

(1963) 10 KL CK 0031

In the High Court Of Kerala

Case No : Criminal Appeal No. 181 of 1963

Bhargavi Amma Chellamma, Vilasathu Veedu

APPELLANT

Vs

The State of Kerala

RESPONDENT

Date of Decision : 11-10-1963

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 164, 207A, 287, 364

Evidence Act, 1872 — Section 114

Penal Code, 1860 (IPC) — Section 302

Citation : AIR 1964 Ker 241 : (1964) CriLJ 414

Hon'ble Judges : P. Govinda Menon, J; Anna Chandy, J

Bench : Division Bench

Advocate : P.V. Ramawarrier, State Brief, for the Appellant; State Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Anna Chandy, J.—This is an appeal filed against the judgment of the Alleppey Sessions Judge, convicting the appellant Chellamma u/s 302, I. P. C, and sentencing her to undergo rigorous imprisonment for life for causing the death of her new born illegitimate child by burying it alive.

2. Chellamma aged 42 was married to-P. W. 4 but got separated from him to live with her parents P. Ws. 1 and 2 and two of her children in Thulasivilasom House for the last eight or nine years. While so living, she became pregnant due to illicit intimacy with Rajappa Menon, her cousin. She showed reluctance to acknowledge her pregnancy till about October 1962 when P. W. 9 the mid-wife of the Muhamma Primary Health Unit examined her in the Unit Office and declared her to be five months" pregnant. The mid-wife continued to take care of the pregnant woman with such solicitude that soon the whole locality including P. Ws. 1 and 2 became fully aware of the accused"s pregnancy.

3. It is alleged that on 19-3-1963 after midnight the accused went out of her house and delivered a live child at the foot of a coconut sapling standing on the

south eastern-side of the compound and buried it in a pit she had dug two and a half feet away: On 20-3-1963 at about 10 A. M. P. W. 13 a school boy of 12 attracted by the crows which gathered at the spot, found a half-exposed dead body of a new-born baby. He informed his mother and others and the news spread all over. P. W. 1 the father of the accused lodged the First Information at the Muhamma Police Station. P. W. 12 the Head Constable registered a case u/s 318, I. P. C. which was eventually charged by the Circle Inspector u/s 302, I. P. C.

4. In this case the inquest was held in the presence of the Executive First Class Magistrate who was requested by the police to disinter the dead body. After inquest, the body was handed over for post-mortem examination on the spot to P. W. 8 the doctor who had reached the place earlier. In the "exhumation notes" prepared by the Magistrate beyond recording what he noticed at the spot, the learned Magistrate has incorporated a confessional statement of the accused in these words: "The woman Chellamma identified the body as that of the child she delivered at the site at about 3 A. M. on 20-3-1963 and which she had buried there".

5. The charge framed by the Sessions Court states that the accused delivered a live child at the foot of a young coconut tree and then and there took the child to a place two and a half feet west of the tree, dug a pit in the earth and buried it to kill it.

6. The Committing Magistrate who found incriminating circumstantial evidence in the documents presented to him by the police u/s 173, Criminal Procedure Code committed the accused to the Sessions Court without asking the accused for any explanation about those circumstances. The Committing Magistrate closed the examination of the accused by asking only two questions (i) whether the accused heard the charge framed against her read and explained and (ii) whether she had any witness to be examined in the Sessions Court. The examination of the accused recorded by or before the Committing Magistrate is meant to be tendered by the Prosecutor and read as evidence u/s 287, Criminal Procedure Code, So if the Magistrate would not ask proper questions, the accused may well claim that she was not given an opportunity to explain the circumstances against her at the earliest opportunity.

7. In the Sessions Court, the accused admitted that she has delivered a child on 20-3-1963 before day-break when she sat for answering the calls of nature under a cashew tree in her compound. The child did not cry and she thought it was dead. She became unconscious and fell on her back. Subsequently she crawled back to her court-yard and fell asleep. She also admitted that she conceived, by her intimacy with her cousin Rajappa Menon who accompanied her on 18-3-1963 to the Alleppey Women's Hospital. The doctor who examined her assured that her delivery would take place only after a week and so she returned home and during the night of 19-3-1963 she suddenly delivered a child that was dead. She denied the allegation against her of having buried the child and alleged that when once Rajappa Menon acknowledged the paternity and

promised to marry her and the whole locality knew about her pregnancy, there was no necessity for her to kill her male child. She denied having been present at the time of the preparation of the inquest or the exhumation notes and of having identified the child as the one she gave birth to, much less the one she buried there.

