

(1991) 04 KL CK 0038
In the High Court Of Kerala
Case No : Criminal Ref. 1 of 1991

Kanaran

APPELLANT

Vs

S. I. of Police, Kuttiadi

RESPONDENT

Date of Decision : 12-04-1991

Acts Referred:

Constitution of India, 1950 — Article 14, 21
Criminal Procedure Code, 1973 (CrPC) — Section 313, 318, 341
Evidence Act, 1872 — Section 114(a)
Penal Code, 1860 (IPC) — Section 300, 302, 32

Citation : (1991) 2 KLJ 692

Hon'ble Judges : P.K Shamsuddin, J;K.T. Thomas, J

Bench : Division Bench

Advocate : K P.G. Menon, State Brief, for the Appellant; M.M. Mathew, Public Prosecutor, for the Respondent

Judgement

K.T. Thomas, J.—A deaf mute stands convicted for the offence under Sec. 32 of the Indian Penal Code. Instead of passing a sentence, learned Sessions Judge forwarded the proceedings to this Court together with a report" under Sec. 318 of the Code of Criminal Procedure (for short "the Code") to enable the High Court to pass "such order as it thinks fit". We appointed Sri. K. P. G. Menon, advocate, on State brief to argue for the convicted person. Sri. T. R. Raman Pillai, advocate, assisted the court as amicus curiae on our request. Learned Sessions Judge, in his report, pointed out that communication with the accused was not possible due to his disability. Sessions Judge made some efforts to make the accused understand the proceedings. For that purpose. Sessions Judge availed himself of the services of a teacher attached to a deaf and dumb institute and also services of accused's son But both of them failed to make the accused understand the proceedings. Nor could they understand what the accused had to communicate. Some questions were put to the accused under Sec. 313 of the Code but Sessions Judge failed, inspite of efforts made through the aforesaid persons, to elicit any meaningful answer. However, as per judgment pronounced

learned Sessions Judge found the accused guilty of the offence under Sec. 302 of the IPC and convicted him.

2. Facts of the case are simple: Notwithstanding his disability, accused married twice. His wife and children in the first marriage were living separately from his second wife and children. Accused was mostly living with his second wife Manikkam in whom he has two sons. Accused had a grievance that his second wife (Manikkam) and children were taking coconuts from his property without his consent. He used to quarrel with them on that issue. On 19-6-1989, while Manikkam was chopping fish with a sickle around 11 a.m. accused asked her something to which she replied through gestures. Accused suddenly took up a chopper and inflicted cuts on her. She died then and there.

3. Sri. K. P. G. Menon contended that the entire trial is vitiated since accused was not able to understand the proceedings and also since Sessions Judge could not understand what the accused had to say about the evidence appearing against him. According to the counsel, there was infringement of fundamental right enshrined in Art. 21 of the Constitution which says that "no person shall be deprived of his life or personal liberty except according to procedure established by law". It was contended further that Sec. 318 of the Code does not afford scope to comply with the procedure for giving reasonable opportunity to the accused to explain any circumstances appearing in evidence against him. Sec. 313 of the Code enjoins on the Sessions Court to examine the accused generally on the case "for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him". The said section empowers the court to take into consideration the answers given by the accused to such questions while reaching final conclusion. According to the counsel, this vital provision stands eluded in a case where Sec. 318 applies.

4. Sec. 318 of the Code reads thus:

Procedure where accused does not understand proceedings:- If the accused though not of unsound mind, cannot, be made to understand the proceedings, the Court may proceed with the inquiry or trial, and, in the case of a Court other than a High Court, if such proceedings result in a conviction, the proceedings shall be forwarded to the High Court with a report; of the circumstances of the case and the High Court shall pass thereon such order as it thinks fit.

