed in **Balram Prasad Agrawal v. State of Bihar and Others (AIR 1997 SC 1830)**.

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Then again in **Ram Gulam Chaudhary and Others v. State of Bihar** [(2001) 8 SCC 311] this principle was applied and followed.

10. The fact that the accused was alone in the house and that the incident happened within the secrecy of their house, would be relevant and sufficient enough to fill up any missing link pointing towards the guilt of the accused, unless there is sufficient explanation from the accused or when the explanation forwarded by the accused is found to be false. In the instant case, no explanation was forwarded by the accused during his examination under S.313 Cr.P.C. Hence, the same is stood as an incriminating circumstance, pointing towards the guilt of the accused.

11. The conduct of the accused in leaving the place on seeing his wife lying unconscious in the room without removing her to the hospital or without seeking the help of neighbours to remove her to the hospital and without whispering anything to the neighbours about what happened to his wife, would be relevant under S.8 of the Evidence Act, as it would satisfy the requirement of a subsequent

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conduct of the accused relevant under S.8 of the Evidence Act just after the commission of the offence.

12. Further, the accused went to the school in an autorickshaw and brought the children back by 11 a.m. on the same day to the rental house under the guise that their mother is not well, is also relevant as he was trying to conceal something from the notice of others. The said conduct of the accused is also relevant and indicates only the hypothesis consistent with the guilt of the accused alone.

13. PW1 who had given FIS at the earliest moment, which is well evident from the fact that the FIR registered in furtherance of the FIS was received by the concerned Magistrate without any delay, gives sufficient corroboration to the oral testimony of PW2 son that the accused had made an extra judicial confession before him that he had killed his wife. PW2 disclosed the same to PW1 at the very moment when they were brought back to the rental house on seeing the dead body and it was disclosed by PW1 in Ext.P1 FIS. The case advanced by the prosecution that no such statement was made by

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PW2 under S.161 Cr.P.C. pales in insignificance as it was disclosed by PW1 at the earliest opportunity while giving FIS and that PW2 was under a frightened stage on account of the death of his mother. The extra judicial confession made by the accused is hence admissible and it would act against him, showing his complicity in the alleged crime.

14. The oral evidence tendered by the next neighbour would be relevant as the accused and the victim were seen together just before her death, that is, inside their house, and hence the theory of last seen together would come into play pointing towards the guilt of the accused.

15. There is utter failure on the part of the accused to explain under what circumstances his wife had sustained the injuries and who had strangled her resulting in her death, though he was present in the house at the time when the alleged incident took place and nobody else was there in the house at that time. Absence of proper explanation or a false explanation forwarded would act as an incriminating circumstance against the accused, giving an additional

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link in the chain of circumstances pointing towards the guilt of the accused.

16. The previous act of the accused in locking the victim in a room in their house and the frequent quarrel in between them would sufficiently show the motive behind the crime. He had brought his children from the school without having sufficient reason of his own, except the commission of offence which has resulted in the death of the victim, is also relevant under Section 8 of the Evidence Act as a subsequent conduct.

17. The fact that he had assigned a false reason before the school authorities in order to bring back the children to his house also amounts to a subsequent conduct in the context of the factual situation involved and hence relevant under Section 8 of the Evidence Act.

18. The medical evidence adduced also supports the main subtractum of the prosecution case. The injuries noted in Ext.P3 postmortem certificate are separately shown as injuries found on the

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neck and ante-mortem injuries. The injuries found on the neck of the deceased are 14 in numbers, which are as follows:

“B. Neck: Neck showed the following fresh ante-mortem injuries:

- 1) Crescentic abrasion 0.7x0.2cm, on right side of neck, 5 cm below right ear lobule and 6 cm outer to midline front of neck.
- 2) Crescentic abrasion 0.6x0.2 cm, on right side of neck, 6 cm below ear lobule and 5.5 cm outer to midline front of neck.
- 3) Crescentic abrasion 0.7x0.2 cm, on right side of neck, 7 cm below ear lobule and 6 cm outer to midline front of neck.
- 4) Crescentic abrasion 0.7x0.2 cm, on right side of neck, 0.3 cm below previous injury.
- 5) Crescentic abrasion 0.8x0.2 cm, on right side of neck, 7.5 cm below ear lobule and 7 cm outer to midline front of neck.
- 6) Crescentic abrasion 0.9x0.2 cm, on right side of neck, 0.3 cm below previous injury.
- 7) Crescentic abrasion 0.6x0.2 cm, on right half of front of neck, 7 cm below right angle of jaw and 4cm outer to midline front of neck.
- 8) Crescentic abrasion 0.7x0.2 cm, on left side of neck, 3 cm below left ear lobule and 9 cm outer to midline front of neck.

