Â¥ REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 104 of 2009

Babu ...Appellant

Versus

State of Kerala ...Respondent

J U D G M E N T

Dr. B.S. CHAUHAN, J.

1. This appeal has been preferred against the judgment and order dated 5.8.2008, passed by the High Court of Kerala, at Ernakulam, in Criminal Appeal No.908 of 2004, reversing the judgment of acquittal dated 8.4.2003 recorded by the Sessions Court, Thrissur in Sessions Case No. 242 of 2001, wherein the appellant was charge sheeted for murdering his wife, Sweety, by giving her Sodium Cyanide.

2. This is a most unfortunate case, in which, a young, B.Com 2nd year student, Sweety died under mysterious circumstances within 15 days of her marriage in her parent's house at Chalakudy. The appellant, Babu, is post-graduate and at relevant time had been employed in the Gulf in a firm, namely, Alukkas Jewellery dealing with golden Jewellery. The couple, after marriage on 15.5.2000, stayed for two days with the brother of the appellant at Ollur and they came back to Chalakudy on 17.5.2000, as the parents of Sweety had arranged a reception for them at their house. The couple stayed there for two days and left for Kozhikode on 19.5.2000 and stayed in the house of Benny (PW.10), a friend of the appellant. The couple came back on 22.5.2000 to Chalakudy, the family house of the deceased, Sweety. The couple again went to Kozhikode on 30.5.2000 to attend the marriage of Benny (PW.10) with one Seethal, which was scheduled to be held on 31.5.2000 and returned to Chalakudy, at 4.00 p.m. on 1.6.2000. The appellant left Sweety at her parent's house and went to Amala Hospital to meet his sister and mother as

his mother had undergone an operation for cancer and was convalescing. The appellant returned to Sweety's house at about 10.30 p.m. and found that door of her room was bolted from inside and there was no response on calling to her. The door was broke opened by the appellant and Sweety's father. Sweety was found unconscious lying on the floor. She was taken to the Government Hospital, Chalakudy, where she was declared dead by the doctors. Poulose (PW.1), father of the deceased lodged an F.I.R. on 2.6.2000 at 7.00 a.m. and it was registered as Crime No. 242 of 2000. The inquest was conducted on the same day and post mortem was conducted on 3.6.2000, and the deceased was buried thereafter. Paily (PW.21), the Deputy Superintendent of Police while conducting the investigation of the case received information that just few days prior to the incident the appellant had procured Cyanide, thus, he



was arrested on 26.6.2000. An alleged confessional statement was made by the appellant that he had purchased Sodium Cyanide from the shop of Xavior (PW.7), who was dealing with jewellery as well as Sodium Cyanide. Xavior, PW.7 made a statement that the appellant had procured 1 Kg. Sodium Cyanide from him between 25.5.2000 and 27.5.2000. The post mortem report revealed that Sweety died of Cyanide poisoning. As per the statement of Omana Poulose (PW.9), mother of the deceased Sweety, the poison was given to Sweety by the appellant under the guise of giving her an ayurvedic contraceptive medicine. Paily (PW.21), the Investigating Officer completed the investigation and submitted a charge sheet against the appellant for the offence under Section 302 of the Indian Penal Code, 1860 (hereinafter called as 'IPC'). The appellant pleaded not guilty to the charge of murder and claimed trial. The prosecution examined 21 witnesses in support of its case. Appellant in his statement under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter called as 'Cr.P.C.') stated that he was innocent and there was a possibility of the involvement of Benny (PW.10), who had misbehaved with Sweety and had sexual intercourse with her on 31.05.2000 when

the couple was staying with him. More so, Sweety might have committed suicide because of feelings of guilt for that reason. The Trial Court dis-believed the prosecution witnesses and acquitted the appellant vide judgment and order dated 8.4.2003.



