VIJAYAN @ RAJAN

v.

STATE OF KERALA

FEBRUARY 16, 1999

[G.B. PATTANAIK AND S. RAJENDRA BABU, JJ.]

Evidence Act, 1872: Section 9.

Test Identification Parade—Found not acceptable—Evidentiary value of—Held, identification of accused in court after many years of occurrence cannot be accepted—Further, it is impossible to remember the face of the accused by the witness for the purpose of identification after 5 years of the occurrence though the witness had seen his face while opening the door.

Test Identification Parade—Photograph of accused shown to witness and also printed in all local newspapers—Held, in the circumstances, test identification parade rightly not relied on by trial court—Further, a witness seeing an unknown man running away cannot identify him at a later point of time particularly when no special feature is indicated by the witness.

Test identification Parade—Witness identified accused in Test Identification Parade but failed to identify him in court—Held, identification in Test Identification Parade loses its importance.

Section 32—Dying declaration—Deceased made a statement that people close to co-accused killed him—No evidence to indicate that deceased knew accused earlier—Held, such statement, even if accepted, cannot be said to be the clinching material to hold that it refers to the accused.

Section 27—Crime articles—Recovery of—Bullets recovered from house of accused on basis of his disclosure statement while in police custody—No evidence to show that bullets recovered from body of deceased were the same as those recovered from house of accused—Held, this circumstance insufficient to connect accused with the crime—Criminal Trial.

Penal Code, 1860 : Ss. 120-B and 302.

Criminal Conspiracy—Establishing of—Held, Prosecution must estab-

A *lish connection between alleged conspiracy and act done pursuant to the said conspiracy.*

The appellants-accused were tried by the Sessions Court for offences under Section 302 of the Penal Code, 1860 read with Section 120-B and were acquitted. However, the High Court convicted the first appellant B under Section 302 IPC and the second appellant under Section 302 read with Section 120-B and were sentenced to undergo imprisonment for life. Hence this appeal.

According to the prosecution, the accused entered into a criminal C conspiracy to cause the death of the deceased. Pursuant to the said conspiracy the first accused fired two shots at the deceased who succumbed to the injuries at the hospital. The photograph of the first accused was shown to the witnesses and also printed in all local newspapers before the Test Identification Parade. (TIP) However, the witness who identified the accused in the TIP failed to identify him in the court. One of the D witnesses saw the first accused running away on the road after the occurrence. Two bullets were recovered from the house of the second accused pursuant to his disclosure statement under Section 27 of the Evidence Act, 1872. The maidservant of the deceased had seen the face of the first accused while opening the door and she identified him in the court after E 5 years. The deceased had made a statement that the people close to first accused had killed him.

Allowing the appeal, this Court

HELD : 1.1. It is highly unsafe to accept the identification of accused F in Court many years after the occurrence when the Test identification Parade made shortly after the occurrence has not been accepted. Moreover, for a person to just see the face of the accused while opening the door and then remember the same for the purpose of identification after five years of occurrence is just impossible. [664-F-G]

G 1.2. Not only the photograph of the first accused was shown to the maidservant but was also printed in all the local newspapers. Under these circumstances, the Sessions Judge rightly did not rely upon the Test Identification Parade. Further, a witness seeing an unknown man running away would not be able to identify him at a later point of time particularly H when no special feature was also indicated by the witness. [665-D]

1.3. Although the witness identified the first accused in the Test Identification Parade yet he could not identify him in court and, therefore, the Test Identification Parade loses its importance. [666-D]

2. Two bullets were recovered from the house of the second accused on the basis of statement made by him while he was in police custody but there is no evidence to show that the bullets recovered from the body of the deceased are the same as those recovered from the house of the second accused. Hence, this circumstance is not sufficient to connect the second accused with the crime. [667-B]

3. The so called dying declaration made by the deceased that some people of the second accused had killed him does not indicate that the deceased knew the first accused earlier and, even if such a statement is accepted, it cannot be said to be clinching material to hold that it refers to the first accused. [667-D]

4. To bring home the charge of conspiracy within the ambit of Section 120-B of the Penal Code, 1860 it is necessary to establish that there was an agreement between the parties for doing an unlawful act. It is no doubt true that it is difficult to establish conspiracy by direct evidence and, therefore, from established facts inference could be drawn but there must be some material from which it would be reasonable to establish a connection between the alleged conspiracy and the act done pursuant to the said conspiracy. [667-H; 668-A]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 43 of 1992 Etc.

From the Judgment and Order dated 21.10.91 of the Kerala High Court in Crl. A. No. 370 of 1986.

