Dhanabal and Another

Vs

State of Tamil Nadu

Criminal Appeal No. 406 of 1976

(Syed M. Fazal Ali, P.S. Kailasam, A.D. Koshal JJ)

13.12.1979

JUDGMENT

KAILASAM, J. –

1. This appeal is by special leave by accused 1 and 2 in S.C. 26 of 1974 on the file of Sessions Judge, South Arcot Division, against their conviction and sentence imposed by the High Court of Judicature at Madras in Criminal Appeal No. 823 of 1974 dated September 1, 1975.

2. The two appellants and Muthuthamizahsrasan were accused 1-3 in the Sessions Court. The first appellant was found guilty under Section 302 IPC and sentenced to imprisonment for life. The second appellant and the third accused were found guilty of an offence under Section 302 read with Section 149 IPC and sentenced to imprisonment for life. On appeal by the two appellants and the third accused, the third accused was acquitted by the High Court and the appellants 1 and 2 are before us.

3. The deceased Rasayal is the sister of appellants and the third accused. The first accused Dhanabal is the eldest and the second appellant and the third accused are his younger brothers. The second appellant married Laxmi, the daughter of Rasayal. Rasayal owned about 5 acres of land in Keelakkarai village. She executed a general power of attorney Ex. P 15 on August 31, 1970 in favour of the second appellant. Rasayal, after she lost her husband, started leading an immoral life which was disliked by her brothers. As a result, Rasayal began to cultivate her own land in spite of the power of attorney executed in favour of the second appellant. There was misunderstanding between the parties and Rasayal had complained to the police stating that her brothers had threatened to do away with her.

4. On the date of the occurrence at about 1.30 p.m. on December 5, 1973, when Rasayal and her farm servant Parmasivan, PW 4 were working in her field removing weeds, the two appellants and the third accused converged to the place where Rasayal was working. The first appellant was armed with veecharuval, the second appellant was armed with a spade and the third was unarmed. On seeing them, Rasayal ran towards the channel running adjacent to her fields. The third accused instigated the first appellant to cut her saying that she was leading an immoral life and that she should not be left. Thereupon, the first appellant cut Rasayal on the right side of her neck with the veecharuval and she fell down in the channel, raising an alarm. The second appellant stated that she should not be left at that and that her head should be severed from her body, she being an immoral woman. Thereupon, the first appellant caught hold of her hair by the left hand and cut her neck with the veecharuval, serving the head from the trunk. The occurrence was witnessed by Ramalingam PW 1 and Ramakrishna PW 2 who were returning at that time after spraying insecticides in the

fields of PW 1. Chelladorai, PW 3 who was coming to the field of Rasayal with food for PW 4 saw the occurrence. Nagappan PW 5 who was going towards the scene of occurrence to meet Ramakrishnan PW 2 for getting arrears of wages also saw the occurrence. Soon after the occurrence, the first appellant left taking away the veecharuval with him and second appellant leaving the spade near the feet of the deceased Rasayal.

5. PW 4 gave a report Ex. P 7 to the Sub-Inspector of Police, Kameratchi at 3 p.m. on the same day. The Sub-Inspector recorded the narration of PW 4, read it over to him and obtained his signatures. After registering a case under Section 302, IPC he took up the investigation and proceeded to the scene of the occurrence and held the inquest. The doctor who conducted post-mortem was of the view that the deceased appeared have died of severance of the head from the trunk. During investigation, the police had Section 164 CrPc statements recorded from PWs 1 to 5 before the Sub-magistrate, Chidambaram on December 24, 1973. During the committal proceedings, PW 4 turned hostile but PWs 1, 2, 3 and 5 gave evidence supporting the prosecution. After committal, PWs 4, 2, 3 and 5 realised from the evidence they gave in the committing Court. They were treated as hostile by the prosecution and their evidence before the committing Court was admitted in evidence under Section 288 of the Code of Criminal Procedure, 1898. The High Court relying on the evidence of PWs 1, 2, 3 and 5 which was marked under Section 288 Criminal Procedure Code, found that it was satisfactory established that the first appellant cut the deceased on the right side of the neck, that the second accused instigated the first accused to cut her saying that she was an immoral woman and the first appellant caught hold of her hair by the left hand and cut her neck with the veecharuval, severing the head from the trunk and left the place along with other accused. The High Court acquitted the third accused on the ground that in the FIR it was not mentioned that the third accused instigated the first accused to cut the neck of the deceased. He was given the benefit of doubt and was acquitted.

6. Mr. Mulla, learned counsel for the appellants, submitted that the conviction of the two appellants based entirely on the retracted evidence of PWs 1, 2, 3 and 5 marked in the Sessions Court under Section 288 cannot be sustained. Secondly, the learned counsel submitted that the High Court was in error in taking into account of statements recorded from the witnesses under Section 164 of the Code of Criminal Procedure in coming to the conclusion that the evidence given in the committal Court could be relied upon. Lastly, the learned counsel submitted that in any event the case of the second appellant is similar that of the third accused and that the second appellant ought to have been acquitted.

