

Chandran @ Surendran and Another

Vs

State of Kerala

Criminal Appeal Nos. 92-93 of 1989

(S. Ratnavel Pandian, J.)

28.08.1990.

JUDGMENT

S. RATNAVEL PANDIAN, J. -

1. These two appeals are preferred by the two appellants who were jointly tried before the Court of Session, Kasargode in Sessions Case No. 83 of 1986 under seven charges framed under Sections 449, 457, 458, 392, 397, 307 and 302 read with Section 34 of the Indian Penal Code on the allegations that on January 11, 1986 after sunset and before sunrise in furtherance of their common intention committed criminal trespass by entering into the building belonging to PW 7 (Parvathi Amma) and brutally attacked Pushpa and Gopalakrishna resulting in their death in the course of the commission of robbery and also caused injuries to PWs 7 and 8 by beating them with a spade. The case of the prosecution as unfolded from the evidence in brief is as follows :

PW 7, her son PW 8, daughter Pushpa (the deceased herein) and a relation by name Gopalakrishna (another deceased in this case) were residing in the house of PW 7 in Kudlu village, adjoining Kasargode town in Kasargode district. This district is at the northern end of Kerala state and adjoining the Karnataka state. The house was a small one consisting of two rooms and one verandah with two doors on both sides. The walls of the house were such that one could climb over and make entry. On the night of January 11, 1986, as usual, PW 8 and the deceased Gopalakrishna took their beds in the verandah while PW 7 and deceased Pushpa slept inside. Pushpa was wearing gold ear studs (MO 2) and nose stud (MO 3). PW 8 was wearing a wristwatch (MO 1). These two appellants residing in a border village in Karnataka state, namely, Talappadi came to the scene house taking MO 4 (a spade) which was lying in the courtyard of PW 6 situated 200 metres away from the scene. They battered PW 8 and Gopalakrishna with MO 4 and removed MO 1 from PW 8. Thereafter, they entered the room wherein the deceased Pushpa and PW 7 were sleeping questioning where they had kept their gold ornaments and money. PW 7 who woke up by then replied that there was no gold or money in the house except some coconuts in the courtyard. The appellants attacked PW 7 and Pushpa with MO 4 and removed MOs 2 and 3 from the person of Pushpa and escaped through the back door. On receipt of the injuries, Pushpa succumbed at the spot.

2. On the next morning at about 11.00 a.m., PW 2 a boy aged about ten years who used to deliver plantain leaves to PW 7 on every Friday and Sunday came to the scene house and found PW 8 and Gopalakrishna lying injured on the verandah. He rushed to the house of PW 3, the elder daughter of PW 7 and informed her of what he had seen. They all came back to the scene house and found Gopalakrishna and PW 8 lying speechless in the verandah in a pool of blood. On opening the door, to her shock, PW 3 found PW 7 lying with bleeding injuries and Pushpa dead. She found MOs 2 and 3 from the person of Pushpa and MO 1 of PW 8 missing. Inside the house, the household

articles and vessels were found strewn and glass splinters scattered. PW 3 sent PW 10 to fetch PW 1. By then a passing police jeep driven by PW 24 was stopped and PWs 7, 8 and Gopalakrishna were removed to the Government Hospital, Kasargode where they were admitted by PW 10, a Medical Officer. Thereafter, all the three injured were taken to the Government Wenlock Hospital, Mangalore where they were treated by PW 12.

3. Meanwhile, PW 1 came to the scene and went to the Kasargode Police Station where he gave a report Ex. P-1 on the strength of which PW 27 (Head Constable) registered a case in Crime No. 14 of 1986 under Sections 449, 397 and 302 IPC against some unknown persons. The Deputy Superintendent of Police, Crime Detachment, Kasargode (PW 33) took up investigation. He held inquest over the dead body of Pushpa and noticed MOs 4 to 24 lying at the scene. On a requisition from PW 33, the Fingerprint Expert (PW 30) reached the scene and found certain glazed articles like pooja vessel and broken glass pieces lying scattered. He found partial thumb impressions and thumb prints on two glass pieces. He took photographs of the impressions. PW 10, an Assistant Surgeon of the Government Hospital, Kasargode conducted the post-mortem on the dead body of the deceased, Pushpa and found nine external injuries as noted in the post-mortem certificate Ex. P-3. The skull was found scattered (sic shattered). In the opinion of the Medical Officer, all the injuries could have been caused with a weapon like MO 4.