8. The learned counsel for the accused argued with reference to the text books on Medical Jurisprudence that the data on which the doctor based his opinion that the child was born alive viz., the rounded shape of the chest, crepitant conditions of the lungs and positive hydrostatic test, only establish the fact of respiration and they cannot positively show that the entire body of the child was completely extruded from the body of the mother when the act of breathing was performed. The question whether the child was born alive or dead merits no elaborate enquiry as the crucial question to be decided is who buried the child. If there is no evidence that the accused dug the pit and buried the child, the question whether the child breathed or not assumes little importance.

The doctor based his opinion that the child died of asphyxia due to being buried alive on account of the presence of fine sand in the mouth and throat of the corpse and blueness of the body and congestion of the internal organs. There was no sand in the nose. The doctor did not separate the sand nor did he measure its quantity to say whether it was sufficient to obstruct the passage to stop breathing. Moreover, in view of the plea of the accused that it was a case of precipitated delivery when she had gone out to answer calls of nature, it is quite possible that when the child fell to the ground, the sand found its way into the mouth and throat. The place is admittedly a sandy one and what was found inside the mouth is described by the doctor as fine sand. Hence the absence of injuries on the face of the body does not stand in the way of such a possibility. Moreover, neither the partially covered up nature of the corpse nor the presence of sand in the mouth and throat can lead to any inference of the child having been buried in this case, where the dead body was found by the Magistrate and the doctor about 32 hours after the delivery and there is no knowing what part mischievous urchins or the inquisitive crowd of crows had played in the meanwhile. It is not unlikely that the recording of the alleged confession in the presence of the doctor might have contributed to the positive opinion recorded by the doctor that it was a case of death by asphyxia as a result of the child being buried alive.

9. There is neither direct evidence nor any telling circumstance connecting the accused with the crime in this case. The learned Sessions Judge seems to have convicted the accused because of the evidence of P. Ws. 1 and 2 the parents, that their daughter never informed them of her pregnancy and delivery and the accused's suspicious conduct in going out to the courtyard to deliver and in not bringing back the child dead or alive to the mother after delivery.

10. The evidence of P. Ws. 1 and 2 appears to be unreliable and intended to ward off suspicion against them. They admitted that nearly a month before 19-3-1963

they knew that the accused's allegation of (word in Malayalam) is a barefaced lie and the accused was really far advanced in pregnancy. They sent the pregnant woman with Rajappa Menon to the Alleppey Hospital on 18-3-1963. The mother would have it that she got up on hearing the screams of her daughter, prepared coffee for her and went back to sleep comfortably because the daughter said that she had only filarial fever. The mother who had seen and passed through enough of child births could not have mistaken labour pains for filarial fever nor would she have believed this story from an erring daughter who was noticeably advanced in pregnancy. They must have known fully well that labour pains had started on 19-3-1963 at 1 A. M. If that is so, their evidence that they came to know of the birth of the child only at 10 O'clock when it was reported that the dead body of a child was found buried in the compound is not true.

Again, the father who asserted twice in the First Information Statement that the child must have been born dead as he did not hear the child's cry is letting the cat out of the bag. They must have known of the child's birth and it cannot be said they also did not have the opportunity or the motive to wipe away the dishonour by jurying the child. In the circumstances of this case they can as well be suspected along with their daughter and the putative father. Their suspicious evidence gives no added support to the complicity of the accused and we find it unsafe to act on it in the absence of corroboration. The circumstances under which the accused came to deliver the child in the compound are explained by her and no adverse inference could be drawn from it. Her conduct in not bringing the child to her mother has no culpable significance especially when it was dead and unwanted.