U.R. Lalit, Gopal Subramaniam, Raju Ramchandran, Ramesh Babu, M.A. Feroz, E.M.S. Anam, B. Raman Pillai, Ms. Beena Prakash and G. Parkash for the appearing parties.

The Judgment of the Court was delivered by

PATTANAIK, J. These two appeals are directed against the judgment and order of Kerala High Court dated 21.10.1991 in Criminal Appeal No. 370 of 1986. Vijayan @ Rajan appellant in Criminal Appeal No. 43 of 1992 alongwith Sadanandan-appellant in Criminal Appeal No. 753 of 1991

A were tried in the Court of Session Judge Ernakulam for having committed the offence under Sections 120B, 109, 447, 302 and 201 read with Section 34 of the Indian Penal Code and also under Sections 35 and 25 of the Indian Arms Act for the murder of Majeendran by means of a revolver. The learned Sessions judge acquitted both the accused persons. On an appeal being carried by the State, the High Court by the impugned judg-
B ment has set aside the order of acquittal passed by the learned Sessions Judge and convicted Vijayan of the charge under Section 302 IPC and Sadanandan of the charge under Section 302 read with 120B(1) of the Indian Penal Code and sentenced each of them to imprisonment for life and hence these two appeals.

C

The prosecution case is that the two appellants entered into a criminal conspiracy to cause death of Majeendran who was residing in the city of Cochin. Pursuant to the said conspiracy and being instigated by accused Sadanandan, Vijayan went to the house of Majeendran at 6.00 a.m. on 9.10.1981 and fired two shots at him from a revolver. One of the said
D shot hit the chest of Majeendran and immediately after firing Vijayan left the place. Majeendran was then first taken to the hospital by some of the neighbours and then to the Medical Trust Hospital where he succumbed to the injuries at about 7.10 a.m. The motive alleged by the prosecution was that Sadanandan was a rising abkari contractor and PW 50 who was
E uncle of Sadanandan was giving financial help to him. Deceased Majeendran was in business and had received finances from said PW 50. Sadanandan was perturbed on account of this, thinking that his uncle would no more render the same financial help for his business and as such he conspired with Vijayan and gave him a revolver and instigated him to
F punish Majeendran which he did on the fateful day during the early hours. Sadanandan was arrested on 27.10.1981. Vijayan surrendered before the Chief Judicial Magistrate, Ernakulam on 4.7.84. Though the prosecution examined as many as 70 witnesses and exhibited 110 documents to bring home the charge against the accused persons but there is no eye-witness to the said occurrence. The prosecution, however, relied upon the cir-
G cumstantial evidence. The learned Sessions Judge examined each of the circumstance which the prosecution relied upon and ultimately came to the conclusion that the circumstances those established do not complete the chain for bringing home the charges against the accused persons and accordingly acquitted both the appellant of all charges levelled against
H them. The High Court by the impugned judgment, however, re-appreciated

the circumstantial evidence and being of the conclusion that the circumstances those established complete the chain pointing the guilt of the accused recorded the conviction of the two appellants. A

Mr. Lalit, learned senior counsel appearing for the appellant Vijayan submitted that the High Court committed serious error in relying upon the evidence of PW3 to come to the conclusion that she saw accused Vijayan on the early hours of the date of occurrence and reliance upon such circumstance is wholly unsustainable. Mr. Lalit also submitted that a bare reading of the judgment of the High Court would indicate that the Court was persuaded to come to a conclusion that the prosecution has been able to prove its case beyond reasonable doubt because of the sensation it created in the locality rather than on a proper appreciation of the evidence on record. Mr. Lalit also submitted that the learned Sessions Judge having discussed each of the circumstance sought to be established by the prosecution and having given good reasons for not accepting those circumstances the High Court was duty bound to consider those reasons and non-consideration of those reasons has vitiated the impugned judgment of the High Court by way of interference with the order of acquittal. B C D

Mr. Gopal Subramaniam, learned senior counsel appearing for accused Sadanandan submitted that there is not an iota of material in support of establishing a charge of conspiracy under Section 120B and the High Court, therefore, committed serious error by convicting Sadanandan on a charge of conspiracy by mere conjectures and not by any legal evidence. E

Mr. Raju Ramachandran, learned senior counsel appearing for the State, however, submitted that the evidence of PW3 could be relied upon even if Test Identification Parade is discarded and if her evidence is accepted then the prosecution case is proved that it was accused Vijayan who came on the date of occurrence during early hours and shot at the deceased. According to Mr. Ramachandran the evidence of PWs 3, 4 and 9 infact constitute a complete chain of events pointing out the guilt of the accused, and therefore, the High Court was fully justified in recording the conviction of the appellants. F G

To test the correctness of the rival submissions it would be necessary for us to examine the circumstances relied upon by the High Court and to find out whether on the materials on record it is possible to hold such circumstances have been established and then to find out whether all such H