At the first blush the argument struck sound, since the procedure laid down in the section to "proceed with the inquiry or trial" is not capable of compliance as long as deaf-mute cannot be made to understand the, proceedings. Of course, procedure envisaged in Sec. 313 of the Code is part of general provisions for trial. That provision cannot, practically, be complied with in the case of a deaf - mute. But an accused cannot be acquitted for the sole reason that he cannot be made to understand the proceedings. If an accused has to be acquitted on that ground alone the situation would lead to dangerous consequences. Such persons could be hired to commit grave crimes like murder with immunity. There is also

the possibility that an accused can pretend without risk that he cannot understand proceedings.

5. Sec. 318, if interpreted and understood pragmatically, is a provision laying down a procedure for trial in such cases. The words "the court may proceed with the [inquiry or trial]" in Sec. 318 of the Code need be understood as a direction to proceed with the trial in the manner laid down in the Code as far as practicable. Sec. 313 of the Code, no doubt, empowers the court to take into consideration the answers given by the accused to the questions put to him. It does not mean that the answers given by the accused would automatically supersede the evidence against him in any inquiry or trial. Court can consider the evidence in the light of what the accused said about it. This would afford the accused protection from the risk of acting on the adverse evidence unilaterally. Such a risk is soft pedalled when the High Court has the freedom to pass "such order as it thinks fit". High Court can take into consideration any defence which the accused could or might possibly have adopted and any answer which he might possibly have given, but for his disability. Looking at it from that angle the procedure laid down in Sec. 318 of the Code cannot be understood as violative of Art. 21 of the Constitution.

6. "Procedure established by law" in Art. 21 of the Constitution envisages a valid law made by Parliament, or State Legislature. Of course; the law so made must not be violative of any other fundamental rights (vide *S. Krishnan and Others Vs. The State of Madras*, and *State of Uttar Pradesh and Others Vs. Shah Mohammed and Another*, ;. In *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, the Supreme Court laid down that the law which deprives a person of "personal liberty" and prescribing a procedure has to stand the vires of other fundamental rights and also the test of reasonableness. "The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non arbitrariness pervades Art. 14 like a brooding omnipresence and the procedure contemplated by Art. 21 must answer the test of reasonableness in order to be in conformity with Art. 14. It must be right and just and fair and not arbitrary, fanciful or oppressive; otherwise it should be no procedure at all and the requirement of Art. 21 would not be satisfied".

7. Applying the aforesaid test, the procedure laid down in Sec. 318 of the Code is reasonable and fair notwithstanding the difficulty to comply with Sec. 313 of the Code when the accused cannot be made to understand proceedings.

8. The treatise by Russell on Crimes refers to the earliest decisions in which principles for governing procedure relating to persons who cannot understand proceedings have been evolved. In *R v. Jones* ((1773) 1 Leach 102) the prisoner appeared to be deaf and dumb. The jury found a verdict "mute by the visitation of God". No offence was found against him. In *R. v. Berry* ((1876) 1 Q. B D. 447), a deaf mute on trial for felony was found by the jury not to have understood the proceedings at the trial and to be unable to understand them. This was held equivalent to a verdict of insanity. In a later case (*R v. Governor* - (1909 2 K. B

81) it was held that a finding that a prisoner was deaf mute amounted to a finding that he was insane within the meaning of Criminal Lunatic Act, 1800. It was later realised that deaf-mute cannot be equated with an insane person, as the latter during insanity is incapable of exercising discretion while the former is, able to do, though he is unable to communicate. A Division Bench of the Mysore High Court has observed in *State v. Kampu shetty* (AIR 1965 Mys 95) that "object" of Sec. 341 is that the High Court should be in a position to satisfy itself that the accused is ensured a fair trial". A Division Bench of this Court in an early decision quoted with approval the observation made by Upper Burme Judicial Commissioner's Court in *Queen v. Bowka Hari* (22 Suth WR Cr. 35) which reads thus: "In a case reported to the High Court under Sec. 341 of the Cr. P. C. (which corresponds to Sec. 318 of the Code) the High Court has full discretion to do whatever the circumstances of the the case require. The section gives the High Court powers to pass sentence the Magistrate's finding". The Division Bench consisting of Koshi C J. and M. S. Menon, J. (as he then was) in *In Re: Peethambaran*, on the basis, of the aforesaid observation held that the wide powers conferred on the High Court involve the protection to such persons. A Division Bench of Madras High Court indicated that presumption under Sec. 114 (a) of the Evidence Act should not be drawn against a deaf mute because accused's infirmity prevents him from putting forward any explanation which he may have to offer (vide *In re Oomayn* AIR 1915 Mad 50).

