
(1993) 01 KL CK 0015
In the High Court Of Kerala
Case No : Criminal A. No. 475 of 1989

Kesavan

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 29-01-1993

Acts Referred:

Evidence Act, 1872 — Section 118, 153
Penal Code, 1860 (IPC) — Section 300, 302

Citation : (1993) 1 KLJ 359

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

Bench : Division Bench

Advocate : V.A. Kasthuri SB, for the Appellant; Public Prosecutor (T. V. George), for the Respondent

Final Decision : Dismissed

Judgement

Thomas, J.—Appellant was indicted for uxoricide and now he stands convicted by the trial court of the offence under Sec. 302 of the Indian Penal Code. The gist of prosecution case is that he killed his wife Omana by cutting her neck with a chopper on the evening of 7-11-1988. Sessions Court rejected his plea that he lost power of self-control due to sudden and grave provocation. He filed this appeal from jail and we appointed Smt. V.A. Kasthuri to argue the case for him on State Brief. Further details of the prosecution story are the following: Appellant and deceased Omana were in love with each other even before marriage, and it is not certain whether their marriage was legally solemnised. However, they lived as husband and wife for about nine years. P. W. 3-Sreeja is the only child born to them She was aged ten when her mother was murdered. Although it was a love marriage, the married life was not sailing smooth for reasons good or bad. Frequently erupting skirmishes marred their connubial life and eventually they contemplated the idea of dissolving the alliance.

2. Appellant desired to finish his wife off. He got a chopper sharp end and reached his house by 5 p.m. on the fateful day-After saying this and that he

inflicted a cut on her neck which pierced the jugular vein and common carotid artery.

3. Hearing the hue and cry made by Pw. 3-Sreeja, some neighbors rushed to the scene. Deceased's brother Vijayan (P. W. 1) also reached the house. Deceased was taken to the hospital and there she was pronounced dead.

4. First information Statement about this was furnished on the same day at 9 p.m. by P.W. 1-Vijayan at 9 p.m. Appellant was arrested on 24-11-1988 and a chopper (M O. 19) was recovered from a concealed place.

5. Appellant when questioned on the prosecution evidence generally denied the allegation and put forward a plea that he was deprived of his self control due to sudden and grave provocation. According to the appellant, Omana was leading a wayward life and on the fateful day he saw her entertaining an outsider from whom she collected some cash, and when appellant questioned her about it she snorted and retorted that it was none of his business to poke into her affair and on hearing those snubbing words he lost his equanimity.

6. The aforesaid plea was not accepted by the Sessions Court. Learned Sessions Judge found that prosecution established convincingly that appellant murdered his wife without any justification. Accordingly, the appellant was convicted and sentenced as aforesaid.

7. It is clear that death of Omana was a case of homicide. It is a point which is not seriously disputed either in the trial court or in this Court. Hence the main question is whether it was the appellant who inflicted the cut injury on the deceased.

8. Testimony of P. W. 3-Sreeja is the most important evidence in this case. She said that she came back from her school during noon recess and after lunch she did not go back to the school since she was asked by the deceased not to go to the school. According to her, deceased sent her to a hotel after 5.30 p.m. to buy tea and when she returned she saw her father holding a chopper and talking to the deceased, Sreeja further said that her father caught hold on the left hand of the deceased and pulled her down and inflicted a cut on the neck with the chopper and when Sreeja made a hue and cry many others including P.W S. 1 and 4 came to the scene. Learned Sessions Judge relied on the aforesaid evidence.

9. Learned counsel for the appellant contended that the evidence of P.W. 3-Sreeja, being a child witness, cannot be used to convict the appellant. According to the learned counsel, testimony of a child witness is fraught with the danger that a child is invariably vulnerable to brain washing and tutoring. She cited the decision reported in State of Bihar, etc. Vs. Kapil Singh, etc., in support of the said contention. The Supreme Court has observed in the decision that there is always the danger in accepting the evidence of a child witness, since under influence the witness might have been coached up to give out a version by

persons who may have influence on the child. But the aforesaid observation cannot be treated as a legal principle being laid down by Supreme Court that testimony of a child witness shall not be acted on by a criminal court if any such hard and fast rule has been laid down. It would lead to the dangerous situation in which murderers killing inmates in dwelling houses in the presence of children will have the advantage of escaping from conviction without difficulty.

10. The law is not that the testimony of a child witness is inadmissible in evidence. Sec. 118 of the Evidence Act declares that all persons are competent to testify unless "the court considers that they are prevented from understanding the questions put to them or from giving rational answer" on account of any infirmity. Tender age and old age are, of course, factors which law regards as capable of affecting testimonial capacity of a person. But the mere fact that a witness is of tender age or of old age is hardly sufficient to conclude that he has no testimonial competence. The Explanation added to Sec. 118 of the Evidence Act shows that even lunacy by itself is not sufficient to disqualify a person from giving evidence unless the persons capacity to understand questions and giving rational answers has been impaired on account of such lunacy.

