
(1986) 04 KL CK 0008
In the High Court Of Kerala

Yohanna Yesudasan

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 01-04-1986

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235, 248, 313, 354, 360
Penal Code, 1860 (IPC) — Section 302

Citation : (1987) CriLJ 14

Hon'ble Judges : S. Padmanabhan, J;K.G. Balakrishnan, J

Bench : Division Bench

Judgement

S. Padmanabhan, J.—The appellant was charge-sheeted for an offence punishable u/s 302 of the I.P.C. in having murdered his wife Chinna at about 5.30 p.m. on 12-11-1982 in the public road near Vattakkavu junction within the limits of Pathanapuram Police Station. For that offence he was tried by the Sessions Judge, Quilon in S.C. No. 43/83. The Sessions Judge found him guilty, convicted him and sentenced him to suffer imprisonment for life. He has come up in appeal from jail. A State Brief Counsel was appointed to conduct the appeal on his behalf. We heard the counsel and the public prosecutor.

2. The appellant married deceased Chinna about 27 years prior to the incident. Six children were born out of the wedlock. On account of some difference of opinion deceased Chinna went and lived with her brother, PW. 6, 25 days prior to the incident. All efforts made by the appellant to get her back proved futile on account of the adamant stand taken by the deceased.

3. On 12-11-1982 the deceased was going along with PW. 1, a co-worker, for manual labour. At that time at about 8 a.m. the appellant saw them on the way. He told the deceased that one of the children is seriously ill and therefore she will have to come home. Not only Chinna rejected the offer, but she also gave a defiant answer that if the child is not doing well, it is the duty of the father and the other children to take care of the child. So saying, she proceeded along with PW. 1. The appellant warned that if this is her attitude he will not allow her to go

on like this. In the evening at about 5.30 P.W. 1 and the deceased were returning after the day's work. On the way in the public road at the scene of occurrence the appellant asked her what she said in the morning and caught hold of the tuft of her hair. With M.O. 1 chopper in hand, he inflicted 3 or 4 cut injuries on her. The deceased tried to wriggle out from the grip of the appellant. In that action accidentally M.O. 1 chopper itself caused some injury on the forehead of the appellant. As a result of the injuries sustained on the spot, Chinna fell down and had an instantaneous death. At about 8 p.m. P.W. 1 went to the Pathanapuram Police Station and gave Ext. P.I first information statement before P.W. 13, Sub Inspector. After some time at about 8.45 p.m.; the appellant also appeared before the same police station with M.O. 1 chopper in hand and alleged that he was attacked by the deceased. His statement was recorded and a case was registered. He was sent for treatment. This in short is the prosecution version of the incident.

4. Investigation was initially conducted by P.W. 13 himself. It was he who held inquest on the dead body and prepared the scene mahazar. Subsequently, investigation was taken over by the Circle Inspector examined as P.W. 14. He conducted investigation in the case registered on the statement given by the appellant also. That case was found false and referred (Sic).

5. The defence version as disclosed by the statement given by the appellant, when questioned u/s 313 of the Cr. P.C. is this. Jointly with the deceased he was constructing a house for their residence. For that purpose, Rs. 1,000/- was obtained by mortgaging his property to P.W. 5. Since masons were not available for construction, they had to wait for a month. Meanwhile, the amount was with the deceased. When the appellant asked for the amount at a time when masons were made available, he was informed by the deceased that the amount was given to P.W. 6. Three or four days prior to the incident, the deceased was sent to P.W. 6 for getting back the amount. But she did not return. On the fateful day, he went in search of the deceased. She was seen coming in the company of P.W. 1. When she was informed that the child is seriously ill, she moved forward without giving any reply. The appellant insisted for some reply. Even then she proceeded further without giving any answer. In order to stop her, he caught hold of the tuft of her hair. Suddenly, the deceased attacked him with M.O. 2 sickle asking whether he is concerned only about the money and whether he will not spare her. At that time P.W. 6 came and the deceased picked up quarrels with him on the question of the amount. The appellant went home with the injuries sustained by him. While he was at his residence, the Panchayat Member persuaded him in the night to go to the hospital. But instead of taking him to the hospital, he was actually taken to the police station.

