

(1980) 11 KL CK 0028
In the High Court Of Kerala
Case No : Criminal R.P. No. 229 of 1979

A.H. Abdulla

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 28-11-1980

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 161(3), 162, 167(1), 172
Evidence Act, 1872 — Section 145, 27, 32(1)
Penal Code, 1860 (IPC) — Section 279, 304A, 337

Citation : (1981) ACJ 180

Hon'ble Judges : U.L. Bhat, J

Bench : Single Bench

Advocate : M.A. Manhu and V.V. Narayanan, for the Appellant; Public Prosecutor for Respondent No. 1, T. Karunakaran Nambiar and M.C. Nambiar, for the Respondent

Final Decision : Allowed

Judgement

Bhat, J.—The defacto complainant, P.W. 5, in C.C. 132/78 has filed this revision challenging the order passed by the Judicial First Class Magistrate, Manantoddy acquitting the second Respondent herein of the charge u/s 304A I.P.C.

2. P.W. 12, Sub Inspector of Police, in Grime No. 29/78 laid a charge against the 2nd Respondent on the allegation that on 8th March 1978 at 1-30 p.m. at Porunnannur amsom, Kringari desorn, the 2nd Respondent drove jeep K.L.P. 5229 in such a rash and negligent manner so as to endanger human life, that while driving the jeep from south to north drove it along the extreme western side of the road and struck a boy standing in the western foot path of the road, as a result of which the boy sustained fatal injuries. The occurrence was caused by the excessive speed, the careless way of driving and the over-loading the front seat of the jeep in such a fashion that the driver could not sit properly. P.W. 5, the father of the injured boy was informed about the occurrence. The boy was taken to the Government Hospital, Manantody, where he died. On intimation

received from the hospital, Head Constable of Police, P.W.3 attached to the Manantoddy Police Station went to the hospital and recorded statement of P.W. 5 and registered a case under Ext. P-5 F.I.R. as Crime No. 57/TR/78 under sections 279 and 337 of the Indian Penal Code. The case was transferred to Vellamunda Police Station within whose jurisdiction the occurrence had taken place, where the Sub Inspector of Police, P.W. 12 registered a case under Ext. P-10 F.I.R. He prepared a body mahazar Ext. P-11 and scene mahazar, Ext. P-8 and subsequently prepared inquest report, Ext. P-9. The vehicle was got inspected by P.W. 4, who prepared Ext. P-6 report. Post-mortem was conducted by P.W. 1, who issued Exf. P-2 certificate. A plan was prepared by the Village Assistant, P.W. 2. On 9th March 1978 itself all the eye witnesses and other material witnesses were questioned and ultimately charge was laid by P.W. 12 u/s 304A I.P.C. The second Respondent pleaded not guilty before the trial court. Prosecution examined 12 witnesses and marked Exts. P-1 to P-11. The defence denied the prosecution allegation of rash or negligent driving and contended that while the jeep was being driven carefully at a normal speed, the boy suddenly crossed the road and was struck by the jeep and it was an inevitable accident. The trial court held that the prosecution evidence cannot be relied on acquitted the second Respondent of the charge u/s 304A I.P.C. against him. This is now challenged by the defacto complainant.

3. I am conscious of the limitations on the jurisdiction of this Court to interfere with an acquittal in a revision filed by a private party. This Court would not be justified in interfering with an acquittal merely because the trial Magistrate has taken a wrong view either on facts or of law or has erred in appreciation of evidence or circumstances. However, if there exist glaring defects in procedure or manifest error on points of law resulting in miscarriage of justice or if manifest illegality has been committed, this Court will be justified in interfering even in these proceedings in order to prevent gross miscarriage of justice. I shall consider the arguments addressed before me, in the light of these salutary principles.

4. P.W. 5, the first informant and the father of the deceased child, is not an eye witness. Nevertheless in the first information statement he has stated the crux of the prosecution case. P.Ws. 6 to 9 are the eye witnesses examined before the trial Magistrate. Of them P.Ws. 6 to 8 were travelling in the jeep driven by the 2nd Respondent. P.W. 6 was sitting in the front seat along with 4 other persons including the second Respondent, while P.Ws. 7 and 8 were sitting in the back seat. P.W. 9 was standing in a garden opposite to P.W. 1's house and by the side of the main road in which the occurrence took place. These witnesses have given evidence in court to the effect that the boy was standing on the left side of the road, that is in the western side of the road (according to some of them he was standing in the left footpath), that the jeep was driven at an excessive or high speed or at an uncontrollable speed (that is how one or the other witnesses describe it) and struck against the boy. The witnesses have also deposed that the jeep was overloaded and in particular, the front seat was overloaded to an extent