A circumstances taken together can be said to be complete which point to the guilt of the accused rather than their innocence. It is not in dispute that the deceased Majeendran was shot at by somebody in his own house during early hours of 9th October 1981 and on account of such gun shot injury he succumbed. PW3 was the maid servant of the deceased and according to her evidence during the early hours when somebody gave a call bell she B went out and found a man standing and wanted her master to come but she replied that master get up late. Even thereafter when the man again gave the bell she got up and opened the door and then called the master and shortly thereafter she heard the sound and when she went back she did not find the man who had earlier given the bell and during her evidence in Court she identified the man to be accused Vijayan. Accused Vijayan C on being surrendered was arrested on 4.7.84 and the Test Identification Parade was held on 7.8.84. This Test Identification Parade was discarded by the learned Sessions Judge as it was apparent from the evidence of PW3 that the photograph of accused Vijayan was shown to her before the Test Identification Parade and further just before she was entering the Sub-jail D to identify the accused somebody had told her to identify the tallest man shown in the parade. The High Court also agreed with the conclusion of the learned Sessions Judge and did not rely upon the same but queerly enough the High Court relied upon the evidence of PW3 as she identified the accused in Court after so many years on the ground that corroboration to the same is available. This conclusion on the face of it is unsustainable. E Since the accused Vijayan was not known to PW3 and the Test Identification Parade having been discarded, the substantive evidence of identification in the Court after so many years cannot be relied upon. Though Mr. Ramachandran, learned senior counsel appearing for the State initially had urged that the evidence of PW3 so far as she identified accused Vijayan in the Court can be accepted even discarding the Test Identification Parade F but ultimately could not support the said contention with any authority. As a matter of prudence it is highly unsafe to accept the identification of accused in Court many years after the occurrence when the Test Identification Parade made shortly after the occurrence has not been accepted. There are also several other reasons for discarding the evidence of PW3 G since according to PW3 the person who gave the bell was not a tall man though height of Vijayan is more than 6 feet. For a person to just see his face while opening the door and then remember the same for the purpose of identification after five years of occurrence, in our considered opinion is just impossible. The evidence of PW3 and the circumstances sought to be proved through her evidence by the prosecution cannot be relied upon H and the High Court committed gross error in relying upon the same.

The next circumstance sought to be relied upon by the prosecution and accepted by the High Court is through the evidence of PW 9 who on the date of occurrence was returning after supplying milk and then he saw accused Vijayan running away without any chappal and in a worried manner. The High Court relied upon his evidence essentially on the ground that he saw accused being clad with a blue pant and shirt and was running without any footwear. We have gone through the evidence of PW9. It is indeed difficult for us to rely upon his evidence and it is highly improbable for a man to remember any person running on the street without chappal. That apart his so called identification in the Test Identification Parade was rightly dis-believed by the Sessions Judge in as much as by the date the Test Identification Parade was conducted not only the photograph of the accused had been shown to PW3 and in all probability must have been shown to PW 9 but also in all the local newspapers the photograph had already been printed. In such circumstances the Sessions Judge in our view, rightly came to the conclusion that the Test Identification Parade is nothing but a farce and cannot be relied upon. The High Court on the other hand appears to have been persuaded by the fact that since a man was found to be running during an early hours without chappal on his foot and with blue pant and blue shirt it was possible for PW9 to identify him. With respect we would say the reasonings of the learned Judges of the High Court are totally unsustainable and having gone through the evidence of PW9 we have no hesitation to come to a conclusion that his evidence cannot be relied upon by the prosecution.

Another circumstance sought to be established through the evidence of PW 4, a young girl living a few yards away from the house of deceased. According to her she heard the sound of somebody running and when she turned she saw accused Vijayan running away after crossing a water channel and was wearing a blue pant and blue shirt. It is no doubt true that she identified accused Vijayan in the Test Identification Parade but for the reasons already advanced while discussing the evidence of PWs 3 & 9 identification of accused in Test Identification Parade cannot be relied upon. The High Court unfortunately appears to have taken a view that the identification of accused by PW4 in the Test Identification Parade should be relied upon. We are unable to agree with this conclusion particularly when it is apparent from the prosecution material that much before the holding of Test Identification Parade photograph of the accused Vijayan had been published in the newspaper and because of certain sensation in

A the locality it had lot of publicity and there was sufficient opportunity for the witnesses being shown the accused person. In this view of the matter in our considered opinion the High Court erroneously interfered with the conclusion of the learned Session Judge in this regard and came to hold that the identification of Vijayan by PW4 be relied upon. We have examined the evidence of said PW4 in great detail and we are unable to B subscribe the view the High Court has taken on the evidence of the aforesaid witness. We also really fail to understand how a witness seeing an unknown man running away could be able to identify him at a later point of time. No special feature was also indicated by the witness. In our view the evidence of PW4 is totally unworthy of credit and as such, cannot be C relied upon for bringing home the charge.

