

(1992) 08 KAR CK 0020

In the Karnataka High Court

Case No : Criminal Appeal No. 155 of 1991 (Against the judgment passed by the XXII Addl. City Civil and S.J., Bangalore Rural Dist., Bangalore, D/- 27-2-1991.)

M. Yellappa

APPELLANT

Vs

The State of Karnataka

RESPONDENT

Date of Decision : 03-08-1992

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 174, 176
Evidence Act, 1872 — Section 21, 25, 26, 27
Penal Code, 1860 (IPC) — Section 302, 307

Citation : (1993) 1 ALT(Cri) 174 : (1993) CriLJ 388 : (1993) ILR (Kar) 977 : (1992) 3 KarLJ 763

Hon'ble Judges : L. Sreenivasa Reddy, J; D.P. Hiremath, J

Bench : Division Bench

Advocate : D.S. Hosamath, for the Appellant; S.R. Bannurmah, Addl. S.P.P., for the Respondent

Judgement

1. The accused-appellant has challenged his conviction for the offence u/s 302, IPC and sentence for life imprisonment for having committed murder of his wife Parvati on the night of 28/29-1-1990 in his house by assaulting her with a grinding stone, throttling and also pressing her neck with a spoon.

2. Briefly stated the prosecution case is that the accused was not treating his deceased wife well. There used to be earlier ill-treatment and it was his mother-in-law P.W. 2 who had made arrangement for his residence by taking a house on rent near her own house. The accused was a tailor by profession but round about the time of this incident he had not work at all. On the night of this incident the accused and the deceased with their child took food and both of them slept. At about mid-night time he committed the murder of his wife by assaulting as stated above and went to Kempegowdanagar Police Station and made a confessional statement before the Sub-Inspector of Police - P.W. 11. It was 1.50 a.m. of 29-1-1990. The information was treated as the first information report in

which he stated thus :

I am residing in the address given above. My native place is Bangalore town, Kattaraguppa. I was married to Parvathi five years ago and have a child of four years by name Gayathri. After marriage for about two years both of us stayed in my father's house. Because my wife could not adjust herself with the wife of my elder brother we took our own house near my father-in-law's house. I had paid Rs. 3000/- as advance for it. The rents however have been paid by my parents-in-law. I studied only upto 6th class whereas my wife had studied upto SSLC. My wife used to tell me that her elder brother will get a job for me. I did not agree to it. In one way or the other there used to be exchange of words between us.

3. With this obsessed mind I had left the house for 9 months. When I was near my elder sister's house near Madhure my father brought me back and left with my wife. Soon after, I left my house for three months for working in the land of one Venkatarayappa of Chetsalpelli in Andhra Pradesh. Three months ago I came back to my house and there used to be galata between me and my wife.

4. On 28-1-1990 at 9.30 at night after taking food I slept with my wife and my child. Before I slept my wife told that she wanted to take to some employment. I advised her not to go for any job. She replied that she was not listening to whatever I told. She replied that it was her parents that were looking after me and I had to listen to whatever she told, failing which I should see what she could get done to me by her elder brother. I was disgusted and could not get sleep. At 12-30 at night when I woke up I saw my wife and child asleep. From the manner in which my wife had talked to me I thought I should not spare her and took a grinding stone and hit on her head. She struggled. Thereafter I throttled her neck and also pressed it with a spoon. My wife died. Even the child which was sleeping by her side coughed and started weeping I also throttled the neck neck of the child, it stopped crying. However, it was alive. Thereafter, I put on my clothes and closed the doors of my house and having come to the police station, I have informed the matter." (read translation of Kannad information).

5. On this information, P.W. 11 registered a case in Crime No. 16/1990 under sections 302 and 307, I.P.C. and having transmitted the first information report to the jurisdictional Court he arrested the accused, took him to the spot and found that his wife had died and the child was struggling. The child was sent for treatment to the hospital through P.W. 10 the P.S.I. The Circle Inspector of Police took over further investigation. The following morning inquest was held over the dead body by P.W. 1 the Tahsildar - Executive Magistrate. The grinding stone and other articles were seized from the spot. The body was sent for autopsy. On completion of investigation the charge sheet came to be filed.

6. The Sessions Court relied on the statement said to have been made by the accused before P.W. 1, believing a part of statement under Ex.P. 3 convicted the accused for the aforesaid offence and sentenced him for imprisonment for life. The correctness of this Judgment of the Sessions Court is now challenged in this

appeal.

7. The entire case depends on circumstantial evidence, the circumstances being the accused and the deceased living in the same house, he filing first information report before P.W. 11 and making a statement before the Tahsildar. As far as motive is concerned even the close relative of the accused like his mother-in-law P.W. 2 and the brother of the deceased deposed that they were living cordially. They also speak about the accused not being in the house when they went there. P.W. 2 and her sons and daughters came to the spot only after learning from the police about this incident P.W. 5 one Shiva who is the landlord of the accused deposed that on the night of 28-1-1990 at 2.00 a.m. the police tapped his door and having come out he saw the dead body of the deceased in her house. P.W. 8 Jayamma a neighbour deposed that at 2.00 a.m. she heard crying voice, and she came out and somebody told that the husband of Parvathi had killed her. She does not state who actually told her. Some people standing outside the house were so talking. The evidence of P.W. 9 another neighbour is also to the same effect. Thus neither neighbours is also to the same effect. Thus neither neighbours nor the relatives of the deceased speak about their knowledge as to how this incident occurred.

