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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE M.B. SNEHALATHA

MONDAY, THE 27TH DAY OF MAY 2024 / 6TH JYAISHTA, 1946

CRL.A NO. 83 OF 2017

AGAINST THE JUDGMENT DATED 04.01.2017 IN SC NO.106 OF 2011 OF THE COURT ADDITIONAL SESSIONS COURT-I, THALASSERY (SPECIAL COURT FOR THE TRIAL OF OFFENCES AGAINST WOMEN AND CHILDREN, THALASSERY)

APPELLANT/ACCUSED:

ABU @ ABDULLA,
AGED 43/2017, S/O.KADER HAJI, TRIPANGOTTUR

BY ADVS.
SRI.P.VIJAYA BHANU (SR.)
SMT.MITHA SUDHINDRAN
SRI.M.REVIKRISHNAN

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM

OTHER PRESENT:

Smt.Ambika Devi S.., Spl.P.P.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 20.05.2024, THE COURT ON 27.05.2024, DELIVERED THE FOLLOWING:

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P.B.SURESH KUMAR & M.B.SNEHALATHA, JJ.

Crl.Appeal No.83 of 2017

Dated this the 27th day of May, 2024

JUDGMENT

P.B.Suresh Kumar, J.

The sole accused in S.C.No.106 of 2011 on the files of the Court of the Additional Sessions Judge-I, Thalassery is the appellant in the appeal. He stands convicted and sentenced for the offence punishable under Section 302 of the Indian Penal Code (IPC).

2. The victim in the case was a physically challenged girl aged 7 years. The accused is none other than the father of the victim. The victim suffered a serious head injury in the late hours of 14.01.2010 and she succumbed to the said injury. A case was registered by Kolavallur police in the early hours of the following day, on the basis of the complaint lodged by the brother of the wife of the accused that he was informed that the accused caused the death of the victim out of anger. After investigation, the final report has been filed in the case against the accused alleging commission of the offence punishable under Section 302 IPC. The accusation in

the final report is that on 14.01.2010, at about 10.10 p.m., the accused committed murder of the victim by holding her upside down by her legs and hitting her with force on to the floor of the veranda of their house, causing the head of the victim to get smashed on the floor. The victim succumbed to the injury sustained on the way to the hospital.

3. On the accused being committed to trial, the Court of Session framed charge against the accused, to which he pleaded not guilty. Thereupon, the prosecution examined 16 witnesses as PWs 1 to 16 and proved through them 23 documents as Exts.P1 to P23. MOs 1 to 8 are the material objects in the case. When the incriminating circumstances were put to the accused in terms of the provisions contained in Section 313 of the Code of Criminal Procedure (the Code), the accused denied the same. The Court of Session, thereupon, on a consideration of the evidence on record, held that the accused is guilty of the offence for which he was charged, convicted and sentenced him to undergo imprisonment for life. The accused is aggrieved by his conviction and sentence, and hence this appeal.

4. It is seen that in terms of the order passed on 11.04.2017, this Court suspended the execution of sentence

imposed on the accused by the Court of Session and enlarged him on bail.

5. Heard the learned Senior Counsel for the accused as also the learned Special Public Prosecutor.

6. The argument of the learned Senior Counsel for the accused is that even though all the witnesses cited by the prosecution to prove the occurrence turned hostile, the accused has been convicted by the Court of Session solely based on the medical evidence and also by applying Section 106 of the Indian Evidence Act. According to the learned Senior Counsel, in the absence of any substantive evidence to prove the occurrence, the Court of Session ought not have convicted the accused. It was also the argument of the learned Senior Counsel that it is not a case where Section 106 could be applied. *Per contra*, the learned Special Public Prosecutor supported the impugned judgment, placing reliance on the decision of the Apex Court in **Selvamani v. State Rep. by the Inspector of Police**, 2024 KHC OnLine 6272.