PW 7 was the person who saw the accused boarding auto rikshaw which was driven by PW2. Though PW7 also had identified accused in the Test Identification Parade which had been conducted by the Magistrate D PW61 but in the Court he could not identify the accused and, therefore, the so called identification in Test Identification Parade loses its importance. That apart the reasons for vitiating the Test Identification parade already indicated would apply so far as the identification by PW7 in the T.I. Parade is concerned. In this view of the matter we are of the considered opinion that the High Court erroneously relied upon the so called E identification of Vijayan by PW7 in the TI Parade even though in Court he did not identify Vijayan. The auto rikshaw driver PW2 stated in his evidence that he took the accused in autorikshaw from Ideal Lodge to Veekshanam office. According to him he had taken accused Vijayan during that morning and second accused came there through the cross road and F he also travelled in his autorikshaw and then alighted from the vehicle. His evidence has been relied upon by the High Court to bring home the charge of conspiracy under Section 120 B IPC. It may be seen that he was examined by the police on 8.10.1982 roughly one year after the occurrence. It has been elicited from him that he was compelled to say that both the accused travelled in his vehicle by the police. Prosecution re-examined him G and brought out from him on re-examination that one Joseph had approached him and paid him Rs.500 for making such statement in the Court. We have examined the evidence of PW2 and in our opinion he must be held to be an unreliable witness and no part of his evidence could be relied upon. The High Court in our view committed gross error in relying H upon his evidence. Though the prosecution relied upon the letter Exhibit

P9 thereby trying to establish the offence of conspiracy between the two accused persons but the High Court excluded the same from consideration as is apparent from paragraph 30 of the impugned judgment, and in our view rightly. But the further conclusion that it was the first accused who shot at Majeendran is wholly unsustainable in view of our discussion of evidence already made and the said conclusion has to be set aside. Though the accused alleged to have given recovery of some bullets and two bullets were also recovered from the house of accused no. 2 but there is no evidence to connect the bullets which were recovered from the body of the deceased are the same as those bullets alleged to have been recovered on the basis of statement made by the accused while in custody. In that view of the matter it is not necessary to delve further into the said circumstance.

So called dying declaration made by the deceased to PW5 merely indicates that the deceased had made statement that Anandan people have killed him but there is nothing to indicate that the deceased knew Vijayan earlier or that the said statement, even if accepted can be said to be the clinching material to hold that it refer to accused Vijayan. Another item of evidence on which the prosecution relied upon is the handwriting of accused Vijayan in the Register of Ideal Lodge which may indicate that Vijayan was staying in Ideal Lodge on the relevant date of occurrence. The learned Sessions Judge severely commented upon the evidence of the handwriting expert who stated in evidence that the writings of the Inland Letter and the Register are possibly of the same person who has knowingly written in a different way. It may be stated that no admitted handwriting of the accused had been taken for comparison. That apart from the evidence of the expert it is not established that it was the handwriting of accused Vijayan which was available in the Register of Ideal Lodge. Even otherwise even if the said circumstance is held to be established, it indicates that Vijayan was staying in Ideal Lodge on the date of occurrence and that by itself cannot be held to be a clinching circumstance to bring home the charge of murder against accused Vijayan.

So far as the circumstances for bringing home the charge of conspiracy under Section 120B against accused Sadanandan is concerned, less said the better. To bring home the charge of conspiracy within the ambit of Section 120B of the Indian Penal Code it is necessary to establish that there was an agreement between the parties for doing an unlawful act. It is no doubt true that it is difficult to establish conspiracy by direct evidence

A and, therefore, from established facts inference could be drawn but there must be some material from which it would be reasonable to establish a connection between the alleged conspiracy and the act done pursuant to the said conspiracy. In the case in hand we do not find any materials produced even for inferring a conspiracy between the two accused persons to do away with the deceased Majeendran.

B

In the aforesaid circumstances we unhesitatingly hold that the High Court committed serious error in setting aside an order of acquittal passed by the learned Sessions Judge and in convicting the appellants. In our view and for the reasons already indicated the prosecution has utterly failed to C bring home the charges against the accused persons and the accused persons are entitled to be acquitted of the charges. We, therefore, set aside the conviction and sentence passed by the High Court and affirm the order of acquittal passed by the learned Sessions Judge. Criminal Appeals are allowed and the bail bonds stand discharged.

V.S.S. Appeals allowed.