3. The High Court considered the submissions made by the prosecution that the appreciation of evidence by learned Sessions Judge was not proper one, thus, the findings of fact recorded by the Trial Court were perverse. The circumstances proved, ruled out the possibility of suicide. The medical evidence proved beyond doubt that the deceased died of Cyanide poisoning. Nobody except the appellant had procured the Cyanide poison and the appellant had persuaded the deceased Sweety to take it under the garb of it being an oral contraceptive. There was no question of dis-believing all the prosecution witnesses including the parents and sister of the deceased, Sweety. Appellant was unhappy with the deceased for her non-cooperation in carnal intercourse. Therefore, all the circumstances necessary to record a finding of guilt against the appellant stood proved by the prosecution. The High Court, vide impugned judgment and order dated 5.8.2008, accepted the State's appeal and reversed the judgment and order of acquittal dated 8.4.2003 passed by the Trial Court. Hence, this appeal.

4. Shri Venkat Subramonium T.R., learned counsel appearing for the appellant, has submitted that the High Court should not have interfered with the judgment and order of acquittal by the Trial Court in a routine manner. The findings of the Trial Court could not be held to be perverse, being based on irrelevant material i.e. evidence on record. The Trial Court had rightly dis-believed the



prosecution witnesses as it had an opportunity to watch their demeanour in the court, and to assess their credibility. The acquittal by the Trial Court bolstered the presumption of innocence

of the appellant. However, the High Court erred gravely holding that the circumstances pointed out to the guilt of the appellant and no circumstance had been brought to the notice of the court which was inconsistent with his guilt. More so, while reversing the judgment of acquittal as recorded by the Trial Court, the High Court imposed a fine of Rs. 1,00,000/- (Rupees one lac) on the appellant which was totally unwarranted. There was no direct evidence in the case. It was a case of circumstantial evidence, thus, the prosecution had to establish the motive for crime. The test for proving a case of circumstantial evidence stands entirely on a different footing, than a case of direct evidence. The judgment of Trial Court did not warrant any interference. Appeal has merit and deserves to be allowed.

5. Per contra, Shri R. Sathish, learned counsel appearing for the State has vehemently opposed the appeal contending that no one else except the appellant had an opportunity to commit the offence as he was fully aware that Cyanide is used for purification and colouring of gold jewellery and he succeeded in procuring Sodium Cyanide from Xavior (PW.7). The Trial Court had wrongly dis-believed all the prosecution witnesses. The High Court had re-appreciated the



entire evidence and recorded a finding of guilt which does not warrant interference by this Court. Appeal lacks merit and is liable to be dismissed.

6. We have considered the rival submissions made by learned counsel for the parties and perused the record.

LEGAL ISSUES:

(I) Appeal against Acquittal :

7. This court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the Trial Court.

The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be more, the probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial Court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial Court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject matter of scrutiny by the appellate court. (Vide Balak Ram



v. State of U.P. AIR 1974 SC 2165; Shambhoo Missir & Anr. v. State of Bihar AIR 1991 SC 315; Shailendra Pratap & Anr. v. State of U.P. AIR 2003 SC 1104; Narendra Singh v. State of M.P. (2004) 10 SCC 699; Budh Singh & Ors. v. State of U.P. AIR 2006 SC 2500; State of U.P. v. Ramveer Singh AIR 2007 SC 3075; S. Rama Krishna v. S. Rami Reddy (D) by his LRs. & Ors. AIR 2008 SC 2066; Arulvelu & Anr. Vs. State (2009) 10 SCC 206; Perla Somasekhara Reddy & Ors. v. State of A.P. (2009) 16 SCC 98; and Ram Singh alias Chhaju v. State of Himachal Pradesh (2010) 2 SCC 445).

8. In Sheo Swarup and Ors. v. King Emperor AIR 1934 PC 227, the Privy Council observed as under:

> "...the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses...."

9. The aforesaid principle of law has consistently been followed by this Court. (See: Tulsiram Kanu v. The State AIR 1954 SC 1;

Balbir Singh v. State of Punjab AIR 1957 SC 216; M.G. Agarwal v. State of Maharashtra AIR 1963 SC 200; Khedu Mohton & Ors. v. State of Bihar AIR 1970 SC 66; Sambasivan and Ors. v. State of Kerala



(1998) 5 SCC 412; Bhagwan Singh and Ors. v. State of M.P. (2002) 4 SCC 85; and State of Goa v. Sanjay Thakran and Anr. (2007) 3 SCC 755).

