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Court : Karnataka

Decided On : Mar-20-1995

Reported in : 1995(2)ALT(Cri)328; 1995CriLJ3237; ILR1995KAR1507; 1995(2)KarLJ168

Judge : M.B. Vishwanath and ;M.M. Mirdhe, JJ.

Acts : Indian Penal Code (IPC), 1860 - Sections 307; Code of Criminal Procedure (CrPC) , 1973 - Sections 378(1) and (3); Evidence Act - Sections 118

Appeal No. : Crl. A. No. 419/1993

Appellant : The State of Karnataka

Respondent : Shabuddin

Advocate for Def. : Mr. S.B. Pavin, Amicus Curiae

Advocate for Pet/Ap. : Mr. A.B. Patil, Addl. S.P.P.

Judgement :

Mirdhe, J.

1. This criminal appeal is preferred by the State under S. 378(1) and (3) of Cr.P.C., against the judgment dated 13-4-1993 passed, by the Sessions Judge, Raichur, in S.C. No. 38/1992 acquitting the respondent-accused of the offence punishable

under S. 307 IPC.

2. We have heard the learned Addl. S.P.P. Sri A. B. Patil and the learned Amicus Curiae Sri Pavin fully and perused the records of the case.

3. The case of the prosecution is as follows : P.W. 5 Sabir is the father of the accused. Both of them maintain themselves by electro plating of utensils by moving from village to village. They used to go to a village for that work and return to their place at Bannimarada camp. P.W. 2 is a resident of Bannimarada camp. She resides in her village along with her two sons and daughers-in-law. She is the complainant in the case. The marriage of P.W. 1 with the accused took place about eight years back and since the marriage she was staying in Bannimarada camp along with her husband and father-in-law. They were staying in a hut. After marriage, the accused and P.W. 1 lived happily for some time. Thereafter, some quarrels started between them. P.W. 1 Kulsumbi was annoyed as the accused had brought a mistress to their house and differences between them were aggravated. On the morning of 26-6-1991, the quarrel started between them. The accused poured kerosene oil on P.W. 1 and set fire to P.W. 1 which caused burn injuries to the upper part of the body. The neighbours extinguished the fire. P.W. 1 was sent to her mother's house where she disclosed that it was her husband who set fire to cause her murder. Kulsumbi was taken to the hospital where she was treated. As she was not in a position to speak, the complaint of Devalamma - her mother was recorded. On the basis of the complaint of Devalamma, the Police registered a case and after investigation, they have filed charge-sheet against the accused for the offence under S. 307 IPC.

4. In order to prove its case against the accused, the prosecution examined in all 12 witnesses. Out of them, P.W. 1 is the most important witness as she is the person who sustained burn injuries. It is not disputed in this case that she is the legally wedded, wife of the accused. P.W. 2 is the mother of P.W. 1. She is the complainant. She has deposed that after P.W. 1 sustained injuries, she was taken to the hospital. P.W. 3 Rasool sab is the brother of P.W. 1 and he has also stated that Kulsumbi sustained burn injuries. P.W. 5 and P.W. 6 have turned hostile. P.W. 7 says to the effect that he examined P.W. 1 on 26-6-1991 at 8.30 A.M., and found

superficial second degree burns over the face, front of the chest, front and back of the neck both the upper limbs and upper part of the abdomen of P.W. 1 Kulsumbi. He has also given the details of the injuries. From the evidence of P.W. 2 and P.W. 3 it stands proved that P.W. 1 had sustained burn injuries. P.W. 7's evidence is also to the effect that he has examined P.W. 1 and she was found to have sustained burn injuries. The prosecution has proved beyond reasonable doubt that P.W. 1 has sustained burn injuries on that day.

