

(1994) 01 KAR CK 0019

In the Karnataka High Court

Case No : Criminal Appeals No's. 870 and 871 of 1988

State of Karnataka

APPELLANT

Vs

R. Varadaraju

RESPONDENT

Date of Decision : 31-01-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 302, 304

Citation : (1994) 2 ALT(Cri) 319 : (1995) CriLJ 1429 : (1994) ILR (Kar) 635 : (1994) 2 KarLJ 40

Hon'ble Judges : Kumar Rajarathnam, J;D.P. Hiremath, J

Bench : Division Bench

Advocate : Y.R. Jagadeesh, HCGP, for the Appellant; A.J. Gunjal, Amicus curiae, for the Respondent

Judgement

D.P. Hiremath, J.—Both these appeals arise out of the judgment of the trial Court under which on a charge u/s 302, IPC, the trial Court found the accused-respondent guilty u/s 304, Part-I, IPC and sentenced him to suffer R.I. for two years and giving set off of the period of detention already undergone u/s 428, Cr.P.C. directed him to serve the remaining sentence. As the appeals arise out of judgment of the trial Court finding the accused guilty for causing the death of his wife Bhagyalaxmi alias Bhagyamma on 27-3-1987 between 1.30 and 2 p.m. in his house at Bangalore by assaulting her with a carpenter's chisel, both the appeals could be brought under a narrow compass. The prosecution case is that the deceased had adulterous connection with one Bhaktavatsala and this serving as a motive, on the afternoon of this incident, the accused came to his house when his two children were out, bolted the door from inside and then assaulted her to death by inflicting multiple injuries with the carpenter's chisel. He then came out which was noticed by P.W. 1 a next door neighbour and whose wife was also working rolling incense sticks along with the deceased then he followed the accused and took him to the police station at Rajajinagar, produced him before P.W. 12 and thereafter on his advice took him to the Basaveswaranagar Police

Station, which was the jurisdictional police station, produced before PSI-P.W. 13 at 3.30 p.m. and also filed his report which was treated as the first information by P.W. 13 and a case was registered u/s 302, IPC. Undisputedly the dead body of the said Bhagyalaxmi was lying in his house with multiple injuries when inquest was held and body subjected to autopsy. It was P.W. 17 who took over investigation and completed it. The accused as apprehended when he was produced in the police station by P.W. 1. He is said to have produced the chisel as well as the blood-stained cloths from his house where he had secreted them. As far as the prosecution evidence is concerned it was one of the circumstances proving the guilt of the accused P.W. 1, P.W. 4 and P.W. 5 gave evidence of movements of the accused and P.W. 5 is none else than the daughter of the accused and the deceased. They spoke about they hearing cries from inside the house that afternoon, the accused coming out and then leaving the house and the body of the deceased with multiple injuries lying in the house. In addition to this circumstantial evidence there is also before Court the confession of the accused recorded by the 1st Additional Chief Metropolitan Magistrate, Bangalore on 4-4-1987. The trial Court acting on this evidence given by the prosecution witnesses mainly P.Ws. 1, 4 and 5 and also considering the circumstances stated by the accused in his confession found that the case of the accused falls under Exception No. 1 of Section 300, IPC, found him guilty u/s 304, Part-I, IPC convicted him and sentenced to undergo R.I. for two years. The State has challenged the acquittal of the accused u/s 302, IPC in Criminal Appeal No. 870/1988 and in Criminal Appeal No. 871 of 1988 alternatively has sought for enhancement of sentence even for the offence u/s 304, Part-I, IPC in the event of the Court confirming the judgment of the trial Court.

2. As the respondent-accused was unrepresented we appointed Sri A. J. Gunjal, Amicus Curiae to assist us in this appeal and he has ably done so.

3. The circumstantial evidence by itself without the confession being looked into could prove the offence u/s 302, IPC but the trial Court looked into the confession even though the learned Magistrate who recorded it was not examined presumably acting u/s 80 of the Evidence Act and finding that there are circumstances which gave rise to grave and sudden provocation found the accused guilty u/s 304 Part-I IPC. We gave our anxious thought to the propriety of the learned Sessions Judge looking into the confession when the evidence of the Magistrate who recorded it not being before him. It must be said that the learned High Court Government Pleader was fair enough to bring to our notice Section 80 of the Evidence Act which reads as follows :-

"Presumption as the documents produced as record of evidence :-

Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge

or Magistrate, or by any such officer as aforesaid, the Court shall presume -

that the document is genuine; that that any statement as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken."