10. In Chandrappa and Ors. v. State of Karnataka (2007) 4 SCC 415, this Court reiterated the legal position as under:

> "(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.
>
> (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
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> (3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.
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> (4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.
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> (5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court



> should not disturb the finding of acquittal recorded by the trial court."

11. In Ghurey Lal v. State of Uttar Pradesh (2008) 10 SCC 450, this Court re-iterated the said view, observing that the appellate

court in dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court's acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court had the distinct advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

12. In State of Rajasthan v. Naresh @ Ram Naresh (2009) 9 SCC 368, the Court again examined the earlier judgments of this Court and laid down that an "order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused."

13. In State of Uttar Pradesh v. Banne alias Baijnath & Ors. (2009) 4 SCC 271, this Court gave certain illustrative circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court. The circumstances includes:

i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;



ii) The High Court's conclusions are contrary to evidence and documents on record;

iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

v) This Court must always give proper weight and consideration to the findings of the High Court;

vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.

14. A similar view has been reiterated by this Court in Dhanapal v. State by Public Prosecutor, Madras (2009) 10 SCC 401.

15. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances,

and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial Court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference.

16. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration



irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (Vide Rajinder Kumar Kindra v. Delhi Administration AIR 1984 SC 1805; H.B. Gandhi & Ors. v. Gopi Nath & Sons 1992 supp. (2) SCC 312; Triveni Rubber & Plastics v. Collector of Central Excise, Cochin AIR 1994 SC 1341; Gaya Din (D) thr. Lrs. & Ors. v. Hanuman Prasad (D) thr. Lrs. & Ors. AIR 2001 SC 386; Aruvelu & Anr. (Supra); and Gamini Bala Koteswara Rao & Ors. v. State of Andhra Pradesh thr. Secretary (2009) 10 SCC 636).

17. In Kuldeep Singh v. Commissioner of Police & Ors. AIR 1999 SC 677, this Court held that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.

(II) Case of Circumstantial Evidence :

18. In Krishnan v. State represented by Inspector of Police (2008) 15 SCC 430, this Court after considering large number of its earlier judgments observed as follows:

"This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that with all human probability the crime was committed by the accused and none else; and

(iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See Gambhir v. State of Maharashtra, AIR 1982 SC 1157)".

19. In Sharad Birdhichand Sarda v. State of Maharashtra AIR 1984 SC 1622, while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity or lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent before conviction could be based on circumstantial evidence, must be fully established. They are :

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established;



(ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
(iii) the circumstances should be of a conclusive nature and tendency;
(iv) they should exclude every possible hypothesis except the one to be proved; and
(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the

accused.

20. A similar view has been re-iterated by this Court in State of U.P. v. Satish, (2005) 3 SCC 114; and Pawan v. State of Uttaranchal (2009) 15 SCC 259.

21. In Subramaniam v. State of Tamil Nadu, (2009) 14 SCC 415, while considering the case of dowry death, this Court observed that the fact of living together is a strong circumstance but that by alone in absence of any evidence of violence on the deceased cannot be held to be conclusive proof, and there must be some evidence to arrive at a conclusion that the husband and husband alone was responsible therefor. The evidence produced by the prosecution should not be of such a nature that may make the conviction of the appellant unsustainable. (See Ramesh v. State of Rajasthan (2009) 12 SCC 603).

(III) Motive in cases of Circumstantial Evidence



22. In State of Uttar Pradesh v. Kishan Pal & Ors., (2008) 16 SCC 73, this Court examined the importance of motive in cases of circumstantial evidence and observed:

> ".....the motive is a thing which is primarily known to the accused themselves and it is not possible for the prosecution to explain what actually promoted or excited them to commit the particular crime.
>
> The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction."

23. This Court has also held that the absence of motive in a case depending on circumstantial evidence is a factor that weighs in

favour of the accused. (vide: Pannayar v. State of Tamil Nadu by Inspector of Police, (2009) 9 SCC 152).