6. Even though the appellant did not say so in so many words, his contention seems to be that the injuries were sustained by the deceased at the hands of her brother P.W. 6 over the quarrel concerning Rs. 1,000/- entrusted to him by the deceased.

7. PW. 1 is the solitary eye witness to the incident. She has spoken to the entire incident that took place both in the morning and in the evening. Her evidence was under serious attack before us by the counsel. Before dealing with her evidence, we may consider the evidence regarding motive. It is not disputed even by the appellant that the deceased was living separate from him at the time of the incident on account of some quarrel. PW. 1, who is a co-worker of the deceased, has stated from her own personal knowledge that for about one month prior to the incident the deceased was living separate from the appellant since they were not on good terms. PW. 3 is a priest belonging to the locality. He said that these two persons were moving in inimical terms. He made an attempt to settle their disputes. His version is that his attempt did not succeed on account of the attitude adopted by the deceased. From the evidence of PW. 6 also it is seen that on account of quarrel with the appellant the deceased was residing along with him. We have no reason to disbelieve the above items of evidence tendered by the prosecution. Further, we have got the added evidence of PWs. 1 and 6 regarding the conversation between the deceased and the appellant on the morning of the fateful day at 8 O'clock and the warning given by the appellant that she will not be allowed to move on freely like this. In such a situation, it will have to be found, that the prosecution succeeded in proving the motive beyond any shadow of reasonable doubt,

8. It is not necessary for us to extract the details of the evidence given by PW. 1 regarding the incident. Suffice it to say that she gave evidence not only regarding the actual acts of assault but regarding the prior conversation also. Some answers given by this witness in cross-examination were attempted to be taken advantage of for the purpose of contending that she might not have seen the incident. We do not think that there is any force in the contention. She is an illiterate rustic witness who was facing a tough cross-examination at the hands of an able lawyer. In answer to certain suggestive questions, she gave some answers which may be capable of an interpretation that she was moving forward and she might not have seen the actual infliction of injuries on the body of the deceased by the appellant. We had occasion to consider the evidence of this witness as a whole. She struck us as a truthful witness who was divulging only what she actually saw and heard. In spite of some answers given in cross-examination she said in chief-examination as well as in re-examination that she heard the initial conversation. She also said that she walked forward since the appellant stared at her. When she was a little ahead, she heard the cry of the deceased which prompted her to look back. At that time she saw the appellant cutting the deceased 3 or 4 times with M.O. 1 chopper. She also said that on receipt of the injuries, the deceased fell down on the ground. We do not think that there is any scope for contending that this witness has not seen the actual incident. This aspect of the matter has been elaborately considered by the Sessions Judge. We are in agreement with the opinion expressed by the Sessions Judge on the evidence PW. 1.

9. On the basis of the evidence of PW. 1, it was also contended that Ext. PI first

information statement might not have been given at the time mentioned by her and stated in Ext. PI. We do not think that there is any basis for this contention also. It is true that in cross-examination some answers were elicited from PW. 1 to the effect that on the night of the incident she was at her residence itself and she was taken to the police station only the next day. But a reading of the entire evidence of this witness shows that she went to the police station along with her husband at 8 p.m. on the date of incident and gave Ext.PI first information statement which was read over to her and signed by her. In this connection, her evidence is corroborated by the testimonies of PWs. 7 and 13. PW. 7 is a local political leader who happened to be in the police station for settling some labour dispute. PW. 13 is the Sub Inspector who recorded Ext. PI. We have no reason to disbelieve the version of these witnesses when they swear regarding the time at which Ext. PI was given by PW. 1 and recorded by PW. 13.

10. The evidence of these two witnesses further show that within 40 or 45 minutes of the recording of Ext. PI first information statement the appellant went over to the police station with M.O. 1 chopper in hand. He made an allegation which we had occasion to refer earlier. His statement was also recorded by PW. 13 and a case was registered. Earlier, we have mentioned that the said case was also investigated by PW. 14 and referred as false. From the evidence of PWs. 7 and 13 it is seen the face and the entire dress worn by the appellant at that time were completely soaked in blood. This is an additional circumstance corroborating the evidence of PW. 1 that the appellant alone is the assailant and the incident might not have taken place as stated by him when questioned u/s 313 of the Cr. P.C

11. Basing on the evidence of PW. 1 an attempt was made by the counsel to contend that even though independent witnesses were available, the prosecution thought of contending with the evidence of PW. 1 alone. It is true that PW. 1 made some mistaken statements that there is a pan shop and another residential building within the close vicinity of the scene of occurrence. The scene mahazar as well as the evidence of PWs. 13 and 14 show that the above ? said statement given by PW. 1 is only a mistake. Further, the evidence of PW. 1 itself shows that nobody else had occasion to witness the incident. In such a situation, we may not be justified in coming to the conclusion that the prosecution has suppressed legal testimony from court.

