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In Re: Malayara Seethu

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Court : Karnataka

Decided On : Nov-09-1954

Reported in : AIR1955Kant27; AIR1955Mys27; 1955CriLJ372

Judge : Venkata Ramaiya and ;Balakrishnaiya, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 367; Evidence Act, 1872 - Sections 3 and 30; Indian Penal Code (IPC), 1860 - Sections 312 and 315

Appeal No. : Criminal Appeal No. 112 of 1953

Appellant : In Re: Malayara Seethu

Advocate for Def. : Adv. General

Advocate for Pet/Ap. : E. Kanakasabhapathy, Adv.

Judgement :

1. The appellant has been convicted of an offence under Section 312, I. P. C., for having caused miscarriage on or about 30-11-1952 to a girl Ammayya and sentenced to rigorous imprisonment of two years and to pay a fine of Rs. 300/- with a direction that in default of payment she should suffer R. I. for a further term of six months. The girl Ammayya, who was accused 2 in the case, was also convicted of the said offence and her mother and brother who were accused 3 and 4 respectively were found guilty of abetment of the said offence. All the four accused were similarly charged with having committed an offence under Section

315, I. P. C., but have been acquitted of the same on the ground that the intention to prevent a child being born alive or of causing the child to die after its birth by thrusting a stick into the womb of A-2 was not made out. There is no appeal against this acquittal or against the convictions of A-2, A-3 and A-4 so that what has to be considered in this appeal is only the correctness of the conviction of the appellant who was the 1st accused in the case for the offence under Section 312, I. P. C.

2. The act constituting the offence is alleged to be the insertion of a green stick into the womb of Ammayya the 2nd accused although this had not been expressly mentioned in the charge framed against the appellant. Nor is there any reference to it in the First Information Report, Exhibit P-1, sent by P. W. 3 the Fatel to the Sub-Inspector of Police on 1-12-1952. What is stated therein is :

'On 30-11-1952 M. Animaiah's elder brother Uthiah went and brought a nurse called Seethamma and took medicine from her hand and has given medicine to the girl.'

There is no direct evidence concerning the act as no one examined in the case has deposed to having seen a stick with the appellant or its being used by her in the manner alleged. The conviction must, if at all, rest on circumstantial proof and as has been often pointed out, it should be such as to be incompatible with the innocence of the accused.

3. The learned Judge has set forth the evidence of the prosecution witnesses in detail and in para 32 of the Judgment stated the facts' established to be that A-2 while unmarried became pregnant, that A-4 on 30-11-1952 engaged the taxi of P. W. 15, took it to Marnad and brought appellant to Madapur, then both went to Boothankad Estate, where A-4 and A-1 had a talk with the manager there and stopped at the Meenkolli river owing to difficulty of crossing the river: that thereafter A-4 went to his house and brought A-2 and A-3, A-1 got down from the taxi, joined A-2 and A-3 who were on the other side of the river and that all these 'disappeared from the view of persons that were near the taxi': after about a quarter of an hour A-1 came back to the taxi and A-2 and A-3 returned to their house.

The appellant in her statement denied this version but admitted that she was taken by A-4 to his house and came away without doing anything. The learned Judge has disbelieved her statement and we think rightly since there is ample evidence such as that of P. Ws. 8 and 15 the cleaner and driver of the taxi, P. W. 3 the Patel and P. W. 7 about movements of the persons in the taxi. The learned Sessions Judge has also accepted the testimony of P. W. 7 though it is uncorroborated that after A-1 crossed the river he observed A-2 and A-3 accompanying her to a spot on the other side of the river. What happened there is a matter of suspicion or speculation. Even A-3 in her statement only alleges that she saw A-2 lie down cross-wise and nothing more. It is however undisputed that after the return of A-2 and A-3 to the house, A-2 delivered a female baby on the next day and the child died an hour or two later.

P. W. 11 a relation of the girl was present at the time of the delivery and she says that the child was born alive and after' the birth, the placenta came out along with a stick of about 6 inches. The placenta and the stick were sent to the Chemical Examiner but as stated in the judgment of the lower Court in paragraph 4 the report of the Chemical Examiner does not disclose anything that would throw any light upon the facts relevant for this case. P. W. 9 the Assistant Surgeon who conducted the post mortem examination of the child stated that it was not possible to say whether the delivery was natural or forced, that there were no external marks of injury on the child, that the child was born alive and that illness of the mother was also one of the causes for the premature delivery of a child. P. W. 10 the Lady Assistant Surgeon who examined the 2nd accused has stated that she was not keeping good health at the time, was bloodless, running temperature and that there was no injuries at the uterus of accused 2. She too is unable to say whether the delivery was natural or forced.