(IV) Burden of Proof and Doctrine of Innocence

24. Every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. However, subject to the statutory exceptions, the said principle forms the



basis of criminal jurisprudence. For this purpose, the nature of the offence, its seriousness and gravity thereof has to be taken into consideration. The courts must be on guard to see that merely on the application of the presumption, the same may not lead to any injustice or mistaken conviction. Statutes like Negotiable Instruments Act, 1881; Prevention of Corruption Act, 1988; and Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those Statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. However, such a presumption can also be raised only when certain foundational facts are established by the prosecution. There may be difficulty in proving a negative fact. However, in cases where the statute does not provide for the burden of proof on the accused, it always lies on the prosecution. It is only in exceptional circumstances, such as those of statutes as referred to hereinabove, that the burden on proof is on the accused. The statutory provision even for a presumption of guilt of the accused under a particular statute must meet the tests of reasonableness and liberty enshrined in Articles 14 and 21 of the Constitution. (Vide: Hiten P. Dalal v. Bratindranath Banerjee, (2001) 6 SCC 16; Narendra Singh v. State of M.P., AIR 2004 SC 3249; Rajesh Ranjan Yadav v. CBI, AIR 2007 SC 451; Noor Aga v. State of Punjab & Anr., (2008) 16 SCC 417; and Krishna Janardhan Bhat v. Dattatraya G. Hegde, AIR 2008 SC 1325).

INSTANT CASE:

25. The instant case requires to be examined in the light of the aforesaid settled legal propositions.

The incident occurred within a very short span of time after the marriage of the deceased with the appellant. They got married on 15.5.2000 and went to Ollur for two days and came back to Chalakudy, the house of the deceased. On 19.5.2000, they went to Kozhikode, house of Benny (PW.10), and returned on 22.5.2000. The deceased appeared in the examination of B.Com 2nd Year on 23.5.2000. The appellant stayed with his brother at Ollur on 26 th/27th May, 2000 as he was not feeling well. Omana Poulose (PW.9), mother of the deceased had gone to his brother's house on 27.5.2000 to know the health condition of the appellant's mother as she was suffering from cancer and was to be operated on 30.5.2000. At the instance of the deceased and Omana Poulose, (PW.9), the appellant along with deceased Sweety attended the marriage of Benny (PW.10) on 31.5.2000 at Kozhikode. Immediately after the marriage of Benny (PW.10), his wife Seethal had gone to her parents' house as there was some problem because it was a love marriage and her family members were not happy with the marriage and did not participate in the marriage on 31.5.2000. When the appellant and deceased Sweety were staying with Benny (PW.10), the appellant had taken liquor and had gone outside to make a call to his employer in the Gulf and when he came



back after some time he saw the deceased and Benny (PW.10) in a compromising position and did not like the situation. Therefore, the appellant confronted deceased Sweety and she had told him that Benny (PW.10) had forcibly done it. All these explanations had been furnished by the appellant in his statement under Section 313 Cr.P.C.

26. In the opinion of Dr. V.K. Ramankutty (PW.17), Sweety died of Hydro Cyanic Acid. The said witness also opined that anti-mortem

injuries found on the body of Sweety could be caused on contact with the rough surface on falling after consumption of the poison and peeling of cuticle might have been due to fall of vomitus containing cyanide as cyanide is a corrosive substance.

27. There is no direct evidence whatsoever regarding taking or administering the poison. Prosecution's case had been that the appellant had persuaded deceased Sweety, to take an ayurvedic contraceptive medicine and under that guise he had given her Sodium Cyanide. Omana Poulose (PW.9) and Sini (PW.2), mother and sister of deceased Sweety deposed that there were three calls from outside by the appellant to Sweety just to know as to whether she had taken the said medicine. As per their evidence, two of the said three telephone calls i.e. 1st and 3rd calls were attended to by the deceased, Sweety. In the first call, the appellant had scolded the deceased for not taking a bath. When the appellant called the