4. The same Medical Officer examined Parvathi and found on her person a lacerated wound over the frontal aspect of the scalp which was grievous in nature. He issued Ex. P-4. The Medical Officer then examined PW 8 and found three lacerated wounds over the right and left side of the scalp, as noted in the certificate Ex. P-5. On Gopalakrishna, he found a lacerated wound over the right side of the scalp as noted in Ex. P-6 and referred the patient to Mangalore Hospital. Gopalakrishna died on January 21, 1986. PW 11 conducted the post-mortem on the dead body and found the head injury as a fatal one. According to the Medical Officer, the injuries on the respective persons could have been caused by a weapon like MO 4.

5. While so, the Deputy Inspector-General of Police, Mangalore formed an Anti-dacoity Squad headed by PW 29 (Dy. Superintendent of Police) to detect series of frequent dacoities accompanied by murders which had been reported in Dakshina Karnataka District. PW 29 accompanied by his party visited various places both in Karnataka and Kerala states. On a tip-off, PW 21 arrested the first appellant on February 27, 1986 at about 1.30 p.m. and the second appellant at 2.30 p.m. He recorded an incomplete statement of the first appellant in the midnight itself. On March 20, 1986, PW 29 telephonically asked PW 32 to verify an information which presumably came to his knowledge. On verification of that information, PW 32 recovered the wristwatch (MO 1) from PW 17 under a seizure Mahazar.

6. It is in the evidence of PW 28, Dy. Superintendent of Police of Panamboor Sub-Division, Karnataka who was investigating some other cases of robbery and murder examined the first appellant on March 10, 1986 and recorded his statement. In pursuance of the said statement, he recovered MOs 2 and 3 along with some other items of property from PW 22. Since the properties, MOs 2 and 3 were connected with the case registered in Kerala, he handed over the same to Dy. Superintendent of Police, Crime Branch (PW 33) on May 7, 1986 with a covering letter. These articles MOs 1 to 3 were identified by the witnesses as having belonged to the deceased - Gopalakrishna and Pushpa. It is the evidence of PW 30 that the finger impressions found on the broken glass pieces, recovered from the scene were developed for comparison and detailed examination. On May 12, 1986, PW 33 sent the finger prints of the appellants marked as Exs. P-20 and 21 respectively to PW 30 who found one of the finger prints detected in one of the glass pieces

identical to that of the first appellant. Similarly, the finger print in another broken glass piece, on comparison was found identical with the right palm print of the second appellant. PW 30 submitted his report Ex. P-22 on May 26, 1986 and his opinion on June 25, 1986 under Ex. P-23. The negatives were in the custody of the Police Photographer, Cannanore. PW 33 under the orders of the court obtained the custody of the appellants, the material objects and other records and questioned the witnesses with reference to the same. After completing the investigation, he laid the charge-sheet against both the appellants.

7. To prove the allegations levelled against the appellants, the prosecution examined PWs 1 to 33, filed Exs. P-1 to P-32 and marked MOs 1 to 23.

8. Both the appellants denied their complicity with the occurrence and stated that they had been subjected to third degree methods by the police and were compelled to touch the glass pieces, evidently referring to the glass pieces on which the thumb impressions are stated to have been detected. The trial court holding that "the evidence clinchingly established the guilt of the accused for having committed the offences punishable under Sections 449, 457, 458, 392, 397, 302, 307 read with Section 34 IPC" convicted them thereunder. Coming to the question of sentence, the trial court for the reasons mentioned under Point No. 9 sentenced both the appellants to death under Section 302 read with Section 34 IPC subject to the confirmation by the High Court of Kerala, and further sentenced both the appellants to imprisonment for life under Sections 449 and 459 IPC on each count. In respect of other convictions under all the remaining charges, the trial court imposed seven years' rigorous imprisonment on each count with a direction that the substantive sentences shall run concurrently and merge with the death sentence. On appeal, the High Court for the reasons mentioned in its judgment confirmed the convictions and sentences imposed by the trial court under all the charges and dismissed the appeals preferred by the appellants and disposed of the R.T. confirming the sentence of death imposed on both the appellants.

9. Before entering into the merits of the case, we at the threshold would like to point out that the conviction recorded by the trial court under Section 459 is without a charge. The High Court has rendered its judgment taking into consideration that both the appellants have been convicted only under Sections 449, 458, 392, 397, 302 and 307 read with Section 34 IPC but not under Section 459 IPC. In other words, the appellate court has not noted the conviction of the appellants under Section 459 and the sentence of imprisonment for life imposed therefor by the trial court without a charge. It seems that the appellants submitted their jail appeals before the High Court and on confirmation of their convictions they have presented the present appeals before this Court also only from the jail.