5. It is the case of the prosecution that due to marital differences between the accused and P.W. 1 mostly on account of the accused bringing a mistress (soole) to his house, which was objected to by P.W. 1, the accused set fire to her. The most important witness in this case is P.W. 1 herself. After starting to record her statement, the trial court has noted at para 1 in brackets as follows :

'(It is noticed that the witness is not in a position to give answers to the questions. It appears that she is not mentally alright. It is observed that she is unable to give the answers to the questions put to her, and therefore it is not possible to record her statement. Hence, her examination-in-chief is deferred). The prosecution to send her to some competent medical officer to ascertain her mental condition and capacity to give evidence before the court. After production of such certificate her examination further in the case will be considered.'

6. From this observation of the trial Judge, it is apparent that when the examination-in-chief of P.W. 1 was started, the Court found that it was not possible to record her statement as she was not in a position to answer to the questions put to her and the prosecution was directed to get her examined by a competent medical officer. On 3-3-1993 the witness was recalled. The Court has noted as follows :

'After recording the evidence of this witness partly, she was referred to Dist. Surgeon, Raichur and also Bellary M.C.H. As asked by hospital authorities the witness was referred to Dr. Karur, Dist. Mental Health Programme Hospital, Bellary to ascertain the mental condition of the witness. It is reported by Dr. Karur about the witness having congenital mental retardation and her mental ability being less than normal, unable to understand the difficult questions put to her.)'

7. Dr. Karur's certificate dated 1-3-1993 which is on record in this case is as follows :

'She has congenital (by birth) Mental Retardation, moderate in degree (with Microcephaly, small ears, quaint etc.,) Her intelligence quotient is about 40 to 50 on clinical assessment. As her mental ability is less than normal, she cannot understand difficult, intelligent and hidden meaning question put to her. She may answer very simple question because of I.Q.'

8. From the certificate issued by Dr. Karur after examining P.W. 1 on 1-3-1993, it is clear that the witness was not in a position to understand difficult, intelligent and hidden meaning, questions put to her. Further examination of this witness started on 3-3-1993. The Court also noted some of the observations of Dr. Karur. Even the first question put to the witness was not replied by the witness. The first question put by the Court was, 'when her marriage had taken place with accused.' The answer was, 'no proper reply'. That means the witness was not only suffering from mental defect as found by Dr. Karur and reported to the Court, but even the court found that the witness was not in a position to answer such a simple question as to when her marriage with the accused took place.

9. Section 118 of the Evidence Act (for short 'the Act') reads as follows :

'118 : All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation : A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.'

10. In 'A Practical Approach to Evidence' the learned Author Peter Murphy has said as follows :

'11.9 Persons of defective intellect :

There was, at common law, an undeveloped view that 'lunacy' was a bar to competence. The view probably resulted both from the dangers of unreliability and from doubtful capacity to appreciate the nature of an oath. It is, of course, a fairly modern tendency in the law to seek to recognise and accommodate the more sophisticated diagnosis and treatment of mental illness, and the law has not always kept pace with the consequences of the obsolescence of the generic classification of mental patients under the heading of lunacy.

Although the position in contemporary law is largely unexploited, it seems that the court will take a pragmatic view, and accord competence to a person of defective intellect, which corresponds with the judge's view of his capacity to understand the nature of the proceedings and to speak the truth to the best of his ability. The question is whether the proposed witness is, at the time of being called, capable of giving proper evidence. If his lack of capacity is a temporary one, his evidence may be receivable after a suitable adjournment, as may be the case with a witness who arrives at court drunk. In - capacity will not be accepted if the witness's evidence can be taken with reasonably practicable precautions, particularly if the evidence may be important.

The matter is, therefore, one for the judge, who should, if necessary, inquire into the capacity of the witness in open court and in the presence of the jury. If the witness is declared to be competent, he may give evidence on any relevant issue, an is subject to the normal rules of evidence.'