second time, he was informed that the deceased was taking a bath and he disconnected the phone. In the final call, the deceased spoke to the appellant and subsequently, she informed her mother that the appellant had called to check if she was going to sleep and whether she had taken the contraceptive medicine before sleeping. In her evidence, Omana Poulose (PW.9) further stated that the deceased had whispered to herself "Why a person who has gone to bed is called back and told again to sleep". The Trial Court has observed that this would indicate that as per the prosecution's version of events, the deceased had already taken the medicine containing Cyanide before attending the third call. From the evidence of Dr. V.K. Ramankutty, Professor of Forensic Medicine (PW.17), it is clear that Sodium Cyanide is a highly corrosive substance and even the fall of vomitus containing the same is sufficient to cause the peeling of a person's cuticles. He has even stated that death from Cyanide poisoning generally occurs within 10-20 minutes of consumption of

the poison. This being the case, if deceased Sweety had already taken Sodium Cyanide before attending the third call, she should have been in severe difficulties at that time. By the time, she attended the last call, she should have vomited already and corrosion would have already occurred in her mouth. But nothing of that sort had occurred. The High Court disbelieved the version of events described by the appellant in his statement made under Section 313 Cr.P.C., wherein, he stated that the deceased Sweety



might have taken cyanide from the Almirah of Benny (PW.10). The High Court observed that had she taken the cyanide at Benny's residence at Kozhikode "she would have died within a few minutes." The Trial Court came to the finding of fact that this aspect of the prosecution's case had not been sufficiently established. The High Court failed to notice this finding of the Trial Court.

28. The evidence given by the Telephone Booth Operator, Krishnan (PW.14) had been to the extent that the appellant had gone to his booth and telephoned someone. He stated that he could only be sure that the accused had come once or twice around the incident. He further stated that normally the people dial the telephone on their own and that there was a separation between his seat and the place from where the appellant had made the phone call. Consequently, both the Trial Court and the High Court came to the conclusion that the evidence offered by Krishnan (PW.14) was not reliable. The High Court, however, stated that there was no reason to disbelieve the prosecution's version that the appellant had called at the residence of the deceased thrice on the evening of the date of incident as this has been established by the evidence of Sini (PW.2) and Omana Poulose (PW.9). The High Court did not see any reason to disbelieve the evidence of Sini (PW.2) and Omana Poulose (PW.9) in this regard. The High Court failed to notice the observation of the Trial Court that Sini (PW.2) and Omana Poulose (PW.9) both were sister and mother of the deceased Sweety and had inimical feelings towards the

appellant since they have come to the conclusion that the appellant was responsible for her death and their deposition had material improvements from their statements recorded during investigation.

The Trial Court had further observed that there was a further irregularity surrounding the investigation into the alleged phone calls. In his evidence, Krishnan (PW.14) has stated that the telephone booth was computerised and that there would have been records of the phone calls that had been made on the given day (indicating what time, the calls had been made and to what phone number, they had been made). The Investigating Officer made no attempt to recover the said records nor did he make an attempt to examine the employer of Krishnan (PW.14), who received a copy of these records every month. The High Court has failed to notice the above-said observations of the Trial Court. Krishnan (PW.14) was examined by the police on 17.6.2000 when he stated:

> "In a day an average of 70 to 80 persons may come there to make telephone calls. On such time it was computerized. Once a person makes a call, the other number to where the call is received would be recorded in the computer. The direction and charge would also be recorded in that ..... I did not say to police that before first accused came there one or two times to make telephone call. The dates before that he came to make telephone could not be remembered. It was in the evening. I could not remember the time."



It is strange that Paily (PW.21), the Investigating Officer did not make any reference at any stage to Krishnan (PW.14) in his evidence before the court. In case, the High Court as well as the trial Court found Krishnan (PW.14) to be unreliable and Paily (PW.21), the I.O. did not make any reference to Krishnan (PW.14), nor any record of the computerised call sheet was produced in evidence, only the statements of Sini (PW.2) and Omana Poulose (PW.9) existed to further the prosecution's theory that the

appellant made three phone calls on the day of the incident. Sini

(PW.2) and Omana Poulose (PW.9) might have an inimical attitude

towards the appellant after thinking that appellant was responsible

for Sweety's death. The prosecution has failed to establish that the

appellant made three phone calls to the residence of the deceased

prior to the incident.