4. The learned Judge has in the course of the judgment referred to certain letters Exhibits P-10, p-11, P-12 and P-13 said to have been seized in the house of the appellant as indicative or suggestive of criminal intention on the part of the appellant to bring about miscarriage. No one-has been examined to prove the writing of these letters and the appellant denies having received these. Since the learned Advocate-General mentioned that these may be left out of consideration

for the purpose of the decision, we do not express any opinion about the bearing or utility of these for the case.

5. The only facts proved therefore are that A-1 was taken in a taxi from her house to the bank of a river, she went to the other side and was in company with A-2 for some time at a distance in a lonely place, the delivery of A-2 on the-next day and emergence of a green stick along with the placenta. Since no one except A-2 knew, if at all the alleged insertion of the stick by the appellant, the information said to have been given by A-3 or A-4 to the other persons of the village is of no consequence. ' The statement of A-2 is not evidence in itself. Nor is it a substitute for evidence. As pointed out in -- 'Periyaswami Mooppan v. Emperor', AIR 1931 Mad 177 (A) at p. 178

'Section 30, Evidence Act, is a very exceptional indeed an extraordinary, provision by which something which is not evidence may be used against an accused person at his trial. Such a provision must be used with the greatest caution and with care to make sure that we do not stretch it one line beyond its necessary intention. It is true that the section provides only that the confession of one accused person may be 'taken into consideration' against the fellow accused. As I understand the section, the confession cannot take the place of evidence against the co-accused; nor can it be added to supplement evidence otherwise insufficient. As I understand the matter, the provision goes no further than this: where there is evidence against the co-accused sufficient, if believed to support his conviction, then the kind of confession described in Section 30 may be thrown into the scale as an additional reason for believing that evidence.'

The same view is reiterated by Reilly C. J. in -- 'Sauna Huduga v. Govt. of Mysore', 13 Mys LJ 69 (B). The fact that a green stick was seen with the placenta when it came out no doubt implies that it must have been inside the body earlier. Besides lack of proof that appellant introduced it, there is uncertainty of its having caused the delivery and the delivery being a miscarriage.

6. A distinction is made in Section 312 between miscarriage to a woman 'with child' and 'quick with child' as a lesser punishment is provided for the former. The appellant is charged with the offence under the former part and this seems to refer

to a state of pregnancy less advanced than in the case of the latter. According to the appellant who is an experienced village nurse, the girl had advanced in pregnancy for a period of 9 months at the time. P. Ws. 9 and 10 say that the period was 7 or 8 months.

In Modi's Medical Jurisprudence at page 325 it is stated

'Legally, miscarriage means the premature expulsion of the product of conception, an ovum or a foetus, from the uterus, at any period before the full term is reached. Medically, three distinct terms, viz., abortion, miscarriage and premature labour, are used to denote the expulsion of a foetus at different stages of gestation. Thus, the term, abortion, is used only when an ovum is expelled within the first three months of pregnancy, before the placenta is formed. Miscarriage is used when a foetus is expelled from the fourth to the seventh month of gestation, before it is viable, while premature labour is the delivery of a viable child possibly capable of being reared, before it has become fully mature.'

At page 303 it is stated that children born at or after 210 days or 7 calendar months of uterine life are viable, i.e. are born alive and are capable of being reared. The child in this case was born alive and the pregnancy was beyond 7 months, so that medically this is a case of premature labour and not of miscarriage. Acts of doctors and nurses which facilitate or accelerate delivery cannot be treated as offences under the section only because the delivery otherwise would have been delayed and particularly when the ' child is born alive and no injury is caused to the mother or the child as in this case.

The evidence of P. Ws. 9 and 10 raises a doubt about the delivery being natural or forced and the green stick having brought about the delivery as It is said that a stick with irritants is used for such a purpose and the chemical examination of the stick in this case did not disclose any trace of irritants or poison on It. In --'Asgarali Pradhania v. Emperor : AIR1933 Cal893 the accused, was held to be not guilty of attempt to cause miscarriage as the materials sought to be made use of were not harmful. All the assessors were unanimously of opinion that the case against the appellant was not satisfactorily made out and the conclusion we have arrived at is also the same. In any event, this is a case in which there is room for doubt, the

benefit of which is due to the appellant.

7. The conviction of the appellant and the sentence passed on her are both set aside and we acquit her. The bail bonds will be cancelled.

8. Accused acquitted.

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