12. The evidence of PW. 4 is also an additional item of evidence lending assurance to the testimony of PW. 1. Just before the incident she saw the appellant moving towards the scene of occurrence. She is a competent witness in the sense that she is running a tea shop at some distance from the scene of occurrence. There is also the evidence of PW. 5 that on the strength of Ext. P2, he advanced Rs. 1,000/- to the appellant for the construction of a residential building. It was PW. 9, who conducted autopsy on the dead body of Chinna and prepared Ext. P4 postmortem certificate. There were four incised injuries on the dead body. Injury No. 1 cut through almost the whole of neck, cutting all the

underlying structures including the trachea, oesophagus, blood vessels and vertibral column. The head was found connected to) the trunk only by skin, subcutaneous tissue and the adjacent muscles of the left side. The other incised injuries were also serious. PW. 9 said that injury No. 1 is necessarily fatal. Therefore, if the prosecution evidence is accepted as true and correct, there cannot be any dispute regarding the" fact that this is a case in which the appellant was acting with the murderous intention.

13. Even though the defence suggestion is that the deceased might have sustained injuries at the hands of PW. 6, no such question was asked to that witness while he was cross-examined. The prosecution evidence completely rules out the possibility of an incident having taken place in the manner stated by the appellant while questioned u/s 313 of the Cr. P.C.

14. It was PW. 10 who examined the appellant and issued Ext. P5 wound certificate. He had a vertical incised wound 3 X 0.5 on scalp deep over the left side of the anterior aspect of the scalp near the forehead. The defence version is that when the appellant caught hold of the tuft of the hair of the deceased, she took out M.O. 2 sickle and cut him on his forehead. The prosecution version is that the above said injury was received by the appellant on his forehead by his own cut With M.O. 1 aimed at the deceased. The evidence only probabalises the prosecution version of the incident. It is true that in Ext. PI PW. 1 had not mentioned anything about the injury sustained by the appellant. An omission in this respect made by PW. 1 cannot in any way probabalise the defence version of the incident. It has to be remembered that PW. 1 is a rustic witness. PW. 10 has stated in cross-examination that a cut with M.O. 2 cannot cause the injury found on the forehead of the accused. According to him, if M.O. 2 was used for inflicting that injury there must necessarily be corresponding injury with the tip of that weapon because of the nature of its curve. He also said that location of the "injury is such that contact of the tip portion of M.O. 1 is inevitable on some part of the head, if M.O. 2 had been used for inflicting that injury. We had occasion to peruse M.O. 2 and we are in full agreement with the opinion expressed by PW. 10 in this respect. The judgment of the Sessions Judge shows that the defence lawyer made a demonstration before him of the possibility of the injury on the forehead with M.O. 2. For valid reasons, the Sessions Judge said that he was not at all impressed by the demonstration. Therefore, we are of opinion that the injury found on the appellant was not at all possible in the manner spoken to by him while questioned u/s 313 of the Cr. P.C.

15. Every item including M.O. 1, and the wearing apparel of the appellant and the deceased were sent for chemical examination and Ext. P6 is to the effect that all of them contained human blood. In this connection, the counsel for the appellant argued before us that M.O. 2 sickle has not been sent for chemical examination and this has prejudiced his defence. Even though we agree with the argument that M.O. 2 also ought to have been sent for chemical examination, we are not in agreement with the argument that the omission had occasioned

prejudice. Even taking for granted that the injury found on the forehead of the appellant was inflicted by the deceased, in the circumstances, it cannot give rise to any right of private defence. According to the prosecution evidence and as per the defence version also it was the appellant who caught hold of the tuft of the hair of the deceased with M.O. 1 chopper in hand. Therefore, evidently he was the aggressor. If, in such a situation, the deceased used M.O. 2 sickle by way of private defence, that cannot in turn give any right to the appellant to act in exercise of the right of private defence. Right of private defence cannot be availed of by the aggressor. Therefore, at any rate, the defence contention cannot succeed.