11. There should not be any automatic presumption that when an illegitimate child is found dead, it must have been killed by its mother. If such a view is allowed to prevail, the presumption of innocence, which is the inalienable right of every accused person, will be totally destroyed. It is surprising how the learned Sessions Judge could have convicted the accused of the murder of the child in the absence of any legal evidence to connect her with the crime. Evidently the illegally recorded confession of the accused incorporated in the exhumation notes Ext. P. 5 that the woman "identified the body of the child as that of the child she has delivered at the spot at about 3 A. M. on 20-3-1963 and which she buried there, must have lent assurance to the inconclusive inferences based on suspicions.

The police had already registered a case against the accused u/s 318, I. P. C. and investigation had started when they requisitioned the services of the Magistrate under Ext. P-6 since the dead body of the child was found buried. The body was exhumed and the inquest was prepared noting all the relevant details regarding the place and the circumstances under which the corpse was found and the condition of the corpse itself. However, we find separate exhumation notes prepared by the Magistrate giving the same details and incorporating the confessional statement alleged to have been made by the accused. The

Magistrate had no jurisdiction to record the said confessional statement and that given under the very nose of the investigating police officers in the exhumation notes. The burial of the child is the very foundation of the charge against the accused. It is a confusion, pure and simple that should have been recorded only in the manner provided for in Section 164.

In *Nazir Ahmed v. Emperor* AIR 1936 PC 233 (i) the Privy Council emphasised the need to follow the method prescribed by Sections 164 and 364 of the Criminal Procedure Code when Magistrates record confessions during investigation and treated as inadmissible a memorandum prepared by the Magistrate to the effect that the accused confessed as well as the oral evidence of the Magistrate in support of it. The following observations made by their Lordships may be borne in mind with benefit.

"Whether a Magistrate records any confession is a matter of duty and discretion and not of obligation. The rule which applies is that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. No doubt the Magistrate acting under Sections 164 and 364 is not acting as a Court, yet he is a judicial officer and both as a matter of construction and of good sense, the rule above applies to Section 164. Sections 164 and 364 must be looked at and construed together, and it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves."

This decision was quoted with approval by the Supreme Court in *Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh*, . True, the confessional statement that the accused had buried the child as such was not attempted to be proved by the Magistrate when he gave evidence. However, Ext. P-5 exhumation notes was admitted as a whole without eschewing the inadmissible portion and the learned Sessions Judge made repeated references to the record and has even incorporated the objectionable portion in the judgment. It cannot be said that the illegal recording of the confession and its admission into the evidence has not prejudiced the accused in this case where there is a total absence of any direct evidence or any clinching circumstance.

12. There is no legal liability on the part of the mother of an illegitimate child to prove that the child was not a still-born one. Her version that she delivered a child that did not cry when she attempted to answer calls of nature is not farfetched or impossible. Her third child was a stillborn one. As her parents and the cousin Menon all knew about the pregnancy, they must also have known that she should give birth to a child one day or the other. The expected day as per the mid-wife is 10th of March 1953. On that day nothing happened. She went to the hospital on 18-3-1963 with the cousin Menon and returned because the doctor assured her that the delivery will take place only a week later. All calculations went wrong and on 19-3-1963 she had a precipitated labour and delivery. The prosecution has not tried to examine Rajappa Menon who accompanied her to

the hospital as admitted by P. W. 1. There is no evidence that the accused tried to destroy her pregnancy by any attempted abortion. She who had given birth to four children to her husband P. W. 4 had no exasperating cause to kill her male child whose paternity was acknowledged.

If the illegitimate pregnancy is not such a dishonour to this woman who had a cousin to own up the parentage, the birth of that child will not be a greater dishonour. In the nature of this case, the circumstances enumerated are not inconsistent with the innocence of the accused and are capable of more than one explanation. Thus there is not an iota of legal evidence to connect the accused with the crime. Except the illegally procured confession in Ext. P-5 exhumation notes and the inconclusive opinion of a medical officer there is not even a single circumstance to prove that the accused caused the death of her live child or caused its secret burial. Suspicion that the mother of the illegitimate child might have caused her child's death cannot be substituted for proof and we are constrained to give the accused the benefit of doubt. Hence the appeal is allowed and the conviction and sentence entered against the accused are set aside. She will be set at liberty forthwith.