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- 9) Crescentic abrasion 0.9x0.2 cm, on left side of neck, 3.5 cm below ear lobule and 8.5 cm outer to midline front of neck.
- 10) Crescentic abrasion 1x0.2 cm, on left side of neck, 7 cm below left ear lobule and 7 cm outer to midline front of neck.
- 11) Crescentic abrasion 0.8x0.2 cm, on left side of neck, 7.5 cm below left ear lobule and 6.5 cm outer to midline front of neck.
- 12) Crescentic abrasion 0.7x0.2 cm, on left half of front of neck, 5 cm below jaw margin and 5 cm outer to midline front of neck.
- 13) Contused abrasion 1.5x1.2 cm, on left side of neck 8 cm below ear lobule and 9 cm outer to midline front of neck.
- 14) A pressure abrasion of size 34x3.5 to 5.5 cm is seen coursing transversely all around neck, placed at and below thyroid cartilage in midline front of neck, 6.5 cm below chin (breadth 3.5 cm); at 3 cm below right ear lobule (breadth 5.5 cm); at 4 cm below left ear lobule (breadth 5 cm) and 1 cm above root of neck in midline back of neck (breadth 4 cm). There were patchy areas of blood infiltration along the base and edges of the pressure abrasion. Flap dissection of neck in a bloodless field showed patchy areas of blood infiltration in the subcutaneous tissues underneath

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the pressure abrasion and also underneath the crescentic abrasions. Thick blood infiltration was seen in the strap muscles on front of neck underneath the pressure abrasion and also in the soft tissues underneath the pressure abrasion on back of neck. Thyroid cartilage was seen fractured obliquely in midline with thick blood infiltration around. The right superior horn of thyroid cartilage was also fractured with thick blood infiltration around. The cricoid cartilage was also fractured in midline front with blood infiltration around. The left horn of hyoid bone showed an inward compression fracture with thick blood infiltration around. Multiple petechial hemorrhages and echymoses were seen in the congested pharyngeal and laryngeal mucosa. Cervical vertebral column was intact.”

The ante-mortem injuries noted are the following:

“C. Injuries (Ante-mortem & fresh):

- 1) Contused abrasion 0.5 x 0.4 cm in upper lip in midline.
- 2) Contused abrasion 3x1 cm on lower lip in midline.
- 3) Contused abrasion 1x1 cm on left half of lower lip, just inner to left angle of mouth.

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- 4) Contusion 2x1.5x0.5 cm on front of chest in midline, 3 cm below sternal notch.
- 5) Contusion 7x4x1.5 cm, on front of chest in midline, 10 cm below sternal notch.
- 6) Contused abrasion 6x0.3 cm, oblique on left chest and breast, upper inner end at inner border of left nipple.
- 7) Contusion 4x3x1 cm on outer aspect of right upper arm, 1 cm below top of shoulder.
- 8) Contusion 5x4x1 cm on outer aspect of right upper arm, 1 cm below top of shoulder.
- 9) Contusion 5x3.5x0.5 cm on inner aspect of right upper arm, 9 cm above elbow.
- 10) Crescentic abrasion 0.8x0.2 cm on outer aspect of left upper arm, 1 cm above elbow with contusion 3x2x0.5 cm underneath.
- 11) Contusion 6x5x2.5 cm on front of right elbow and forearm, lower end at 4 cm below elbow.
- 12) Three circular contusions in a row, each of size 2x1.5 cm, 2x2 cm and 2x1.5 cm, over an area of 7x4 cm on front and inner aspects of right forearm, 5 cm below wrist.
- 13) Contusion 2x2x0.5 cm on back of right forearm, 12 cm below elbow.
- 14) Contusion 8x4x1.5 cm, on front and inner aspects of left forearm, 4 cm above wrist.

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- 15) Contusion 3x2x0.5 cm on back of left upper arm, 8 cm below top of back armpit fold.
- 16) Contusion 5x4x0.5 cm, on front of left upper arm, 4 cm below top of shoulder.
- 17) Contused abrasion 2x1.5 cm on upper aspect of left shoulder, just outer to root of neck.
- 18) Scalp contusion internally, 9x7 cm on left half of back of head, 2 cm behind top of ear. Thin subdural and subarachnoid bleeding was seen on left parietal and occipital lobes of brain.”

Crescentic abrasion which comes to 12 in numbers and the other abrasions found on the neck of the victim would show the application of hand and throttling and ligature strangulation.

19. The circumstances brought out by the prosecution, thus, are complete in nature, satisfies all the links pointing towards the guilt of the accused and no other hypothesis rather than the one consistent with the guilt of the accused is possible. Hence, we are of the considered view that there is no sufficient reason for having an interference to the finding of guilt of accused under S.302 IPC, as the medical evidence reveals 18 ante-mortem injuries and the crescentic marks (ligature marks) noted in the neck comes to more

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than 11 in numbers which would be an indication of not only strangulation by using a ligature but also throttling as spoken by the Doctor who conducted autopsy on the body of the deceased, which would satisfy the first and second limbs of S.300 IPC, an intentional commission of murder with full knowledge.

20. The sentence awarded, being a lesser one, does not call for any interference by this Court. Hence, the appeal fails, deserves only dismissed and we do so.

In the result, the appeal is dismissed confirming the finding of guilt of the accused for the offence under Section 302 IPC and the conviction and sentence thereunder.

A.M. Shaffique
Judge

P. Somarajan
Judge

ahz/