IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

WEDNESDAY, THE 11TH DAY OF OCTOBER 2023/19TH ASWINA, 1945

CRL.A NO. 511 OF 2019

AGAINST THE JUDGMENT IN CP 47/2012 OF JUDICIAL MAGISTRATE OF FIRST CLASS, KUNNAMKULAM

SC 599/2012 DATED 24.11.2018 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT -IV, THRISSUR

APPELLANT/ACCUSED (IN CUSTODY):

SANATH ROY

BY ADVS.
SARATH BABU KOTTAKKAL
REBIN VINCENT GRALAN

RESPONDENT/COMPLAINANT/PROSECUTION:

STATE OF KERALA
REPRESENTED BY THE CIRCLE INSPECTOR OF POLICE, KUNNAMKULAM POLICE STATION THROUGH PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.
BY ADV.ALEX M THOMBRA, SR.PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 11.10.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.B.SURESH KUMAR & P.G.AJITHKUMAR, JJ.

Criminal Appeal No.511 of 2019

Dated this the 11th day of October, 2023.

JUDGMENT

P.B.Suresh Kumar, J.

The sole accused in S.C. No.599 of 2012 on the files of the IV Additional Sessions Court, Thrissur is the appellant in this appeal preferred under Section 374(2) of the Code of Criminal Procedure (the Code). He stands convicted and sentenced for the offences punishable under Sections 449, 302 and 397 of the Indian Penal Code (the IPC).

2. One Jithesh, who gave evidence in the proceedings as PW1 made arrangements for starting a hollow bricks manufacturing unit at a place called Aalumthai on 11.03.2012 and engaged the deceased Pradeep Roy @ Dheeru, a native of West Bengal for the said purpose. The deceased was introduced to PW1 by the accused, Sanath Roy @ Sonu, who is

also a native of West Bengal. On 11.03.2012, when PW1 arrived at the unit at about 5.30 a.m. for conducting a religious ceremony in connection with the opening of the unit, he found Dheeru lying on the floor of the office room of the unit in a pool of blood with a cut injury on his neck. On the basis of the information furnished by PW1, Kunnamkulam Police registered a case on the same day under Section 302 IPC. The investigation of the case was taken up later by PW17, the Circle Inspector of Police, Kunnamkulam. In the course of investigation, PW17 arrested the accused, effected seizure of various objects based on the information stated to have been furnished by the accused and laid the final report in the case alleging that on 10.03.2012 between 10.45 and 11 p.m., with a view to appropriate the money borrowed by Dheeru, the accused trespassed into the office room of the unit, caused the death of Dheeru by inflicting a cut injury on his neck and robbed his mobile phones and purse containing Rs.16,500/-. The offences alleged were the offences punishable under Sections 449, 302 and 397 IPC. On committing the case for trial, since

the accused denied the charge framed and read over to him by the Court of Session, the prosecution examined 21 witnesses on their side as PWs 1 to 21 and proved through them Exts.P1 to P24 documents. MOs 1 to 7 are the material objects identified by the witnesses. As the Court of Session did not find the case to be one fit for acquittal under Section 232 of the the Code, the accused was called upon to enter on his defence, and since the accused did not adduce any evidence, he was convicted and sentenced based on the evidence adduced by the prosecution, after affording the accused an opportunity to explain the incriminating circumstances appeared against him in the evidence let in by the prosecution. As noted, the accused is aggrieved by the conviction and sentence imposed on him.

3. Heard the learned counsel for the appellant as also the learned Public Prosecutor.

4. The learned counsel for the appellant did not challenge the finding rendered by the Court of Session that it is a case of homicide. Instead, his attempt was only to establish that satisfactory evidence has not been let in by the

prosecution to prove that it is the accused who caused the death of Dheeru. It was pointed out by the learned counsel that the only evidence relied on by the prosecution to prove that it was the accused who caused the death of Dheeru, is the oral evidence of PW3 and the disclosures stated to have been made by the accused to PW17 while in custody on the basis of which MO4 chopper and cash amounting to Rs.16,500/-, MO5 and MO6 mobile phones, MO1 purse and MO2 identity card were seized, which are admissible under Section 27 of the Indian Evidence Act (the Evidence Act). According to the learned counsel, the disclosures alleged to have been made by the accused to PW17 as referred to above are not admissible in evidence inasmuch as PW17 has not deposed the exact particulars of the disclosures made by the accused to him in the language spoken to by the accused nor have the same been recorded in the contemporaneous mahazars prepared while effecting the seizures. It was argued by the learned counsel that inasmuch as the accused was not a person proficient in the language Malayalam and inasmuch as he stated to have made