16. On an entire reappraisal of the evidence, we are of opinion that the prosecution fully succeeded in establishing beyond doubt that the appellant committed murder of his wife Chinna at the time and place alleged by the prosecution. The Sessions Judge has awarded only the lesser of the two alternatives.

17. In the judgment the Sessions Judge said that as he does not propose to award the capital sentence, there is no need to hear the accused on the question of sentence. Therefore, he proceeded to award the sentence of imprisonment for life without hearing the accused or the prosecution on the question of sentence. This attitude of the Sessions Judge was commented upon by the public prosecutor to be not strictly in accordance with law. Even though we are not prepared to accept that what the Sessions Judge did is illegal or that it resulted in prejudice or miscarriage of justice, we are of opinion that there is an element of irregularity involved. In Section 235 of the Cr. P.C. occurring in Chap. XVIII relating to Sessions Trial, it is provided that if the accused is convicted, unless the Judge proceeds in accordance with Section 360, he shall hear the accused on the question of sentence and then pass sentence on him according to law. In Section 248 appearing in Chapt. XIX relating to trial of warrant cases by magistrates also, there is an identical provision. Section 354(3) says that when the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence. It is true that for the offence punishable u/s 302 of the IPC the two alternative punishments are death or imprisonment for life and fine. Imprisonment for life is the normal sentence and conviction alone need be the reason for awarding that sentence.

18. Non-compliance with Section 235(2) is not a mere irregularity in the course of the trial curable u/s 465. It is much serious. It will amount to by-passing an important stage of the trial and omitting it altogether. Non-compliance amounts to disobedience to an important express provision of the Code as to the mode of trial (Santa Singh Vs. The State of Punjab, . Section 354(3) of the Code marks a significant shift in the legislative policy underlying the Code of 1898 according to which both the alternative sentences were normal sentences. Now on the face of

Section 354(3) the normal punishment for murder and six other capital offences under the Indian Penal Code is imprisonment for life or for a term of years and death penalty is an exception. Section 235(2) of the Code bifurcates the trial by providing for two hearings, one at the pre-conviction stage and the other at the pre-sentence stage. Even though Section 235(2) does not contain specific provision as to evidence and provides only for hearing of the accused as to sentence, it is implicit that if a request is made in that behalf either by the prosecution or the accused or by both, the Judge should give the party or parties concerned an opportunity of producing evidence or material relating to the various factors bearing on the question of sentence. *Bachan Singh Vs. State of Punjab*, . That means that even though hearing the accused alone is provided u/s 235(2) in the matter of sentence, the prosecution is also entitled to be heard in the matter and in case of necessity both sides are entitled to let in evidence also though it cannot be a protracted affair. Even though the Judge has made up his mind to award life imprisonment alone in a murder case even before hearing either side on the question of sentence, both sides may desire to have their own say in the matter. The prosecution may desire to argue for capital sentence or place materials in support of it. The accused may desire to argue or place materials to persuade the court to make some observations or recommendations to the executive government. Any how Section 235(2) provides for hearing and Section 354(3) provides for stating reasons. These provisions will have to be complied with.

19. In this case the non-compliance of these provisions have not in any way resulted in prejudice or miscarriage of justice. We heard both sides on the question of sentence and the defect, if any, has been cured thereby. As earlier stated, there are only two options on the question of exercising the sentencing discretion. The lesser sentence alone has been awarded. Even after hearing the appellant, the Sessions Judge could not have awarded any lesser sentence. In such a case a plea of violation of Section 235(2) cannot be entertained by the appellate court. *Santa Singh Vs. The State of Punjab*, Such a plea would be meaningless and futile especially when the appellant (accused) has no case that he had anything else to say or any material to be placed on the question of sentence or on any other matter. The plea itself was raised by the public prosecutor and not by the appellant. The public prosecutor also did not argue that the sentence was improper. State has not filed any appeal also. Therefore, even though we feel that a hearing on the question of sentence ought to have been made, we do not feel that on that score any interference is necessary.

Confirming the conviction and sentence, we dismiss the criminal appeal.