7. We have been taken through the relevant evidence of the witnesses, their statement under Section 164 of the Code of Criminal Procedure and the evidence given by them in the committal Court which was transposed to the record of the Sessions Court under Section 288 of the Code of Criminal Procedure. Before considering the questions of law raised by the learned counsel, we fine that the plea of the learned counsel on behalf of the second appellant has to be accepted. The case for the prosecution is that the two appellants and the third accused went to the scene of occurrence - the first appellant armed with veecharuval, the second appellant with a spade and the third accused unarmed - converged on Rasayal and the first accused gave a cut which resulted severance of her head. We feel that when the three brothers went to the scene determined to do away with Rasayal, any instigation was most unlikely. The first accused who actually caused injury is the eldest brother. It is difficult for us of accept that before he actually caused the injury, he needed the instigation of the second appellate. In the deposition of the Ramalingam PW 1, which was marked under Section 288, Code of Criminal Procedure, EX. P 2, he stated that the first accused came with aruval, A-2 with a spade and along with A-3 went towards Rasayal Ammal. A-1 with the veecharuval cut

Rasayal Ammal on her right neck. The other persons were standing there. Thus the instigation attributed by the prosecution to the second appellant is not found in the evidence of Ramalingam. Taking into account the facts and the probabilities of the case, we feel it is most unlikely that the second appellant instigated the first accused as a result of which the first accused caused the fatal injury. The second appellant is entitled to the benefit of doubt. His appeal is allowed and his conviction and sentence are set aside. He is directed to be set at liberty.

8. We will now take up the first contention of the learned counsel that the conviction based on statements marked under Section 288 of the Code of Criminal Procedure is not sustainable for consideration. Section 288 of the Code of Criminal Procedure, runs follows :

> The evidence of a witness duly recorded in the presence of the accused under Chapter XVIII may, in the discretion of the Presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of Indian Evidence Act, 1872.

The plea of the learned counsel is that the evidence marked under Section 288 is inadmissible as it was only read in full to the witnesses and had not been put to them passage as required by Section 145 of the Evidence Act. The procedure that was adopted in the Sessions Court was that when the witness started giving a version hostile to the prosecution, he was asked examined in the committal Court. The evidence marked as given by him in the committal Court was read over to the witnesses by the Public Prosecutor. The witness admitted that he had given evidence as found in the Ex. and that he had signed it. The evidence given in the committal Court was transposed to the record of the Sessions Court under Section 288 of the Code of Criminal Procedure.

9. The Procedure adopted was challenged on the ground that Section 288 contemplates that the evidence given during committal proceedings can be treated as evidence in the case subject to the provisions of the Indian Evidence Act, and, therefore each and every passage on which the prosecution relies on should have been put to the witnesses before the passages can be marked and treated as substantive evidence. Section 145 of the Evidence Act, runs as follows :

A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

10. Reliance was placed on the decision of this Court in Tara Singh v. State of Punjab (1951 SCR 729 : AIR 1951 SC 441 : 52 Cri LJ 1491), wherein it was held that the evidence in the committal Court cannot be used in the Sessions Court unless the witness is confronted with his previous evidence as required under Section 145 of the Evidence Act. The Court observed that if the prosecution wishes to use the previous testimony as substantive evidence then it must confront the witness with those parts of it which were to be used for the purpose of contradicting him and then only matter can be brought in as substantive evidence under Section 288. On the facts of the case the Court found that all happened was that the witnesses were asked something about their previous statements and they replied that they were made under coercion. It does not appear that the entire previous statements of the witnesses were put to them and they were asked whether they, in fact, made the statements.

11. In Bhagwan Singh v. State of Punjab (1952 SCR 812 : AIR 1952 SC 214 : 1952 Cri LJ 1131),

this Court distinguished the case of Tara Singh v. State of Punjab (1951 SCR 729 : AIR 1951 SC 441 : 52 Cri LJ 1491), and observed that resort to Section 145 of the Evidence Act is necessary only if a witness denies that he made the former statement. When the witness admits the former statement, all that is necessary is to look to the former statement on which no further proof is necessary because of the admission that it was made. Hidayatullah, C.J., in State of Rajasthan v. Kartar Singh ((1971) 1 SCR 56 : (1970) 2 SCC 61 : 1970 SCC (Cri) 297), while dealing with the procedure to be adopted in treating the statement in the committal Court as substantive evidence observed that the witnesses should be confronted with their statements in the committal Court which are to be read over to them in extenso. The Chief Justice pointed out that the witnesses in the case admitted that their statements were truly recorded in the committal Court but decided that they were a true a statement because they were made to depose that way by the police. It would have been useless to point out the discrepancies between the two statements because the explanation would have been the same and in the circumstances, the requirements of Section 145 of the Indian Evidence Act were fully complied with.

12. It is thus clear from the authorities referred to above that the requirements of Section 288 would be fully complied with if statements of the witnesses are read in extenso to them and they admit that they have made these statements in the committal Court. The required procedure has been followed in this case and the attack made by the learned counsel has to fail.