the disclosures in Hindi which was translated to the investigating officer by another, the exact words spoken to by the accused should have been recorded in the mahazars or at least the translator should have been examined in the case. It was argued by the learned counsel that if the disclosures claimed to have been made by the accused are eschewed from consideration, what remains is only the evidence tendered by PW3 that he saw the accused proceeding to the office of the unit on the relevant day at about 10 p.m. It was argued by the learned counsel that the evidence tendered by PW3 is not reliable and trustworthy, for PW3 has not satisfactorily explained his presence at the scene at the relevant point of time and it is not possible for a person to identify another in the manner spoken to by PW3, as it has come out that the place referred to by PW3 in his evidence where he claimed to have seen the accused, would be pitch-dark at the relevant time. Alternatively, it was also argued by the learned counsel that even if it is found that the evidence tendered by PW3 in this regard is reliable and trustworthy, the same, in the absence of

any other material, is not sufficient to hold that it is the accused who caused the death of Dheeru. The essence of the submissions made by the learned counsel, in the circumstances, was that it is a fit case where the accused has to be given the benefit of doubt.

5. Per contra, the learned Public Prosecutor supported the impugned judgment, pointing out that the evidence tendered by PW3 coupled with the evidence tendered by PW17 as regards the disclosures made by the accused which led to the discovery of various material objects, would prove the guilt of the accused beyond doubt. It was also argued by the learned Public Prosecutor, alternatively, that even if the evidence tendered by PW17 as regards the disclosures made to him by the accused is found inadmissible in evidence, the subsequent conduct of the accused in making available the weapon used, the cash robbed as also the seizure of mobile phones, purse and identity card of the deceased, from various places in the house where he was residing, are admissible under Section 8 of the Evidence Act. It was submitted that the

evidence regarding the same coupled with the evidence tendered by PW3 would, at any rate, prove the guilt of the accused beyond reasonable doubt.

6. We have examined the materials on record and considered the elaborate submissions made by the learned counsel for the parties on either side.

7. A close reading of the impugned judgment reveals that the view taken by the Court of Session in arriving at the conclusion referred to above, is that in the light of the evidence tendered by PW3, it was obligatory for the accused to offer an explanation as to what happened to the deceased after he went to the unit, in terms of the provision contained in Section 106 of the Evidence Act, and in the absence of any explanation from the accused in that regard, the same coupled with the evidence regarding the disclosures made by the accused to PW17, are sufficient to establish the guilt of the accused.

8. The points that arise for consideration are (1) whether the disclosures deposed to have been made by the

accused to PW17, on the basis of which MO4 chopper, cash amounting to Rs.16,500/-, MO5 and MO6 mobiles phones, MO1 purse and MO2 identity card of the deceased were seized, are admissible in evidence under Section 27 of the Evidence Act, (2) whether the prosecution has established any conduct of the accused to connect him with the crime which is admissible under Section 8 of the Evidence Act, (3) whether the evidence tendered by PW3 is reliable and trustworthy and (4) the relief, if any, the accused is entitled to, on the basis of the findings on points (1) to (3).

9. Point (1): As noted, the accused is a native of West Bengal. It is observed by the Court of Session in the impugned judgment that the accused is a person who is proficient in Malayalam. The examination of the accused under Section 313 of the Code was almost six years after the alleged occurrence and all throughout, he was in jail. It is seen that in the meanwhile, he picked up Malayalam and it is on account of the said reason that he could answer the various questions put to him by the court in the course of his examination under

Section 313 of the Code. But, in the context of examining the sustainability of the argument advanced by the learned counsel for the accused that the disclosures claimed to have been made by the accused to PW17 are not admissible in evidence, what is to be seen is whether the accused was proficient in Malayalam at the time when he made the alleged disclosures. It is seen from the evidence of PW17 that it was with the assistance of one Shaik Ameed, a Civil Police Officer who was proficient in Hindi that the investigation of the case had been conducted. PW17 admitted in his cross-examination that the disclosures have been made to him by the accused in Hindi and the same have not been recorded in the language spoken by the accused, but only in Malayalam as he was not proficient in Hindi. The relevant portion of the deposition of PW17 reads thus:

> "പ്രതി പറഞ്ഞ Hindi മലയാളത്തിൽ ആക്കി എഴുതിയതാണ് . പ്രതി പറഞ്ഞ വാക്കുകൾ അതേ ഭാഷയിൽ എഴുതിയിട്ടില്ല . എനിക്ക് Hindi അറിയാത്തതുകൊണ്ടും കോടതിയിൽ ഹാജറാക്കുന്നതിന് ആണ് മലയാളത്തിൽ ആക്കി എഴുതിയത"

The question therefore is whether the evidence tendered by PW17, in such circumstances, as regards the disclosures which led to the seizure of various material objects, is admissible

under Section 27 of the Evidence Act. The question is no longer *res integra.* It is answered in the negative by a Division Bench of this Court in **Sanjay Oraon v. State of Kerala**, 2021 (5) KLT 30. The relevant passages of the concurring opinion of Justice K.Vinod Chandran, as he then was, on the point in the said case read thus:

> "........... However, I wish to add one aspect regarding the recovery effected as per the statement of the accused which would again inure to the accused. The confession so far as it is permissible under S.27 is marked as Ext.P6(a) which is in Malayalam. The accused was a native of West Bengal and not proficient in Malayalam. So much is evident from the S.313 questioning. S.313 questions though recorded in Malayalam the Trial Judge has specifically noticed that they were translated in Hindi by an Advocate to enable the accused to understand the same. The answers were recorded in Hindi itself and so was the further statement made by the accused. Ext.P6(a) however is in chaste Malayalam, obviously the words of the translator and and not of the accused. The statement from Ext.P6(a) indicates that it was recorded on questioning the accused after the arrest in the presence of a Home Guard who is conversant with Hindi. In that circumstance the exact words of the accused ought to have been recorded and the translation appended. Here, in passing it is to be mentioned that the translator was also not examined, which even if done, in the present case, we are afraid would not cure the defect. On this aspect we refer to 1942 AIR (Cal) 593 Naresh Chandra

Das v. Emperor. Athappa Goundan v. Emperor MANU/TN/0455/1937 was quoted where it was observed that "statements made by an accused person which are or may be provable under Section 27, Evidence Act, should be clearly and carefully recorded by the police officer concerned. They should be recorded in the first person, that is to say, as far as possible in the actual words of the accused. They should not be paraphrased. Obviously, if what a man says is to be used in evidence his own words should be used and not a rendering into third person of the purport of the statement. With such a record of the statement before him it will then be for the trial Judge to decide how much of it is admissible under the section." (sic) It was then held so :

> 44. The observations are indeed of much weight. Apart from any other consideration there is always the weakness of testimony to oral utterances. One's assertion of what another said is subject to a special weakness, viz., the risk of defective perception of words uttered orally. The specific features of weakness in such a case are : (1) the perception of the words may be imperfect, either by perceiving words differently from the reality, or by perceiving a part of them only; (2) the memory of them may be imperfect; (3) the narration of them may be different; (4) no data are available for determining which of these is the source of error and for checking possible error. Then there is the illusion of recollection which may confuse facts with conjecture. When a man's fate is made to depend upon a statement on the ground that it is his own statement, such a statement should be provable after excluding as much as practicable all such possible sources of error.
>
> [Emphasis supplied by underlining]

If perception, memory and narration could fail in the

case of a statement recorded in a language in which both the person uttering the same and recording it are conversant with; then the pitfalls in translation cannot be overemphasized. We are quite aware that Athappa Goundan to the extent it held that any information under Section 27 which served to connect the object discovered with the crime/offence charged was admissible, has been overruled in Pulukuri Kottayya v. Emperor (AIR 1947 PC 67). So much of the statement which evinces some or any connection with the crime has been held to be not admissible by the Privy Council; which now remains the established position. In fact in Naresh Chandra Das the said finding in Athappa Goundan was not approved and a different view was taken (Paragraph 52); as was subsequently declared by the Privy Council. However the proposition that the exact words of the accused should be recorded survives.

