Jose Alias Kolli Jose

Vs

The State of Kerala

Criminal Appeal No. 99 of 1972

(C.A. Vaidialingam, I.D. Dua JJ)

10.01.1973

JUDGMENT

VAIDIALINGAM, J. -

1. The first accused, in this appeal, by special leave, challenges the judgment and order, dated August 19, 1971 of the High Court of Kerala confirming his conviction for an offence under Section 302, I.P.C. as well as the sentence of death imposed upon him for the said offence. The appellant, along with four others, was tried by the learned Sessions Judge of Trichur for an offence under Sections 302, 143 and 201 of the Indian Penal Code. The charges against the accused were that on April 13, 1970, at about 11.00 p.m. they formed themselves into an unlawful assembly with the common object of committing the murder of one Divakaran Nair and to cause disappearance of evidence punishable under Section 143 and that on the same day all of them, with the intention of committing the murder of the said Divakaran Nair, beat and fisted him and threw him in the courtyard of the house of the appellant and thereby caused his death. It is further alleged that the appellant and the second accused tied the hands and feet of the said Divakaran Nair and that the appellant poured poison into his mouth with the intention of causing his death and, with a view to cause evidence of the offences committed by them to disappear, they carried the body of Divakaran Nair and left it near the railway line.

2. The prosecution case was that the appellant with the help of the other accused and P.W. 4 was running a brothel in his house situated on the Trichur-Shoranur road. On April 13, 1970, the deceased, Divakaran Nair, visited the brothel and spent a couple of hours with P.W. 4. As Divakaran Nair overstayed the stipulated period, the appellant and the other accused got annoyed and, after beating and fisting Divakaran Nair, carried him from the room and threw him in the courtyard. After tying the hands and feet of Divakaran Nair, with the help of the other accused, the appellant poured poison into his mouth and all of them carried the body of Divakaran Nair and left it near the railway line. As a result of being thrown on the ground, Divakaran Nair sustained injuries to the skull and he died shortly thereafter.

3. The prosecution relied on the evidence of P.Ws. 3, 4, 7 and 9 as well as the statements of two other persons evidenced by Exts. P-25 and P-26. The learned Sessions Judge accepted the above evidence and held that the appellant and the three other accused had together attacked Divakaran Nair and threw him on the ground which caused him an injury to the skull as a result of which he died, and hence, it was further held that the said accused were guilty of an offence punishable under Section 302. The learned Sessions Judge further held that the administration of poison by the appellant to the deceased was also an offence under Section 302. The learned Sessions Judge sentenced the appellant to death. However, the other three accused were sentenced to life

imprisonment. The fifth accused was, however, found guilty only of the offence under Sections 143 and 201 and was sentenced to rigorous imprisonment for three months and one year respectively. Though the appellant and accused 2 to 4 were also found guilty of the offences punishable under Sections 143 and 201, I.P.C., no separate sentences were passed for those offences. The High Court, on appeal by all the accused, agreed with the findings of the Trial Court and confirmed their conviction and also the sentence.

4. As mentioned earlier, only the first accused has come to this Court and the other accused are not before us. Mr. Ramachandran, appearing as amicus curiae counsel for the appellant, has attacked the finding of guilt recorded against his client both by the learned Sessions Judge and the High Court.