10. Mrs. Reena George who was appointed amicus curiae was represented by Mr. S.K. Dhingra, advocate who argued the case on behalf of the appellants before us.

11. The facts that there was a dreadful incident in the house of PW 7 on the night of January 11/12, 1986 in which Pushpa and Gopalakrishna were done away with in a ghastly manner and PWs 7 and 8 were seriously injured cannot be disputed and indeed it is not. The evidence of the Medical Officers who examined the injured persons and conducted the post-mortem examination on the dead bodies have opined that the injuries found on those unfortunate and helpless victims could have been caused with a weapon like MO 4. The only question that arises for our consideration is whether there is sufficient, cogent and acceptable evidence to incriminate both the appellants in this heinous crime.

12. Admittedly, there is no direct evidence connecting the appellants with the offence. No

identification parade seems to have been conducted although PW 33 has deposed that he requested for an identification parade. Further, there is no evidence about the movement of these appellants near the scene either before or after the occurrence. Therefore, the inference of guilt of the appellants is to be drawn from circumstantial evidence only. It is needless to emphasise that those circumstances should be of definite tendency pointing towards the guilt of the appellants and in their totality must unerringly lead to the conclusion that the offence was committed by the appellants and none else. The circumstantial evidence adduced by the prosecution in the instant case is two fold :

(1) The recovery of MOs 1 to 3 said to have been made in pursuance of the statement of the first accused to the police.

(2) The evidence of PW 30, the Fingerprint Expert to the effect that the finger impressions found on the two glass pieces seized from the scene of the occurrence were found on comparison and examination as those of appellants 1 and 2.

13. As the appellants are awarded the extreme penalty of law only on the above two pieces of evidence, we have to scrutinise these two circumstantial pieces of evidence in a very careful, cautious and meticulous way and see whether this evidence can be accepted and acted upon to mulct these appellants with this dastardly crime. The fact that these two murders which are cruel and revolting had been perpetrated in a very shocking nature should not be allowed in any way to influence the mind of the court while examining the alleged involvement of the appellants. It is worthwhile to recall an observation of this Court in *Datar Singh v. State of Punjab* [(1975) 4 SCC 272 : 1975 SCC (Cri) 530] articulating that (SCC p. 275, para 3) "Courts of justice cannot be swayed by sentiment or prejudice against a person accused of the very reprehensible crime..."

14. Before launching a discussion on the merits of the case, we may painfully point out that the chronology of events have not been satisfactorily brought on record. There were three police officers in the rank of Deputy Superintendent of Police, namely, PWs 28, 29 and 33 who were incharge of the investigation of various offences of dacoities and murders in that locality. In the present case, all these police officials in the course of the investigation of their respective cases entrusted to them have examined the first appellant on various dates and made recoveries of various items of properties inclusive of the material objects 1 to 3 concerned in this case. This has led us to strain to some extent to cull out the relevant portion of the evidence from the depositions of these witnesses so as to have a complete chain of circumstances.

15. The occurrence took place on the intervening night of January 11/12, 1986. It is in the evidence of PW 29 that on a credible information, he arrested the first appellant on February 27, 1986 at about 1.30 p.m. at a place called Kotigare and thereafter arrested the second appellant at about 2.30 p.m. at Azad Nagar. He conducted a search in the house of A-1 but nothing incriminating the appellant was recovered. On the same day between 9.00 p.m. and 12.00 midnight, he examined the first appellant and recorded his statement which was incomplete.

16. PW 28, another Deputy Superintendent of Police who was in charge of the investigation of some other cases of robbery and murder examined the first appellant on March 10, 1986 evidently on coming to know the arrest of A-1 by PW 29. The first appellant gave another statement of PW 28, the admissible portion of which (i.e. Ex. P-16) led to the recovery of some gold ornaments inclusive of MOs 2 and 3 and a wristwatch from PW 22 who has stated that he purchased those articles from the first appellant.

17. Since MOs 2 and 3 were found to have been concerned with this case registered in Kerala State, PW 28 handed them over to PW 33 with a covering letter on May 7, 1986. PW 29, the Deputy Superintendent of Police of Anti-dacoity Squad informed PW 32, the Sub-Inspector of Police, Belthangadi Police Station on March 20, 1986 at about 7.30 a.m. to verify an information - evidently relating to the recovery of MO 1. Accordingly, PW 32 went to the shop of PW 17 and recovered two watches, one of which being MO 1. This MO 1 was handed over to PW 32 at 7.30 p.m.