In the instant case what has been recorded is what has been stated by the translator and obviously even the Police Officer who recorded it does not know whether the words are an exact translation. We garner further support from (1999 (3) KLT OnLine 1136 (SC) = AIR 2000 SC 591) Mujeeb & Ors. v. State of Kerala: “Though according to Investigating Officer the recovery was made on the basis of statement of the accused but we find from the evidence that actual words in verbatim leading to recovery were not recorded by the Investigating Officer” (sic). Therein the recorded statement was in the third person. But the principle applies squarely even when the accused speaks in a language not familiar to the person recording it, when a translation is warranted, where a third person comes in between the accused and the Investigating

Officer. The person recording the statement obviously is not aware of what the accused says and it is the translator's words that are recorded. When it comes to Court the satisfaction of the Court also stands substituted by the satisfaction of the translator. The accused is left in the dark as to how his words are reflected in the statement and in the translated form he has no chance of challenging it. We have a prevalence of such situations in India, a multi-lingual nation and this State, being a favoured destination of migrant labourers. I would also respectfully refer to the concluding portion of my learned Sister's Judgment which eloquently speaks of the sad plight of the migrant labourers who are left to the vagaries of official apathy and native scorn. These migrant labourers from marginalised sections of society are mostly illiterate and are often familiar only with their native language and dialect; pithily said, for the uninitiated, a 'peculiar tongue'. Proof of such a statement after excluding all possible sources of error can be achieved only if the statement, as their Lordships in the fore cited decisions held; is recorded verbatim in the language spoken and a translation appended. In that event even the translator need not be examined and the Prosecution or the Court can get the services of a responsible person, like a language teacher, to opine on the exact words spoken to verify the genuineness of the recorded translation. We also extract the further declaration of Naresh Chandra Das in Para 49:

> ....In order thus to be admissible against the accused under Section 27; (1) the information must be the one given by the accused the statement conveying the information

> must be <u>his own statement in his own language</u> and then (2) only so much of the information as is necessary and sufficient to cause the discovery will be admissible.' (sic)"
>
> [underlining by me]

As evident from the extracted passages, it was observed by this court in the said case that even if the translator is examined in the proceedings, the same would not satisfy the requirement under Section 27 of the Evidence Act. It is seen that later in **Siju Kurian v. State of Karnataka**, 2023 KLT Online 1329(SC), the Apex Court has clarified that merely because the disclosure made by the accused is translated from one language to another language and recorded in a third language, it cannot be contended that it is not admissible in evidence, if the translator comes forward and gives evidence in the case. However, the decision of the Apex Court in **Siju Kurian** may not improve the case of the prosecution in the case on hand, as Sri.Shaik Ameed who rendered assistance to PW17 to translate the disclosures made by the accused has not been examined in the proceedings. In short, we are constrained to hold that the evidence tendered by PW17 as regards the disclosures deposed

to have been made by the accused which led to the seizure of various material objects, is inadmissible in evidence.

10. Point (2): Let us now examine whether the prosecution has established any conduct of the accused to connect him with the crime which is admissible under Section 8 of the Evidence Act. MO4 chopper and the cash stated to have been made available by the accused to PW17 do not connect the accused with the crime as there is no evidence to prove that MO4 is the weapon used by the assailant on Dheeru. Similarly, the conduct of the accused in making available MO2 identity card of the deceased to PW17 also does not connect him with the crime in any manner, especially since it has come out in evidence that the accused and deceased were close associates and it is not unusual for the accused to have a copy of the identity card of the deceased. Likewise, there is no evidence to show that MO5 mobile phone is one that was owned by the deceased. Of course, PW18, a co-worker of the deceased under a different employer and who claimed to have resided with the deceased for about 4 months, stated in his

evidence that MO1 purse and MO6 mobile phone deposed to have been handed over by the accused to PW17, are the belongings of the deceased. During cross-examination, PW18 conceded that there would be similar other mobile phones, indicating that his deposition as regards the identity of MO6 mobile phone might be wrong. Similarly, during cross-examination, even though PW18 admitted that there would be many other similar purses, he asserted that he is sure that MO1 was the purse held by the deceased. On a meticulous analysis of evidence tendered by PW18, we are of the view that it is not safe to rely on the evidence tendered by PW18 to hold that MO1 was the purse used by the deceased, for even if it is taken that PW18 has given evidence with utmost *bona fides*, the possibility of PW18 committing a mistake cannot be ruled out. We take this view also for the reason that there were various other ways and means for the prosecution to prove the ownership of MO6 mobile phone. One of such means was to ascertain the person to whom the SIM card, if any, used in the mobile phone was issued to. PW17, the investigating officer conceded that he did