8. Though it is not disputed that the statement made by the accused before the Tahsildar-Magistrate at the time of inquest could be used against him the evidence of P.W. 1 to this effect does not inspire confidence. Perhaps this is a very rare instance in which we have found that the police requisitioned the services of a Tahsildar to hold inquest over the dead body. P.W. 1 was directed by the Assistant Commissioner to hold inquest over the dead body. He went to the house of the accused and found Kamakushmma P.W. 2 the mother of the deceased, Byrappa P.W. 3, Krishnappa P.W. 4 and Yellappa the accused. At the time of inquest the accused was present and he stated that he had committed the murder of his wife. He also stated before him that on the night of this incident there was galata between him and his wife, he was obsessed and he committed her murder. This was done by using a spoon and a grinding stone. He also told him that his daughter was also assaulted by him.

9. Apparently the Tahsildar who was acting in his capacity as the Executive Magistrate under S. 174, Cr.P.C. must have questioned the accused, if at all he had questioned and elicited a reply from him, or the accused might have voluntarily stated before him what the learned Magistrate now wants the Court to believe as a confessional statement made before him. Such a course finds support in S. 176 of the Code. It is competent for the Executive Magistrate to record a statement of the accused which may amount to a confession and it is not hit by S. 26 of the Evidence Act. If proved, is admissible in evidence and has to be considered with other evidence adduced by the prosecution. A Division Bench of the Madras High Court in *In Re: Ramaswami Reddiar and Another*, observed that it cannot be said that no Magistrate can ever record a confession from an accused person except in strict conformity with S. 164 of the Code. A

Magistrate, thus holding an inquest under S. 176 and not empowered to record confessions under S. 164, can record a confession, as the powers under S. 176(1) include the power of taking down any statement, whether it be a confession or not, from any person who knows anything about the cause of death. It is not necessary for the Magistrate to immediately send the accused to a Magistrate empowered to record confessions under S. 164. The confession should be recorded in the form of questions and answers as required. It was further observed that a statement made to a Magistrate holding an inquest under S. 176 is admissible under S. 21 of the Evidence Act. It follows that a confession recorded by a Magistrate holding an inquest under S. 176, Cr.P.C. and not empowered under S. 164 to record confession is admissible in evidence and can be used against the accused as it falls within the scope of S. 21 of the Evidence Act. The Andhra Pradesh High Court in the case of Public Prosecutor Vs. Shaik Ibrahim and Others, held that a voluntary confession made by an accused out of his own free will in the course of an enquiry under S. 176 is admissible in evidence and may be used for all permissible purposes. The dictum that the statements recorded by a Magistrate in the course of an enquiry under S. 176 are not admissible in evidence in any future proceedings is not correct. Such statements can be treated and used as former statements of witnesses, or as confessions or admissions of accused persons in accordance with and subject to the relevant provisions of the Evidence Act. We are in respectful agreement of the view taken in the decisions referred to above that the Executive Magistrate is competent to record the statement of an accused person during inquest and if proved that the same was voluntary it could be used as a confession or admission under S. 21 of the Evidence Act. We have therefore to see if what P.W. 1 has now deposed before the Court is acceptable.

10. P.W. 2 the mother of the deceased stated that when she went to the house of the accused to see the body of her daughter the police were present but her son-in-law was not there. She does not know where he was. P.W. 3 the older brother of the deceased swears about the police taking them to the place where his sister was murdered. He does not speak about the Tahsildar questioning the accused anything though he was present but his younger brother and mother gave statement P.W. 4 admitted that the accused was taking food in their house and also looking well after the deceased. It is pertinent to note that none of P.Ws. 2 to 4 state about the accused making any statement before the Tahsildar. It is further pertinent to note that though the Tahsildar states that he reduced to writing whatever the accused stated before him, the same has not been tendered in evidence nor produced in Court. Therefore, at this point of time when P.W.-1 swears that the accused told before him about he committing the murder of the deceased though becomes admissible but there is no reason why other witnesses who were present could not speak about it and more so why the statement which was reduced to writing could not have been produced and tendered in evidence. Therefore, what is ultimately left is Ex.P. 3, the information given by the accused himself at the police station.