11. In England statutory provision has been made for reception of unworn evidence from a child. The enactment is "Children and Young Persons Act, 1933." It provides that the evidence of child witness must be corroborated in some material particulars implicating the accused. It is apposite in this context to make a reference to the observations made by Lord Lane C.J., in R v. Z (1990) 2 All. E.R. 971 that "the question in each case was whether having regard to the nature and circumstances of the case and the nature of the evidence the child was called on to give, the child possessed sufficient intelligence to justify the reception of her evidence and understood the duty of speaking the truth. Furthermore, the younger the child the more care which had to be taken before admitting the child's evidence" Eventhough the said observations were made while considering the scope of Section 38 (1) of children and young persons Act, 1933, they provide useful guidance for us also. Of course, there is no such provision in any statute in India and hence there is no legal hurdle in acting on the testimony of a child witness in India. All the same courts have cautioned from early times that it is only a sound rule in practice not to act on the uncorroborated evidence of a child witness, whether oath has been administered to him or not. This was first observed by Lord Goddard in Mohamed Sugal Esa v. The King (AIR 1946 (Vol. 33) P. C 3). This is more a rule of prudence than a rule in law. A Division Bench of this Court has sounded the same caution 30 years ago (vide Joseph v. State- 1960 K. L. T. 430).

12. The Supreme Court has directed that the aforesaid caution must be adopted as a rule of prudence when the court has to consider the evidence given by a child witness (vide Bharvad Bhikha Valu and Others Vs. The State of Gujarat, and Suresh Vs. State of U.P., .

13. There are two items of evidence in this case which corroborate the testimony

of P. W. 3 - Sreeja. Brother of the deceased deposed as P. W. 1 that on hearing the hue and cry from the house of the deceased he rushed to the place and then he was told by P.W. 3 that her mother was cut by her father. P.W. 1 made a mention of this fact even in the First Information Statement.

14. P W. 4 is another witness who rushed to the place on hearing the hue and cry. She also deposed that she got a brief account of the occurrence from P. W. 3 which account is consist with P. W. 3"s testimony in court.

15. The evidence of P.W. 3 was assailed by the learned counsel with the help of defense evidence. D. W. 1-a teacher of the Government U. P. School, Tathamangalam, proved Ext. D1 attendance register of the school. It shows that presence of P. W. 3 in the class during the afternoon session on 7-11-88 was marked in the said register. It is doubtful whether such a material can be admitted in evidence in view of Sec. 153 of the Indian Evidence Act. In a similar situation, a Division Bench of this Court has held in *Ghandran v. State of Kerala* (1992 2 K. L. T. 126) that such evidence is not admissible. The fact that she attended the class during the afternoon session (even if true) is not a fact in issue in this case. At the most it is only a collateral issue. That apart, even assuming that the evidence tendered by D. W. 1 together with Ext. D1 is admissible, we have to point out that the same is hardly sufficient to discredit the testimony of P. W. 3. Firstly because D. W. 1 is not sure about the identity of any of her students. Second reason is that the incident in this case had happened around 6 p.m. and hence P. W. 3 Sreeja could see the incident even if she was present in the Class when the attendance register was marked.

16. We are, therefore. Inclined to place reliance on the testimony of P. W. 3 Sreeja as corroborated by the other items of evidence. It is unnecessary to consider the evidence relating to extra-judicial confession spoken to by P.W. 11 since we can hold that prosecution has established beyond doubt that it was the appellant who inflicted the cut injury on the deceased"s neck even without the evidence of P.W. 11. Appellant has failed to make out that he did the act whilst being deprived of his power of self control due to sudden and grave provocations as envisaged in the first exception to Sec. 300 of the IPC. No such defense was thought of when P.Ws. 1 to 4 were cross-examined and no such suggestion was even put to P.W. 3 Sreeja during cross-examination. Nor can such a plea to supported from the evidence of the prosecution, On the contrary, prosecution succeeded in proving through the evidence of p. W. 8 (a black-smith) that appellant made some advance preparation for committing the murder. P. W. 8 deposed that appellant gave M. O. 19 chopper to him on the previous day for sharpening it. Appellant"s story that he saw somebody else walking out of the house remains only an ipso dixit of the appellant. P.W. 7-a Councilor of the local Municipality gave evidence that deceased had complained to him earlier that her husband was very cruel to her. She solicited the help of P.W. 7 to get her marriage alliance dissolved. For the said reasons, we are not satisfied that appellant had any justification to have the degree of offence brought down from

Sec. 302 of the IPC,

Accordingly, we confirm the conviction and sentence and dismiss the appeal.