not take pain to ascertain the ownership of MO6 mobile phone with the aid of the data available with the mobile service providers and the unique identification number provided to it by its manufacturer as is usually done in similar cases. Instead, the investigating officer chose to adopt a shortcut to prove the ownership of MO6 mobile phone by placing reliance on the statement given by PW18. As the best evidence to prove the ownership of MO6 mobile phone has not been adduced by the prosecution, we are unable to place any reliance on the evidence tendered by PW18 as regards the ownership of MO6 mobile phone also. True, if the ownership of MO1 purse and MO6 mobile phone had been established by the prosecution, the accused would have been obliged under law to offer an explanation as to how he happened to be in possession of the same. Inasmuch as the ownership of MO1 purse and MO6 mobile phone have not been conclusively established, the accused cannot be blamed or found fault with for having not offered any explanation as to how he happened to be in possession of the said objects. Needless to say, the prosecution

has not established any conduct of the accused to connect him with the crime which is admissible under Section 8 of the Evidence Act.

11. Point (3): PW3 deposed that he is an auto driver; that he used to park his auto in front of the office of the unit of PW1; that on 10.03.2012, at about 10 p.m. when he went to the place where he used to park his auto to change its position, he saw the accused proceeding to the office room of the unit. He also deposed that as a person residing in the locality, he was acquainted with the accused. During cross-examination, PW3 deposed that he is residing almost 50 meters away from the unit of PW1 and that on 10.03.2012, he finished his work at about 7.30 p.m. and left for home. On a question as to why then he came back again near the unit, the answer given by PW3 was that he came back for changing the position of his vehicle. Even though we do not find any reason as to why PW3 should lie to the court that he saw the accused proceeding to the office of the unit, if he has not actually seen the accused doing so, we do not find the explanation offered by PW3 to

justify his presence near the unit at 10 p.m. satisfactory, as there is no reason why he should change the position of his vehicle which was parked there, that too, after he left the place after finishing that day's work and when he does not offer any satisfactory explanation as to the need to change the position of the vehicle. We hold so, also for the reason that PW3 deposed that he does not usually go to the said place at that time as it would be pitch-dark by then. Be that as it may, it was stated by PW3 that he saw the accused then at a distance of about 10 to 20 meters and that he was coming at that time from the nearby paddy field. PW13, the Village Officer who prepared Ext.P13 sketch of the scene of occurrence deposed that she did not find any electric post in the surroundings of the unit of PW1 and had she seen any electric post in that surroundings, she would have certainly shown the same in Ext.P13 sketch. The fact that no electric post is shown in the surroundings of the unit of PW1 by PW13 in Ext. P13 sketch is not in dispute. If that be so, if the surroundings would be pitch-dark at about 10 p.m., according to us, it may not be possible

for anyone to identify a person at a distance of about 10 to 20 meters. We take this view also for the reason that this being a case on circumstantial evidence, it is obligatory for the prosecution to prove each and every circumstance forming the chain of circumstances to prove the guilt of the accused. In this context, it is necessary to clarify that we are not disbelieving PW3. This might be a case where PW3 must have gone to the surroundings of the unit on the relevant day at the relevant time and he might also have seen somebody proceeding at that time to the office of the unit. Still, we are not placing reliance on the evidence tendered by PW3 taking the stand that the error of judgment, if any, made by PW3 shall not result in an incorrect finding being rendered by this Court.

12. Point(4): In the light of the findings on Points (1) to (3), the conviction of the accused is unsustainable in law and the same is liable to be interfered with. Before parting with this judgment, it is also necessary to observe that our decision would have been the same, even if we found that the evidence tendered by PW3 is reliable and trustworthy, for according to

us, from the said circumstances alone, it is not possible to conclude that it is the accused who caused the death of Dheeru, especially when no one has seen the accused together with Dheeru before his death, to apply the “last seen together” theory, if at all the same applies.

In the result, the appeal is allowed, the impugned judgment is set aside and the appellant is acquitted. He shall be set at liberty forthwith from the concerned prison, if his continued detention is not required in connection with any other case. Registry shall communicate this judgment forthwith to the concerned prison, where the appellant is undergoing incarceration.

Sd/-

P.B.SURESH KUMAR, JUDGE.

Sd/-

P.G.AJITHKUMAR, JUDGE.

YKB