5. The first contention of Mr. Ramachandran was that almost all the witnesses have turned hostile and ultimately the conviction has been rested substantially on the evidence of P.W. 3. According to the learned counsel it is not safe to base a conviction for murder on the testimony of a single witness. We are not inclined to accept this contention of Mr. Ramachandran. There is no impediment in law in a conviction being based upon the testimony of a single witness provided the courts come to the conclusion that his evidence is honest and trustworthy. But this contention need not detain us now, because, as we will presently show the courts have taken into account other items of evidence also. It is no doubt true that some of the witnesses have turned hostile, but it is clear that those witnesses have deliberately gone behind the statements made to the police with a view to help the accused. Another point to be borne in mind is that the incident, having taken place in a brothel, the evidence that will be forthcoming will only be of that quality which would be expected under the circumstances. The deceased was left in the house of the appellant at about 9.00 p.m. on April 13, 1970, as clearly borne out by the evidence of P.W. 5, the taxi driver. Regarding the actual occurrence, the evidence of P. Ws. 3 and 4 and the statements, Exts. P. 25 and P. 26, are very material. P.W. 4 was admittedly one of the inmates of the brothel and it was with her that the deceased spent a couple of hours. According to her, the deceased engaged her for two hours at about 9.00 p.m. on April 13, 1970. After a couple of hours, the appellant and accused 2 to 4 forcibly entered the room by removing the doors frame and all of them beat and fisted the deceased. The deceased was carried by being bodily lifted by all the four accused, taken out of the room and thrown in the courtyard. His hands and feet were tied by the accused and the appellant poured poison into his mouth. After this all the accused carried the body of the deceased out of the house. P.W. 3, who came to visit the brothel in the company of one Vasu, has also given evidence to the effect that he heard Divakaran Nair shouting 'do not kill me'. He saw the appellant and the three accused carrying the deceased from the room and throwing him in the courtyard and the appellant pouring some liquid into his mouth Exhibit P-25 is the statement given by Vasu and Exhibit P-26 is the statement given by one Krishnan, who was staying in the adjoining house. In both the statements Vasu and Krishnan have substantially given the same version as P.W. 3. Apart from those items of evidence, both the courts have also relied on the testimony of P.Ws 7 and 9. As evidence of all these witnesses have been accepted by both the courts and as we agree with their appreciation of the evidence, the criticism of the counsel that the conviction is based only on the evidence of P.W. 3 is not correct. We have already pointed out that even if there has been only solitary witness, namely P.W. 3, the conviction cannot be said to be bad provided that evidence was considered to be truthful, honest and acceptable. In view of the large volume of evidence mentioned above, the finding of the two courts holding that the appellant, along with the other three accused beat the deceased and threw him into the courtyard and that the appellant also poured poison into his mouth is correct. Thus the participation of the appellant in the incident is amply established.

6. The second contention of Mr. Ramachandran is that the courts have committed an error in law in

treating the evidence given by Vasu and Krishnan in the committal court as substantive evidence at the trial. We are not inclined to agree with this contention either. Even without these two statements, as pointed out by us earlier, there are various other items of evidence implicating the appellant. Anyhow we will also indicate that the courts have not committed any error in treating these statements as substantive evidence at the trial. The statement of Vasu, who accompanied P.W. 3 when the latter visited the brothel on the night in question, is Ext. P-25. The statement of Krishnan, the neighbour of the accused, is Ext. P-26. Both the statements were treated as substantive evidence in the Sessions Court under Section 33 of the Evidence Act on the ground that his presence cannot be obtained without an amount of delay and expense, which under the circumstances of the case, the court considers unreasonable. The evidence of the Investigating Officer, P.W. 24, which has been discussed by both the courts shows that at the time of trial, Vasu had left for Coorg and he was not available. It was not possible to serve summons on him and even a non-bailable warrant issued by the court was returned with the endorsement 'not available'. Under those circumstances, the learned Sessions Judge brought on record the statement made by Vasu before the Committal Court as substantive evidence and marked the same as P-25. Similarly regarding Krishnan, it was in evidence that he was laid up with paralysis at the relevant time and was not in a position to attend the court and give evidence. The learned Sessions Judge marked his deposition before the Committal Court as Ext. P-26 and treated it as substantive evidence. The High Court also has considered this matter and upheld the order of the Sessions Court treating these two items as substantive evidence under Section 33 of the Evidence Act. We are in entire agreement with the discussion of the High Court on this aspect. Therefore, this contention also will have to be rejected.