11. The effect of such information given by the accused before the police and subsequently the informant becoming an accused has been considered at length by the Supreme Court in the case of Aghnoo Nagesia Vs. State of Bihar, That was a case in which four persons were murdered by the accused and then the accused himself went to the police station and gave information on which a case to be registered. Dissecting the information into various parts, the Supreme Court pointed out how each of the sentence therein could become inadmissible or admissible, as the case may be. It was held that confession may consist of several parts and may reveal not only the actual commission of the crime but also the motive, the preparation, the opportunity, the provocation, the weapon used, the intention, the concealment of the weapon and subsequent conduct of the accused. If the confession is tainted, the taint attaches to each part of it. It is not permissible in law to separate one part and to admit it in evidence as a non-confessional statement. If each part discloses some incriminating fact i.e. some fact which by itself or along with other admitted or proved facts suggested the inference that the accused committed the crime, and though each part taken singly may not amount to a confession, each of them being part of a confessional statement partakes the character of a confession. If a statement contains an admission of an offence, not only that admission but also every other admission of an incriminating fact contained in the statement in part of the confession. Their Lordships further pointed out that the separability test is misleading and the entire confessional statement was hit by S. 25 and save and except as provided by S. 27 and save and except the formal part identifying the accused as the maker of the report, no part of it could be tendered in evidence.

12. In the instant case, the learned Additional State Public Prosecutor has asked us to rely on that part of Ex. P-3 in which the accused stated that, that night after taking food he and his wife and child slept in the house. That according to him is not an inculpatory statement and therefore, the same is separable from other parts of Ex. P-3 and hence, admissible in evidence. If the purpose for which this part of the statement is sought to be used is considered it is not possible to agree with the submission made by the learned Addl. State Prosecutor. Sleeping in the night along with the accused in the house wherein no one else than their own child lived provides a connecting link in the chain of circumstances, thus making out a case of the accused having an opportunity to cause the death of his wife and also the circumstance of the accused and the deceased being together last before her death, which again is an important and vital link in the chain of circumstances. This cannot be isolated and highlighted as a part exculpatory and non-incriminating statement. The appellant's counsel in meeting the argument of learned State Prosecutor has invited our attention to a decision of Punjab & Haryana High Court in the case of Banarsi Dass Vs. The State of Punjab, in which the decision of the Bombay High Court in the case of Harnam Kishan v. Emperor AIR 1935 Bom 26 : (36 Cri LJ 539) was quoted with approval. The facts of that case as extracted in this decision were as follows :

"The accused was sleeping with his wife on the night in question and had a

quarrel with her because she refused to have sexual intercourse with him. He then beat her to death with a "Dharia". After killing his wife, he proceeded to the police station where he made a report early next morning."

The gist of the report was extracted by Beaumont, C.J. and the material portion that was sought to be used against the accused was -

"I was sleeping with my wife on the night in question; I quarrelled with her; and I killed her".

It was argued that that portion which related to the accused sleeping with his wife and quarrelling with her was admissible in evidence but that portion which related to the actual commission of the murder was inadmissible. The learned Chief Justice, as pointed out by the learned Judges of Punjab and Haryana High Court delivering the Judgment held (at page 1238) :

"The confession shows opportunity for the offence, motive for the offence and commission of the offence, and it seems to me impossible to say that the portion of it which deals with opportunity or the portion of it which deals with motive, can be treated as no part of the confession. If the confession is suspect as having been induced by improper means, it is obvious that the whole confession may have been so induced, and that the truth may be that the accused was never in the house at all. Therefore, in my opinion, we must exclude from the evidence the whole of Ex. P-16. If that is so, we are left with nothing, but this, that the body of the accused's wife was found in his hut in the early morning, that she had obviously been murdered with a "dharia" or some similar weapon, that the accused handed over to the police a "dharia" stained with human blood and the clothes he was wearing were also stained with human blood if one excludes the confessional statement, it seems to me obvious that the evidence which remains is not sufficient to justify conviction."

The facts of the instant case are almost similar to the facts in the case before the Bombay High Court in Harnam Kishan's case. The prosecution cannot use that part of the information which seeks to establish that the accused was sleeping with his wife that night which ultimately would be the vital link in the chain of circumstances that that night in the house there were none else than the accused, his wife and the child and consequently there was no question of anyone else entering into the house to commit the murder of the deceased. To use this part of the information would certainly offend the bar created under S. 25 of the Evidence Act. We respectfully agree with the view taken in the case of Banarsi Das as it is quite in conformity with the view of the Supreme Court in the case of Aghnoo Nagesia (supra). The prosecution did not examine any other witness who could prove that on the previous night in the house there were none else than the accused and the deceased. The two neighbours who came to give evidence only stated that they had seen the dead body of the deceased and people were talking that the accused had committed her murder. That being the evidence and as Ex. P-3 is not under S. 27 of the Evidence Act and no part of it

could be used to support the prosecution case, we find that the Sessions Court was not right in using that part which even in this Court was urged by the prosecution as being admissible, to find the accused guilty. The appeal therefore has to be allowed. It is allowed and the Judgment of conviction and sentence passed by the Sessions Court against the appellant are set aside. The accused-appellant is acquitted of the charge for which he was convicted. He shall be set at liberty forthwith.

13. Appeal allowed.