11. Sec. 118 of the Act quoted above speaks of a person who can be competent to testify unless the Court considers that the witness is prevented from understanding the questions either by tender years, extreme old age, disease, whether of mind or body or any other cause of the same kind. here there is no question of disease of the body. P.W. 1 appears to be suffering from decease of the mind. The disease of the mind applies to idiocy and lunacy and an idiot is one who was born irrational; a lunatic is one who was born rational but has subsequently become irrational. The idiot never can become rational; but a lunatic may entirely recover, or have lucid intervals. In view of the fact that P.W. 1 was suffering from some mental defect and she was also not able to answer the

question put to her by the Court which was a very simple question, the Court was required to give a finding as to whether the witness was competent to depose after having found that the witness was suffering from mental disease. It was the bounden duty of the court to examine the witness with reference to the doctor's report and then give a finding that the witness is competent to depose. It is only after giving such a finding, the Court can permit the witness to be examined. Sec. 118 of the Act lays down clearly that if the Court finds that the witness is competent to speak, it can permit him to depose. If the competency is affected by the circumstances mentioned there, the court cannot permit such witness to be examined.

12. In this case, the medical report and also the examination of the doctor go to show that the witness was not capable of answering even the simplest question like as to when her marriage with the accused took place. Hence, the trial court ought to have given a finding whether P.W. 1 was competent to depose or not. In this case, without giving that finding, the trial court has recorded the evidence of the witness and it has relied upon the evidence of that witness in acquitting the accused. The case of the prosecution is mainly based on the evidence of P.W. 1. The trial Court's judgment also shows that it has mainly considered the evidence of that witness in acquitting the accused. When the trial court has not given such a finding as to the competency of the witness it was not justified in recording the evidence of P.W. 1 and also relying on it. It will be unjust to the witness herself in view of the procedure followed by the court which is not proper in law. We think that the entire trial is vitiated as the trial court has relied on the evidence of P.W. 1 without giving any finding as to the competency of the witness to depose in the case.

13. Now the question that arises is, since the entire trial is vitiated due to the examination of P.W. 1, who was suffering from mental defect, by the trial court without giving a finding as to whether she was competent to depose or not, what should be the consequent order to be passed by this Court. We are aware that de novo trial has to be ordered in a rare case. In Ukha Kolhe v. State of Maharashtra, (AIR 1963 SC 1531), the Supreme Court held that an order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied

that the court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was for reasons over which he had no control, prevented from leading or tendering evidence material to the charge and in the interests of justice, the appellate court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. Here the question of re-trial is not arising on account of any lapses on the part of either the prosecutor or the accused to lead any evidence. The trial is vitiated on account of serious illegality on the part of the court in permitting P.W. 1 to be examined without giving a finding as to whether P.W. 1 was competent to depose or not. In our view, in view of such serious illegality committed by the trial court the order of the trial court cannot be sustained and to close the prosecution case on the basis of other evidence available on record it will be unjust and improper and it will also affect the interests of justice. Therefore, it is necessary that the case should be remanded for re-trial again. Hence, we proceed to make the following :

ORDER

The appeal is allowed. The judgment of the trial court is set aside. The case is remanded to the trial court for de novo trial. The trial court is directed to subject P.W. 1 again to medical examination and after receiving the medical report to examine her in the open court by putting her proper question and thereafter give a finding as to whether she is a competent person to be examined. If the Court finds that she is competent to be examined, then the prosecution may be permitted to examine her. If it is found that she cannot be permitted to be examined the court may consider whether there is possibility of her being cured within a reasonable time. If there is such a possibility the case may be adjourned to a reasonable time to give an opportunity for recovery of P.W. 1. If it is found that there is no possibility of her being recovered within a reasonable time from her mental illness, then the court will have to decide the case on the basis of the evidence of other witnesses that may be led by the prosecution.

Before parting with the case, we place on record the services rendered by Sri Pavin as amicus curiae in this case. Mr. Pavin took us through the evidence and question of law involved in the case. He has argued in a very able manner and he is entitled for a fee of Rs. 1000/- as amicus curiae in this case.

14. Order accordingly.