18. It is pertinent to note that the statement of the first appellant recorded by PW 29 on February 27, 1986 did not lead to the recoveries of MOs 1 to 3 although PW 29 claims to have recovered some other articles in pursuance of the said statement. But surprisingly, the statement recorded much later i.e. on March 10, 1986 by PW 28 led to the recovery of MOs 2 and 3. It was only ten days thereafter MO 1 was recovered.

19. On a careful scrutiny of the evidence with regard to the recoveries of MOs 1 to 3, we are least impressed with the version of the prosecution that these recoveries clinchingly establish the guilt of the first appellant. Be it noted that none of the recoveries was made in pursuance of any statement of the second appellant.

20. The next circumstances adduced by the prosecution is the evidence relating to the presence of the finger prints of the two appellants on two glass pieces (MOs 22 and 23) which were found scattered at the scene.

21. PW 30, the fingerprint expert on receipt of a message from the Inspector of Police examined the articles lying scattered at the scene of the occurrence and found the two broken glass pieces (MOs 22 and 23) containing portion of finger and palm prints. He developed the fingerprints for comparison and kept them in the fingerprint bureau, Cannanore. It is in the evidence of PW 33 that on May 11, 1986 the fingerprint and palm print of A-1 and A-2 were taken by a police constable of Kumbala Police Station under his direction and they were sent to PW 30 on May 12, 1986 for comparison. PW 30 compared those two fingerprints which were developed from MOs 22 and 23 with the fingerprints of A-1 and A-2 (marked as Exs. P-21 and 20 respectively) sent by PW 33 and gave his opinion that one of the fingerprints found in one of the glass pieces was identical with the right palm print of A-2 and the fingerprint found on the other glass piece tallying with the thumb impression of A-1. The explanation given by both the appellants in their statements recorded under Section 313 CrPC is that their fingerprints were obtained by the police on two glass pieces under coercion.

22. It is very strange that only two broken glass pieces among others recovered from the scene of occurrence contained two fingerprints tallying with the fingerprints of A-1 and A-2 respectively. According to PW 33, he got information about the arrest of the appellants by Karnataka Police on February 28, 1986 and got the custody of the appellants on April 25, 1986 which was extended for some more days. Then he obtained the custody of the second appellant on May 2, 1986. Though both the appellants were in the police custody on or about May 2, 1986, PW 33 thought of taking their fingerprints only on May 11, 1986. The purpose for which the two appellants were taken to the police custody is not known. It seems that nothing has been recovered from any of the appellants after they have been taken to the police custody.

23. At the risk of repetition, we may state at this juncture that the explanation offered by the two appellants for the presence of the fingerprints on MOs 22 and 23 is that their fingerprints were taken

on the two glass pieces under compulsion. The non-explanation for taking these two appellants into police custody long after their arrest leaves an impression that all was not well with the prosecution.

24. In passing, it may be mentioned that the photographer (Charge-Sheet Witness No. 40) who took the photographs of the fingerprints was not available for examination. Though the evidence of PW 30 by itself is free from any infirmity, we are unable to sustain the conviction of these two appellants on the opinion of PW 30 alone as we have entertained a lurking suspicion in our mind about the manner in which the evidence had been obtained as indicated above. Further it is highly hazardous to rely on these two scanty pieces of circumstantial evidence which are brought on record in a very unsatisfactory and loathsome manner and which lack guarantee to inspire confidence.

25. We may, in this connection, quote an observation made by a bench of this Court in *Sharad Birdhi Chand Sarda v. State of Maharashtra* [(1984) 4 SCC 116 : 1984 SCC (Cri) 487 : (1985) 1 SCR 88], reading as follows : (SCC p. 195, paras 179 and 180)

"A moral conviction, however, strong or genuine cannot amount to a legal conviction supportable in law It must be realised that the well established rule of criminal justice is that 'fouler the crime higher the proof'."

26. Since we are not inclined to accept the above circumstantial pieces of evidence which in our view do not merit consideration for the reasons we have hereinbefore assigned, we are in total disagreement with the findings of the courts below and consequently set aside all the convictions inclusive of the conviction under Section 459 IPC and the sentences recorded by the trial court inclusive of the sentence of death and acquit the appellants of all the charges. The appeals are allowed accordingly.

27. The appellants are directed to be set at liberty unless their detention is required for some other cause such as for undergoing imprisonment in some other case or for trial of any other case or for any other reason.

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