When we drew his attention to the requirement u/s 164 Cr.P.C. that at any rate, the prosecution must prove that the learned Magistrate did comply with the requirement u/s 164 Cr.P.C. in the matter of recording statement he relied on the presumption available u/s 80 of the Evidence Act and also the decision of the Supreme Court in the case of Madi Ganga Vs. State of Orissa, in which the Supreme Court pointed out that Section 80 of the Evidence Act makes the examination of the Magistrate unnecessary. It authorises the Court to presume that the document is genuine, that any statements as to the circumstances under which it was taken are true and that such confession was truly taken in accordance with law. They further pointed out that where the Magistrate had put to the accused all the necessary questions to satisfy himself that the confession was voluntary and, he had also appended the necessary certificate, it can be rightly acted upon without examining the Magistrate in the absence of any circumstances justifying the calling of the Magistrate as a witness. In fitness of things the Public Prosecutor in the Court below ought to have brought on record by examining at least an official of Court to show that it was a confessional statement recorded by the Magistrate of the Court. However only an Advocate knowing Tamil was examined to prove the transaction thereof when the trial Court marked it and read it into evidence. It appears that the learned counsel for the accused had also no objection to take in evidence. We may also mention here that this confession was retracted by the accused when he was examined u/s 313 Cr.P.C. and stated that it was an outcome of coercion and torture. We are not on the point of acting on it to support the prosecution case. The prosecution has independently proved that it was the accused and accused alone who did inflict fatal injuries on the deceased that afternoon by examining the witnesses aforesaid and we have no doubt in our mind that the deceased did succumb to the injuries which were as many as 21, many of them chopped wounds as noticed by PW. 11, the Assistant Surgeon in the Victoria Hospital Bangalore but in the confession statement the accused had given the circumstances which provoked him to take the extreme step of eliminating his adulterous wife from this world. He has stated how the altercation between him and his wife began the previous night when he had refused to have intercourse with her, how his wife compared the manner of intercourse of her paramour Bhaktavatsala with her and she even told him that if he was not willing to come she would get Bhaktavatsalam and under the very nose of her husband would indulge in such intercourse. In the morning he woke up, went out, came in the afternoon and even in the afternoon his wife picked up quarrel with him. Then he got angry took "uli" or chisel from the house and stabbed her. He himself then went to the police station and told them about it. Earlier he stated that the words used by his wife caused him mental suffering and he was not knowing what he was doing.

The learned Sessions Judge considered this part of his confessional statement and found this was enough for the accused to have grave and sudden provocation within the meaning of Exception-I to Section 300 and to cause her fatal injuries. It is no doubt true that the accused did not see both his wife and her paramour Bhaktavatsalam indulging in the actual act of intercourse. As far back as in the year 1930 the Calcutta High Court in the case of Emperor Vs. Dinbandhu Ooriya, had an occasion to deal with a case with almost similar situation and at page 203 of the Report the learned Judges of the Division Bench referred to the case of Rex v. Palmer and quoted with approved the Judgment of Channel, J., which is quite illuminating which we find it useful to extract and it reads as below AIR 203

"It is well established law that if a husband discovers his wife in the act of adultery and thereupon kills her he is guilty of manslaughter only and not of murder. That has been extended in Reg. v. Rothwell (2) and Rex v. Jones (3) to a sudden confession by a wife of past adultery an extension which no doubt creates an exception to the general rule that provocation by words is not enough. The reason for that exception is that a sudden confession is treated as equivalent to a discovery of the act itself. But here the relation between the parties was not that of husband and wife, nor was it a case of unmarried persons living together as husband and wife. They were simply persons who were in position of being engaged to be married. Under those circumstances if the effect of the summing up was to leave the jury under the impression that they could not properly find a verdict of manslaughter we think that it was rights".

It could thus be seen that it all depends on how a particular situation acts on the mind of the person keeping in view his social status, and mental background to which man of his nature could be prone to. If we consider the background of the incident in question it is apparently clear that the whole night the altercation between the accused and the deceased over an affair with Bhaktavatsalam and naturally he said in his statement that he was much oppressed by the incident of the previous night. Even when he came home back the following afternoon again the deceased quarreled with him and perhaps in the situation in which he was placed this was enough for him to lose his self control and take the chisel, his instrument of carpentry and then cause her fatal injuries. We have no hesitation in our mind that all these circumstances put together did cause provocation to him and the trial Court was justified in looking into this confessional statement which is in favour of the accused though retracted and found him guilty u/s 304 Part-I IPC.

4. Coming to the other appeal seeking enhancement of the sentence the learned trial Judge has given reasons as to why he was taking a lenient view at para-54 of the Judgment which reads as follows :-

"....."

54. Having heard the accused on the question of the sentence to be passed

against him, I proceed to pass the following Order :

The accused R. Varadaraju has got three small children including PW. 5, who is now aged about 12 years, only, PW. 5 has stated that the accused was affectionate towards her mother and also towards herself and other children. The deceased had caused sufficient mental agony and humiliation to the accused and she did not prove herself to be a faithful wife and a virtuous lady. The accused is hardly aged about 38 or 39 years and he is the only source for the children, who are still young to face the world. The accused was only a carpenter by profession and his family condition has not been satisfactory. Considering the above and the circumstances, which forced him to commit the offence, I think that a lenient view in so far as the quantum of punishment is concerned would be justified. In Prabhu Prasad Sah Vs. State of Bihar, the imprisonment for about two years under S. 304, Part-I of the IPC in the consideration of the youth of the offender was considered to be sufficient".

In our view, the reasons are quite adequate and under the circumstances and keeping in view the welfare of a daughter of 12 years of age at that time and other two children trial Court has given the benefit of leniency to the accused and thought it would be just and proper to award sentence of R.I. for two years only. The appeal has been pending for nearly 5 years and keeping in view the circumstances under which the offence was committed, we do not find it necessary to enhance the sentence and send him back to the jail leaving the helpless children in lurch. Consequently both the appeals are dismissed. Fees of the amicus curiae shall be Rs. 500/-.

5. Appeal dismissed.