7. The point that arises for consideration is whether the conviction of the accused and the sentence imposed on him, are sustainable in law.

8. The Point: The fact that the victim suffered a

grave head injury on the relevant day at the relevant time, is not in dispute. The victim was taken by PW3, the father of the accused to PW9, a private doctor. PW9 deposed that he examined the victim in the car in which she was brought to his house and at the relevant time, the victim was lying on the laps of a lady and her grandfather inside the car and blood was oozing out from the nose and mouth of the victim. PW9 deposed that when he examined the victim, there was only a feeble heartbeat and the same had stopped within seconds. Even though PW9 deposed that he was informed that the child suffered the head injury on account of a fall, he opined that the injury suffered by the victim was not one which is likely to be caused on account of a fall and that an injury of this nature would be possible only by a forcible hit of her head on the floor by someone. PW9 also deposed that he referred the victim to the Government Hospital, Thalassery. PW11 was the Civil Surgeon attached to the Government Hospital, Thalassery who examined the victim at about 11.55 p.m. on the relevant day. PW11 deposed that the victim was brought dead to the casualty by one Muhammed Haneefa and there was a bleeding injury on the head of the deceased. PW11 also deposed that he was told that the victim suffered the injury on account of a fall.

PW11 also deposed that the injury suffered by the victim was one that could be caused by a hit by force by someone causing the head of the child to hit on the floor. PW12 was the doctor who conducted autopsy on the body of the deceased. Ext.P14 is the autopsy certificate issued by PW12. The following are the ante-mortem injuries noted by PW12 at the time of autopsy:

> "1. Punctured lacerated wound 0.4 x 0.3 cm on the left side of head overlying the parietal eminence; crushed brain matter was oozing out through the wound. All the bones of the vault of skull were fractured and fragmented. Some of the fragments were bulging out through the intact skin. There was fragmentation of the floor of anterior cranial fossa; the fracture line extended to the left side of middle cranial fossa also. Dura was irregularly torn. Left cerebral hemisphere was irregularly lacerated, with scattered areas of crushing. Subarachnoid bleeding was seen bilaterally. Cerebellum and the brain stem were completely torn away from the cerebral hemisphere. Air passages contained aspirated fluid blood. Cervical spine was fractured and dislocated at C2 level. Lower jaw was fractured in the midline, upper jaw was fractured into two, just outer to the incisor teeth on the right side.
>
> 2. Abrasion 4x0.5 cm vertical on the back of trunk in the midline, midway between the root of neck and natal cleft."

PW12 deposed that the victim died of blunt violence sustained to the head. PW12 deposed that the entire skull, except the posterior cranial fossa around the brain stem was seen fractured. When PW12 was required to explain as to what he

meant by the expression 'blunt violence', he clarified that a blunt violence to the head means that the injury was caused by some other person. Even though PW12 was cross-examined at length, the evidence tendered by him that the victim died of blunt violence sustained to her head has not been discredited in any manner, whatsoever. In other words, the prosecution has established beyond reasonable doubt that it is a case of homicide.

9. The next aspect to be considered is as to who caused the death of the victim. PW1 is none other than the brother-in-law of the accused, on whose complaint the case was registered. PW1 turned hostile to the prosecution and deposed that the victim died on account of a fall. Even though PW1 admitted his signature in Ext.P1 First Information Statement, he denied having made any statement to the police that it was the accused who caused the death of the victim out of anger. PWs 2 to 5 are the witnesses examined by the prosecution to prove the alleged occurrence, namely that it was the accused who caused the death of the victim. Among them, PW2 is none other than the mother of the victim, PW3, as already noticed, is the grandfather of the victim, PW4 is a neighbour of the accused and PW5 is the wife of the brother of

the accused who was residing with the accused and his family in the house where the occurrence took place. All the said witnesses also turned hostile to the prosecution. Among them, PW4 deposed that he did not see the occurrence at all and on enquiry, it was found by him that the victim died on account of a fall. PWs 2, 3 and 5 who were very much in the house at the time of occurrence were also consistent in their stand that the victim died on account of a fall from an elevated place in the front side of the house which is used to offer prayers. It was clarified by PW2 in her evidence that the victim who was suffering from paralysis, was lying on a mat at the elevated place at the relevant time. In short, there is no evidence to prove the occurrence.