9. Cases above referred to would indicate very wide powers for the High Court to deal with case where trial court convicted a deaf mute. No restriction whatsoever is imposed exercise of such powers by the High Court. Prescription of any extent or limitation for sentence for the. offence in the statute does not affect or limit the wide powers of the High Court to pass "such order as it thinks fit". The endeavour to be adopted on a report made under Sec. 318 of the Code is to find out, first whether on the evidence conviction is sustainable and second whether the accused would have been, able to put forward any defence if he had the capacity to communicate to the court. There is no hurdle in affording the maximum benefit to the convicted accused if the court feels that a particular defence could have reasonably been raised by him but for his infirmity.

10. In this case there is absolutely no difficulty to confirm the finding that deceased Manikkam was murdered by the accused P. W. 10 doctor, who conducted the autopsy on the dead body described five incised antemortem injuries noticed by her. One was on the left side of head associated with fissured fracture and subarachnoid haemorrhage over brain. Another was on the right and front of neck involving jugular vein and common carotid artery, besides fracturing the fourth cervical vertebra including spinal cord completely. The remaining incised injuries were simple or superficial injuries which were located near the major incised injuries Learned counsel pointed out that P. W. 1 was able to account, only for two injuries in chief examination and therefore he could not have seen all that preceded the infliction of those two injuries. When we made a closer scrutiny of the details shown by the doctor regarding the incised injuries,

we felt that the simple injuries could, as well, have been caused while inflicting the major incised injuries. Those three simple injuries need not necessarily have been the result of independent strikes with the weapon. We are not inclined to disbelieve the version of P. W. 1 for the mere reason that he did not account for all the five injuries.

11. P. W. 3 had seen only the final stage of incident. Other witnesses do not matter much so far as the occurrence is concerned. Learned Sessions Judge placed reliance on the testimony of P.Ws. 1 and 3. We would say that learned Sessions Judge had not acted wrongly in placing reliance on the testimony of those two witnesses.

12. At this stage adequate consideration should be given to the possible defences which the accused could have reasonably adopted if he was in a position to communicate to the court. Learned counsel argued that presence of sickle in the hand of the deceased (as she was preparing fish) would have afforded background for setting up a defence of right of private defence. Deposit a sickle with the deceased, we do not find any cause, in the broad probabilities of this cast, for the deceased to attack the accused. Even a remote possibility of accused exercising right of private defence when he inflicted the stab injuries on the deceased could not be observed in this case. However, evidence of P.W.I, cannot dispel the possibility of raising a plea based on Exception 1 to Sec. 300 of the Penal Code, if accused had the capacity to communicate. The suddenness with which accused attacked the deceased with a chopper may indicate that the accused would have flared up with rage.- His anger would perhaps have been ignited on account of some conduct on the part of the deceased, either by words or gestures. Possibility of accused having been deprived of the power of self control under grave and sudden provocation in the broad setting of this case cannot be foreclosed. Interest of justice demands, in this case, to consider the aforesaid aspect in assessing the quantum of sentence to be imposed. Even though he was convicted for the offence under Sec. 302 of the IPC, in exercise of High Court's special jurisdiction under Sec. 318 of the Code, we are not inclined to impose a sentence to him higher than what we may impose in a case where Exception I to Sec. 300 of the Penal Code can be applied. Considering all aspects, we impose a sentence of simple imprisonment for seven years to the accused for the offence found against him.

Reference is answered accordingly. Sri K P G Menon discharged his duty remarkably as advocate for the accused person. We express our thanks to Sri, T. R. Raman Pillai who rendered valuable help to us as *amicus curiae* even on a short notice.