that the driver was sitting partly on the seat and partly without any support. The learned trial Magistrate rejected this evidence mainly on two grounds. The first ground was that P.W. 5 during the course of the investigation "admitted" that the occurrence took place when the boy crossed the road. The second reason which impressed the court was that the investigator deposed that he questioned all the eye witnesses for a second time a few days after the first questioning which had taken place on the day next to the occurrence and on the second occasion the witnesses stated that the jeep was travelling at a normal speed and the occurrence took place when the boy crossed the road. Though the learned Magistrate was surprised by P.W. 12, the Sub Inspector of Police questioning the witnesses again, he proceeded to accept the testimony of P.W. 12. Accepting the testimony of P.W. 12, the learned Magistrate thought that P.Ws. 6 to 9 who have a consistent version in court are contradicted by their case diary statements with reference to speed and on the question whether the boy was merely standing on the left side of the road or whether he had crossed the road. These "contradictions" also weighed with the learned Magistrate in disbelieving the prosecution case.

5. Learned Counsel for the revision Petitioner would contend that it is extremely doubtful if actually the Sub Inspector had questioned the witnesses for the second time and if he had done so it was wholly unjustified and the so-called contradictions have not been brought on record when concerned witnesses were in the witness box. Learned Counsel strongly urged that the trial Magistrate committed a very serious illegality resulting in prejudice to the prosecution by relying on entries in Police Diary or Case Diary and portions of statements recorded u/s 161(3) of the Code, evidently handed over to the court by the investigator when the investigator stepped into the witness box. Learned Counsel for the second Respondent contended that the contradictions had been brought properly on record and proved and P.W. 12 had right to question the witness any number of times, that the court was justified in relying on the contents of diary.

6. Records produced in court do not give any indication to show that the eye witnesses were questioned twice and the second questioning revealed certain information contrary to the information brought forth in the first questioning. This indeed is a serious matter.

7. P.Ws. 6 to 9 are the eye witnesses, who had been examined by the prosecution. In cross-examination they were asked if one or other of them told the police regarding the jeep travelling at a normal speed or regarding the act of the boy in crossing the road. I may note that all these suggestions had not been put to all the witnesses, but one or the other of these suggestions had been put to one or the other of the witnesses. All the depositions have been read before me in full. The depositions show that the relevant extracts of the alleged Section 161 statements were not put to the witnesses. They were not given an opportunity to affirm or deny the exact portions of the alleged previous statements. In the event of denial, they should have been given an opportunity

to explain the contradictions, if any. That was not done. I may even point out that none of these witnesses was asked whether he had been questioned for a second time by the investigator. This was wholly unfair to the witnesses. It has to be remembered that these witnesses have consistently spoken to the case of excessive speed and the boy standing on the left side of the road and not crossing the road. To condemn the evidence on the basis of contradictory previous statements alleged to have been made by them, without specifically drawing their attention to those statements, was wholly improper.

8. I may also notice that Section 162 of the Code of Criminal Procedure (for short the Code) prohibits the use of statement recorded u/s 161(3) of the Code except under three specified conditions, namely, where evidence is to be contradicted in terms of Section 145 of the Indian Evidence Act, or when the statement is sought to be relied on u/s 32(1) of the Indian Evidence Act or where a portion of the statement is sought to be used u/s 27 of the Indian Evidence Act. According to the Learned Counsel for the second Respondent, the use to which these statements had been put in this case was u/s 145 of the Evidence Act. In order to test this argument it is necessary to look into the exact requirements of Section 145 of the Evidence Act, Section 145 of the Evidence Act reads thus:

145. Cross-examination as to previous statements in writing--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.

A reading of the Section 145 of Evidence Act makes it clear that in order to contradict a witness with reference to his previous written statement, his attention must be called to the portion sought to be used for the purpose of contradiction. In other words, when a witness is sought to be contradicted, the specific portion of his previous written statement must be brought to his notice specifically and an opportunity given to him to admit it or deny it. If he admits the previous statement, it is unnecessary to prove it. If he denies the previous statement, such statement has to be proved in an appropriate manner.

9. This does not mean that there is only one way of bringing on record a contradiction contained in a previous statement recorded u/s 161(3) of the Code. There may be several ways of doing it one way would be to read out the specific portion from the statement to the witness and incorporate that portion specifically within inverted commas in the deposition. That would be the ideal way of doing it. Some courts adopt the method of extracting only first few words and the last few words of the previous statement and marking the relevant passage. Some other courts, instead of extracting the portion in the deposition, merely mark the portion in the document containing the statement and allow it to be read out or shown to the witness. Depositions of P.Ws. 5 to 9 in this case show that none of these ways was adopted.

10. It is needless for me to emphasis that these witnesses to the extent they were confronted with their previous statements, though not in the proper form, denied having made such statements. That being so, it was the duty of the defence to have proved those statements through the investigator, who claims to have questioned the witnesses on the second occasion. Even when the investigator stepped into the witness box, specific portions of statements were not read out and extracted in the deposition nor were portions of the previous statements marked and put to him in cross-examination. It cannot, therefore, be said that the alleged contradictory portions of the alleged previous statements have been proved; much less can it be said that the makers have been confronted with those portions or given an opportunity to explain the same.