10. It is seen that the Court of Session found, based on medical evidence let in by the prosecution, that the injury suffered by the victim would not have been caused on account of a fall from an elevated place as deposed by the witnesses examined on the side of the prosecution. As such, according to the Court of Session, inasmuch as the occurrence took place inside the house of the accused, in the light of the provision contained in Section 106 of the Indian Evidence Act, the accused is duty bound to explain the homicidal death of his

daughter, and the non-explanation of the same would be a strong circumstance against the accused that he is responsible for commission of the crime. The Court of Session has relied on the decision of the Apex Court in **Gajanan Dashrath Kharate v. State of Maharashtra**, (2016) 4 SCC 604, in support of the said view.

11. We are unable to accept the view taken by the Court of Session. **Gajanan Dashrath Kharate** is a case where the accused committed murder of his own father in their residential house. A perusal of the said judgment indicates that at the time of the alleged occurrence, the accused alone was present in the house along with the victim and it is in the said circumstances, the Apex Court applied Section 106 of the Indian Evidence Act to hold that the accused is bound to explain the homicidal death of his father and the non-explanation of the same would be a strong circumstance against the accused that he is responsible for commission of the crime. The said judgment has no application to the facts of the present case.

12. In **Sirajudheen v. State of Kerala**, 2024 KLT OnLine 1193, after referring to the decisions of the Apex Court in **Trimukh Maroti Kirkan v. State of Maharashtra**, (2006)

10 SCC 681 and in **Balvir Singh v. State of Uttarakhand,** 2023 SCC OnLine SC 1261, this Court explained the scope of Section 106 of the Indian Evidence Act thus:

> "On a consideration of the provision and the decisions of the Apex Court referred to above, we are of the view that it is only when it is impossible or at any rate, disproportionately difficult, for the prosecution to give wholly convincing evidence on certain crucial facts, in terms of Section 106 of the Indian Evidence Act, the accused is obliged to give evidence on those facts, if it is established that those facts are within his knowledge, if he wishes to get rid of his conviction. In other words, it is only when it is shown that all that is possible to prove the facts in issue have been proved by the prosecution and what remains is only the facts which are exclusively within the knowledge of the accused, the burden shifts to the accused."

Reverting to the facts, PWs 2, 3 and 5 were very much present in the house when the occurrence took place. As noted, all of them took the consistent stand that the death of the victim occurred on account of a fall from the elevated place in the house which was used to offer prayers. In such a situation, the burden to prove the occurrence will not be shifted to the accused in terms of Section 106 of the Indian Evidence Act.

13. If Section 106 of the Indian Evidence Act has no application to the facts, the only evidence available in the case is the medical evidence which is not substantive evidence, and there cannot be any conviction solely based on

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the medical evidence [See **Balaji Gunthu Dhule v. State of Maharashtra**, (2012) 11 SCC 685 and **Nagendra Sah v. State of Bihar**, (2021) 10 SCC 725].

14. In **Selvamani** *(supra)*, the proposition laid down by the Apex Court is that the evidence of hostile witnesses cannot be discarded as a whole, and relevant parts thereof which are admissible in law can certainly be used by the prosecution. The said judgment, according to us, has no application to the facts of the present case. Needless to say, the accused is entitled to the benefit of doubt.

In the result, the Criminal Appeal is allowed. The conviction of the appellant and the sentence imposed on him are set aside and he is acquitted.

Sd/-
P.B.SURESH KUMAR, JUDGE.

Sd/-
M.B.SNEHALATHA, JUDGE.

ds 22.05.2024