7. The third contention of Mr. Ramachandran was that the medical evidence does not establish that death in this case was caused by poison, and therefore, the appellant cannot be found guilty of murder. Here again, it is not possible for us to accept this contention. Both the learned Sessions Judge as well as the High Court have found the appellant guilty of the offence of murder under Section 302 and in recording this finding they have no doubt also taken into account the act of the appellant pouring poison into the mouth of the deceased. Mr. Ramachandran, however, is well-founded in his contention that the medical evidence does not establish that death in the present case was due to poisoning. This aspect has missed the attention of both the courts when they proceeded on the basis that the evidence on record establishes death being caused by poisoning also. In the post-mortem certificate, Ext. P-21, the doctor, P.W. 18, has given the cause of death as (1) shock and haemorrhage due to fracture base of skull and (2) poisoning. P.W. 18 has added a note to the effect 'opinion reserved pending result of chemical examination'. The doctor at that stage was not in a position to categorically give an opinion that the death was due to poison also. The Chemical Examiner P.W. 17, in his certificate, Ext. P-19 has stated that endrin, a poisonous chlorinated cyclic hydro-carbon, was detected in the viscera, in the stomach contents and liver, spleen and kidney. When the doctor has reserved his opinion on the question of death by poisoning in Ext. P-21, one would have expected the prosecution to have got further clarification when P.W. 18 was being examined. We have gone through the evidence of P.W. 18 and the impression left in our mind is that his evidence is very conclusive on this aspect. The sum and substance of his evidence is that endrin is a poison and that it will cause death if a sufficient quantity had been consumed. But he has admitted that he cannot say what quantity had been consumed. But he has admitted that he cannot say what quantity of endrin had to be administered to cause death. Therefore, it is clear that though the appellant might have poured a poisonous liquid into the mouth of the deceased, there is no evidence to hold that death in the present case was due to poison.

8. But the above finding does not help the appellant. The evidence clearly establishes that Divakaran Nair was bodily lifted and thrown in the courtyard as a result of which he sustained very serious

injuries. The post-mortem certificate shows that Divakaran Nair had sustained as many as six injuries and that the left frontal bone had suffered a fracture. According to the doctor, the injuries mentioned in his report, Ext. P. 21, could be caused by the victim being thrown on a floor. The injury to the frontal bone could cause shock and haemorrhage leading to death. In Ext. P-21 the doctor has stated that the cause of death was shock and haemorrhage due to fracture base of skull. Therefore, it is clear that the act of the appellant along with the others, in throwing Divakaran Nair on the ground resulted in his sustaining, among other injuries, fracture of the left frontal bone which proved fatal. Therefore, the conviction of the appellant for an offence under Section 302 is justified.

9. Mr. Ramachandran finally pleaded that the sentence of death should not have been imposed on the appellant. In our opinion, this contention has considerable force. Both the learned Sessions Judge and the High Court have proceeded on the basis that the appellant has acted in a brutal and callous manner when he administered poison to Divakaran Nair after the letter was thrown on the ground and on that ground the imposition of the death sentence is quite warranted. We have accepted the contention of Mr. Ramachandran earlier that in this case the medical evidence regarding death by poisoning is inconclusive, and as such it has to be ruled out. Therefore, the position is that the appellant was a party with accused 2 to 4 in bodily lifting Divakaran Nair and throwing him on the ground as a result of which the latter sustained the fatal skull injury. But the evidence regarding the lifting of Divakaran Nair and throwing him on the ground is common not only to the appellant but also to accused 2 to 4. There is no indication in the said evidence that the appellant played any greater part in the said act than the other three accused. For the same act, accused 2 to 4 have been sentenced only to life imprisonment and we do not see any reason why he appellant for the same part played, as accused 2 to 4, should be singled out for different punishment. The sentence of death was imposed on the appellant for his conduct of administering poison. Once that circumstance is ruled out, the appellant, in our opinion, should be awarded the same punishment as accused 2 to 4. Therefore, while confirming the conviction of the appellant for the offence under Section 302, we set aside the sentence of death passed on him and sentence him to imprisonment for life.

10. Subject to the above modification regarding the sentence, the appeal is dismissed.

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