11. I have dealt extensively with this aspect of the case only because the reason which weighed with the learned Magistrate to reject the testimony of P.Ws.6 to 9 was the belief that they had given contradictory earlier statements to the Sub Inspector of Police. The same is the case with reference to P.W. 5. The above discussion is sufficient to show that in fact and in law there is no proof that these witnesses had made contradictory previous statements. In other words, the learned Magistrate disbelieved the witnesses on a ground which really did not exist and on material which really he had no authority to look into. This is a serious flaw in the trial and in my opinion it has caused serious prejudice to the prosecution.

12. There is another aspect of the matter, which deserved consideration. Dealing with the first informant, P.W. 5, the learned Magistrate observed in paragraph 9 as follows:

In the F.I.R. he has stated that he came to know that while the boy was standing by the side of the road the jeep came and hit against the boy. But it appears from the case diary that the person who gave F.I.R. i.e. P.W. 5 (the father of the deceased boy) was again questioned by P.W. 12. Then P.W. 5 would say that he gave the F.I.R. on a wrong information and in fact the accident happened when the boy crossed the road.

(emphasis mine)

The above passage shows that the learned Magistrate took the case diary or police diary from the investigator, perused it and came to know that P.W. 5 had given a contradictory statement to the police. The records do not show that this so-called contradiction was brought to the notice of either P.W. 5 or P.W. 12. Alleged contradiction was noticed only by the court when it looked into the case diary file. It is important to note that this is one of the main circumstance relied on by the trial court to reject the prosecution case. In other words, the trial court has relied on materials contained in case diary or police diary and not brought on record, to test the veracity of witnesses and the prosecution version. I do not think this can be supported either on any principle or law or even by expediency.

13. Case diaries, or entries in case diaries or statement of witnesses u/s 161(3)

of the Code normally reach court under one or the other of the following provisions, namely, Section 167(1) or 172(2) or 173(5) of the Code. Section 167(1) requires the investigator after arresting the accused and finding that investigation cannot be completed within 24 hours, to produce him before the nearest Judicial Magistrate with copies of entries in the case diary. The purpose of this provision is obvious. The Magistrate may be required to order the accused to be detained for the purpose of further investigation. To arrive at a conclusion in that behalf, the Magistrate must have relevant materials before him. For that purpose the copies of the case diary entries must be sent to him. This is one way in which the Magistrate can use entries in the case diary.

14. Section 173(5) requires the police to forward to the court along with final report, all documents or the relevant extracts on which the prosecution proposes to rely and statement recorded in Section 161. The purpose of this provision is to enable the court to supply these documents to the accused u/s 207 of the Code so that he may prepare his defence. This is another way in which these records come to the custody or notice of the court.

15. Section 172(2) of the Code authorises any criminal court to send for police or case diaries of case under enquiry or trial and further states that the court may use such diaries not as evidence in the case but to aid it in such enquiry or trial. What is apparent on a plain reading of Section 172(2) of the Code is that the court cannot use any part of the case diary as evidence or even to test the evidence before court. The court can use it only for one purpose and that is to aid it in the enquiry or trial. It is unnecessary for me to enumerate and it is not possible to enumerate also the various circumstances under which the court could look into the case diary. It may be that the circumstances exist in a case requiring the court to know the exact sequence of events which took place during the course of investigation. The court may require to know in a given case the order in which witnesses have been examined. When investigator claims to have taken some steps and the same is challenged by the other side, it may be open to the court to look into the case diary (defence itself not having the right of looking at it, unless the witness looks at it for the purpose of refreshing his memory or the court uses it to contradict the officer), to draw the attention of the investigator if the case diary does not bear out his statement and thereby contradict him. I am only mentioning some of valid purposes for which the court may look into case diary. But there is nothing in Section 172 or any other provision of the Code warranting use of any portion of the case diary by a court as evidence or material to test the evidence of other prosecution witnesses, or even to test the probability of the prosecution case. The learned trial Magistrate has done precisely this. Having looked into the case diary and having come to know that it contains some information to the effect that P.W. 5 told the investigator that the boy had crossed the road, learned Magistrate accepted it and used it to disbelieve the other witnesses thereby casting doubt on the prosecution case.

16. I have indicated that the entire eye witness testimony has been disbelieved on two grounds and both these grounds are wholly untenable in law. The learned Magistrate relied on wholly inadmissible material to reject the prosecution testimony. I do not want to make any more observations since it may prejudice either one or the other side, as I am satisfied that the facts and circumstances of the case justify the quashing of the acquittal and a further trial.

For the reasons stated above I am satisfied that there has been manifest illegality in the procedure adopted by the trial Court which has resulted in serious prejudice to the prosecution. This reason in my opinion is sufficient to set aside the acquittal. The acquittal is set aside. The case is sent back for fresh trial. The revision petition is allowed.