29. We are of the opinion that all of the aforesaid circumstances

raise great doubts about the prosecution's theory regarding the

three phone calls by the appellant to the residence of the deceased

on the evening of the incident, being an indication of the anxiety

of the appellant. Thus, the very genesis of the case stands

falsified.

30. Admittedly, the appellant and deceased were staying with

Benny (PW.10) on 30-31.5.2000. Omana Poulose, mother of the

deceased (PW.9), had given two-three calls but Benny (PW.10) did not



talk to her and the explanation given by the appellant was that as

Benny (PW.1) had mis-behaved with Sweety, she might have telephoned

her mother. Thus, Omana Poulose (PW.9), wanted to talk to Benny

(PW.10) seeking his explanation, though, the deceased told her

mother (PW.9) that Benny (PW.10) was not there. However, Benny

(PW.10) had deposed in his examination that he was there, but

outside the house. No explanation was furnished by Benny (PW.10) as

to why he did not want to talk to Omana Poulose (PW.9).

31. It is in evidence that the appellant had purchased a huge

quantity (1 Kg.) of Sodium Cyanide on 26th/27th May, 2000, from Xavior

(PW.7). Namdev (PW12) stated that it was known to Jaison (PW.4)

who had asked him for cyanide for one of his friends. Nam

dev

(PW.12) did not name the appellant at all. It is nobody's case that the appellant has any type of acquaintance with Xavior (PW. 7).

According to Xavior (PW.7), he was running an institution, namely, C.P. Sons Engraving and Electroplating. Appellant had met him twice in the last week of May, 2000 and asked him for 1 kg. Sodium Cyanide as he had started a jewellery shop. The witness gave him 1 Kg. sodium cyanide after taking the payment. He was interrogated by the police after a month. The witness has admitted that he had no licence to deal with sodium cyanide and was not maintaining any account/record of its sale. It was a totally illegal activity on his part. He was not able to explain what was the source of supply to him. He simply stated that he used to purchase it from Tamilians.

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Xavior (PW.7) supplied 1 Kg. sodium cyanide to the appellant without making a receipt. He could not reveal the amount he had taken. It is strange that a dealer, indulging in an illegal business has trusted an unknown person and supplied him such a huge quantity of sodium cyanide without verifying whether he had a jewellery shop or not. The Trial Court had rightly disbelieved him as such a conduct is against normal human behaviour and, particularly, when Xavior (PW.7) has himself stated that he used to give sodium cyanide only to known persons having jewellery shop. Other witnesses, particularly, Jaison (PW.4) and Davis (PW.5), deposed that the appellant had told them that he wanted to purchase Sodium Cyanide for killing the stray dogs on the streets. Further, the appellant was an employee of Alukkas Jewellery which had branches in Kerala and he could have easily procured the Sodium Cyanide from there .

32. There is ample evidence on record to show that Jaison (PW.4), Davis (PW.5) and Namdev (PW.12) were known to and friends of Benny (PW.10). Benny (PW.10) had himself indulged in the business of cleaning and colouring jewellery, and thus, knew how to use Sodium Cyanide. To kill a person, a small quantity of a few milligrams is

enough. This means that as per the prosecution's case, almost an entire one kilogram of sodium cyanide should have still been with the appellant. In this context it is pertinent to note that no recovery of Sodium Cyanide had been made from the accused. Nor has there been any recovery of the remaining amount of the ayurvedic



contraceptive medicine that the appellant was alleged to have mixed the cyanide in. In the instant case, the inquest was conducted on 2.6.2000 by L.K. Somanathan, Tahsildar (PW.18) and the clothes worn by the deceased were preserved which included Churidar Bottom (M.O.1), Bathing Towel (M.O.2), Chuddy (M.O.3), Brasiere (M.O.4) and Churidar Top (M.O.5). There is no explanation by the prosecution as to why only Churidar Top (M.O.5) alone was sent for medical analysis As per the chemical analyst report in respect of Churidar Top (M.O.5), a yellowish water soluble material (stain) was found. However, it does not lead to the inference that M.O.5 contained any evidence of having Cyanide. Dr. V.K. Ramankutty (PW.17) has stated that Sodium Cyanide is water soluble and since a water soluble stain was found on the Churidar Top, on chemical examination Sodium Cyanide could have been detected.