13. The second legal contention raised by the learned counsel was that the High Court was in error in taking into account the statements recorded from the witnesses under Section 164 of the Code of Criminal Procedure in coming to the conclusion that the evidence given by them in the committal Court could be relied upon. The High Court stated "we are satisfied having regard to 164 statements of PWs 1 to 3 and 5 that the statements given by these witnesses before the committing Court are true and could be relied on" and proceeded to observe "that as there are more statements admitted in evidence under Section 288 of the Code of Criminal Procedure than one, the evidence of one witness before the committing Court is corroborated by that given by others". Mr. Mulla learned counsel, submitted that a statement recorded under Section 164 of the Code of Criminal Procedure indicates that the police thought that the witness could not be relied on as he was likely to charge and, therefore, resorted to securing a statements under Section 164 of the Code of Criminal Procedure. The statement thus recorded, cannot be used to corroborate a statement made by witness in the committal Court. In support of this contention the learned counsel relied on certain observations of this Court in Ram Charan v. State of U. P. ((1968) 3 SCR 354 : AIR 1968 SC 1270 : 1968 Cri LJ 1473) In that case, in a statement recorded from the witness under Section 164 of the Code of Criminal Procedure, the Magistrate appended a certificate in the following terms :

> Certified that the statement has been made voluntarily. The deponent was warned that he is making the statement before the 1st Class Magistrate and can be used against him. Recorded in my presence. There is no police here. The witness did not go out until all the witnesses had given the statement.

The Court observed that the endorsement made is not proper but declined to infer from the endorsement that any threat was given to those witnesses or that it necessarily makes the evidence given by the witnesses in Court suspect or less believable. The view of the Patna High Court in Emperor v. Manu Chik (AIR 1938 Pat 290, 295 : 39 Cri LJ 635), where observations made by the Calcutta High Court in Queen Empress v. Jadub Das (ILR (1900) 27 Cal 295 : 4 Cal WN 129), that statements of the witnesses obtained under this section always raises a suspicion that it has not been voluntarily made was referred to, was relied on by the learned counsel. This Court did not agree

with the view expressed in the Patna case (AIR 1938 Pat 290, 295 : 39 Cri LJ 635) but agreed with the view of Subba Rao, J. (as he then was) in In re Gopisetti Chinna Venkata Subbiah (ILR (1955) AP 633-38 : AIR 1955 Audh 161 : 1955 Cri LJ 1152), where he preferred the view expressed by Nagpur High Court in Parmanand v. Emperor (AIR 1940 Nag 340 : 42 Cri LJ 17). It was observed that the mere fact that the witnesses' statement was previously recorded under Section 164 will not be sufficient to discard it. It was observed that the Court ought to receive it with caution and if there are other circumstances on record which lend support to the truth of the evidence of such witnesses, it can be acted upon. During the investigation the police officer, sometimes feels it expedient to have the statement of a witness recorded under Section 164, Code of Criminal Procedure. This happens when the witnesses to a crime are closely connected with the accused or where the accused are very influential which may result in the witnesses being gained over. The 164 statement that is recorded has the endorsement of the Magistrate that the statement had been made by the witness. The mere fact that the police had reasons to suspect that the witness might be gained over and that it was expedient to have their statements recorded by the Magistrate, would not make the statements of the witnesses thus recorded, tainted. If the witness sticks to the statement given by him to the Magistrate under Section 164, Code of Criminal Procedure, no problem arises. If the witness resiles from the statement given by him under Section 164 in the committal Court, the witness can be cross-examined on his earlier statement. But if he sticks to the statement given by him under Section 164 before committal enquiry and resiles from it in the Sessions Court, the procedure prescribed under Section 288, Code of Criminal Procedure, will have to be observed. It is for the Court to consider taking into account all the circumstances including the fact that the witness had resiled in coming to the conclusion as to whether the witness should be believed or not. The fact that the police had Section 164 statement recorded by the Magistrate, would not by itself make his evidence suspect.

14. Section 157 of the Evidence Act makes it clear that the statement recorded under Section 164 of the Code of Criminal Procedure can be relied on for corroborating the statements made by the witnesses in the committal Court. This Court has expressed it view that though the statements made under Section 164 of the Code of Criminal Procedure is not evidence, it is corroborative of what has been stated earlier in the committal Court vide State of Rajasthan v. Kartar Singh ((1971) 1 SCR 56 : (1970) 2 SCC 61 : 1970 SCC (Cri) 297). The High Court was right in relying on the statement of the witnesses under Section 164 as corroborating their subsequent evidence before the committal Court. Equally unsustainable is the plea of the learned counsel that a statement recorded under Section 288 of the Code of Criminal Procedure of one witness cannot corroborate the statement of another witness under Section 288. The statements are treated as substantive evidence in law and we do not see any flaw in treating the statement of one witness as corroborative of the other. The result is the questions of law raised by the learned counsel fail. The appeal of the second appellant is allowed and his conviction and sentence set aside. He is directed to be set at liberty forthwith.

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