33. It is evident from the record that Benny (PW.10) was not known to the deceased, Sweety or any of her family members before Sweety's marriage. The record reveals that Smt. Omana Poulose (PW.9), mother of the deceased had been in contact of Benny (PW.10) continuously. In spite of the fact that Benny (PW.10) did not talk to her in spite of two-three calls on 31.5.2000 when appellant and Sweety were staying with him, on the date of incident, Smt. Omana Poulose (PW.9) still telephoned Benny (PW.10) at about mid-night and informed him about the unfortunate incident. It is even admitted by Benny (PW.10) in his examination-in-chief that on the same night



Sweety's mother telephoned him and told that Sweety was not getting up even after they had tried their best to wake her. After opening the door, Babu, the appellant and his father-in-law took her to the

hospital. Immediately after receiving a telephone call at mid-night, Benny (PW.10) had left for Chalakudy from Kozhikode and had reached Thrissur. He telephoned and came to know that Sweety had died. No explanation could be furnished by Omana Poulose (PW.9), mother of the deceased as to what was the occasion to inform Benny (PW.10) at mid-night except that he was a good friend of the appellant. Undoubtedly, there were good relations between the two, otherwise the appellant could not have gone to his house just after the marriage and could not have attended the wedding of Benny (PW.10) leaving his mother, who was suffering from cancer, in the hospital. However, it is also on record that Benny (PW.10) had taken loan from the appellant and two cheques issued by Benny (PW.10) had bounced and some complaints were also pending between the parties.

34. On the fateful night, when Sweety had been taken to the hospital, the house of Omana Poulose (PW.9) remained open and a large number of persons visited the house. Fr. Johnson G. Alappat (PW.8), the Priest had come about 12.30 at night and he was the first person to see the glass with white material on Almirah. The inquest in the case started on next day. As per Fr. Johnson Alappat (PW.8), it was a white colour material, but the analyst's report reveal that it was a yellowish colour. Two glasses and a container



etc. were recovered and they were marked as MOs. 4, 6, and 8. The recovery was made on 2.6.2000. Admittedly, the said material was produced before the Magistrate in Court only on 8.6.2000. Therefore, it remained in the custody of Investigating Officer for 6 days. There is no evidence on record to show that said material had been kept under the sealed cover. According to the deposition of Fr. Johnson G. Alappat (PW.8), the room was open and a large number of persons i.e. about 25 persons were there. He was informed by Sini (PW.2), sister of the deceased Sweety about the three phone calls made by the appellant on that day. He deposed that the appellant had talked to him for about half an hour and disclosed that "he loved one Della and hence, it was the cause of Sweety's death." In

fact, it also came i=n evidence that the said Della was the daughter of the appellant's elder brother and was only 8 years old at the time of the incident. Fr. Johnson G. Alappat (PW.8) admitted that in order to find out the truth and take proper action against the culprit in this case an "Action Council" was formed under his patronage. He further deposed as under:

> "I informed the police that Sweety and Babu were at Kozhikkode for seven days. I informed the S.P. that there is something to suspect about that. I informed the Dy. S.P. that I knew during the time of inquest there were seven injuries on Sweety's body. I doubted it happened during the time of the Kozhikkode journey. I told the police that this aspect is not clear. I doubted that at Kozhikkode Sweety was harassed physically and mentally and in order to hide it, somebody might have done something."

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It is apparent that the role of Fr. Johnson G. Alappat (PW.8) was not such that may inspire confidence. Instead, he gave a new theory from his own imagination as it was nobody's case that the couple stayed at Kozhikode for seven days. Had it been so, four injuries on the face, at least, could have been noticed by her family members just on her arrival. Medical evidence has been that injuries found on the person of the deceased could be caused because of fall after consumption of cyanide.

The Trial Court dis-believed Sini (PW.2), the sister and Omana Poulose (PW.9), mother of the deceased taking into consideration the fact that they and had made improvements to the extent that their statements were inconsistent with the statement recorded by the I.O. under Section 161 Cr.P.C. The well reasoned judgment of the Trial Court has been reversed by the High Court without giving proper reasoning and without realising that it was a case of circumstantial evidence. No motive was attributed except that Benny (PW.10) had deposed that appellant was not satisfied with the sexual behaviour of Sweety deceased.

While the High Court was satisfied with this alleged motive, it failed to notice the glaring contradiction that surrounded it. On

the one hand, the prosecution's case alleges that the motive behind the appellant's murder of his deceased wife was that she was refusing to have sexual relations with him. On the other hand, the



prosecution's case is that the deceased, Sweety, was taking an ayurvedic contraceptive at the behest of the appellant. There is absolutely no explanation that has been provided for why the deceased, Sweety, would have taken a contraceptive if she was not having sexual relations with her husband or anyone else. In any event, it should be noted that the judgment of the trial court found that Benny (PW.10) also stated in his testimony that the deceased, Sweety, had agreed to have intercourse with the appellant. The couple could live together only for a period of two weeks, such a short span of time is not enough to record a finding on personal relations between husband and wife. Even otherwise, if the deceased Sweety had such attitude, she could have told her mother Omana Poulose (PW.9), on being asked by her, as to what precaution she had been taking for avoiding pregnancy. In view of such material contradictions in the case of the prosecution, we are of the opinion that the prosecution has been unable to establish a motive in the instant case.

35. In view of the fact that Benny (PW.10) had developed intimacy with the deceased Sweety and her mother and while travelling in a car he had fed Sweety with his hands while the appellant was asleep and there had been some untoward incident about which the appellant had confronted the deceased, the possibility of some involvement of Benny (PW.10) cannot be ruled out or it could also cause embarrassment to deceased. In a case of circumstantial evidence,



motive must be established at least to certain extent. Had there been a motive on the part of the appellant to get rid of deceased

and he had purchased the Sodium Cyanide on 26 th/27th May, 2000, from Xavior (PW.7), it is difficult to believe that he was waiting upto 1.6.2000 and that he would have advised his wife to take the Cyanide under the guise of an Ayurvedic contraceptive medicine at the residence of her parents.

36. The Trial Court had doubts regarding the veracity of the depositions of Jaison (PW.4), Davis (PW.5), and Xavior (PW.7), being friends of Benny (PW.10). The Trial Court, in fact, had an advantage to watch the demeanour of the witness and was in a better position to evaluate their credibility. Thus, the High court ought not to have reversed the judgment of the Trial Court. The High Court observed as under:

> ".....that it was the accused and the accused only who could have caused her to take the poison. The above circumstances clearly point only to the guilt of the accused and no circumstance has been brought to our notice, which is inconsistent with his guilt.....". (emphasis added)

In fact, the High Court has erred in emphasising that onus to prove his innocence was on the appellant. It could not be the requirement of law. In fact the prosecution has to prove its case beyond reasonable doubt. In the case of circumstantial evidence the burden on prosecution is always greater.



37. In view of the above, the judgment and order of the High Court impugned herein dated 5.8.2008 in Criminal Appeal No.908 of 2004 is hereby set aside and judgment and order of the Trial Court dated 8.4.2003 is restored. The appellant be released forthwith if he is in custody and not wanted in any other case. The appeal is allowed accordingly.

.....J. (P.SATHASIVAM)

.....J.
(Dr. B.S. CHAUHAN)

New Delhi,
August 11, 2010

ITEM NO. 1-B COURT No.10 SECTION II
( For Judgment )

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CRIMINAL APPEAL NO.104 OF 2009

BABU .. Appellant(s)

Versus

STATE OF KERALA .. Respondent(s)

DATE : 11/08/2010 This APPEAL was called on for pronouncement of judgment today.

For Appellant(s) Mr. Romy Chacko, Adv.

For Respondent(s) Mr.R. Sathish, Adv.

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Hon'ble Dr. Justice B.S. Chauhan pronounced the judgment of the Bench comprising Hon'ble Mr. Justice P. Sathasivam and His Lordship.

The appeal is allowed.

The appellant be released forthwith if he is in custody and not wanted in any other case.

[ Usha Bhardwaj ]
Court Master

[ Savita Sainani ]
Court Master

[ Signed reportable judgment is placed on the file ]