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In Re: Kamya

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Court : Andhra Pradesh

Decided On : Apr-22-1959

Reported in : AIR1960AP490; 1960CriLJ1302

Judge : Jaganmohan Reddy and ;Ranganadham Chetty, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 221(7), 310, 311 and 342; Evidence Act, 1872 - Sections 54 and 118; Indian Penal Code (IPC), 1860 - Sections 75 and 302

Appeal No. : Criminal Appeal No. 665 of 1958

Appellant : In Re: Kamya

Advocate for Def. : Addl. Public Prosecutor for State

Advocate for Pet/Ap. : A. Venkataramana, Adv.

Disposition : Appeal allowed

Judgement :

Jaganmohan Reddy, J.

1. The Sessions Judge, Adilabad, convicted the accused under Section 302 and awarded life imprisonment. He also convicted him under Section 379 for robbery giving him 3 years R. I. The appellant and the brother of the father of the deceased

Maria married sisters. It is said that on the day of the occurrence, namely, on 8-8-1958, the accused came to the house of the father of the deceased, Pochi-gadu and asked him where he was and when ha was told that he was away in the field, he wanted the deceased to take him and show him the places where his father was working. Pochigadu had two children, one is the deceased Digambcr of 7 years and the other a girl Satti aged 8 years. It is further alleged that the sister of the deceased, P.W. 14 saw the accused taking her younger brother at about 2 p. m., on the day of the occurrence.

The accused and the deceased were seen going towards Bhainsa by P. W. 10 Nagiah. When Di-gamber did not return home, the sister and the mother began to weep and cry and P.W. 10 who had come to their house informed them that he had seen the deceased and the accused going towards Bhainsa. Immediately thereafter P.W. 2, Lachadu, another brother of the father of the deceased and P. W. 10 went in search of the accused. They found him in a Cinema house. They brought him out and asked him what he had done with Digam-ber, The accused denied all knowledge of the deceased at which P. W. 10 is alleged to have told him that he had seen him. with Digamber.

Both these persoas took the accused to the house of the Deshmukh, Natharao, but he was not there. His clerk Khande Rao was informed about the missing boy and when Khande Rao questioned the accused, he denied all knowledge of the boy. Later Khande Rao is said to have asked the accused to tell the truth, when he began to shake and shiver and thereafter confessed that he had killed the boy in the toddy tope near the village where the deceased and his father lived in order to commit theft of the ear-rings. The accused was immediately marched off to the Police Station where he is said to have confessed and brought out of his pocket the two ear-rings which he handed over to the Sub-Inspector, P.W. 16.

Thereafter he made a statement as a result of which he took the mediators to the place where the dead body was found. At that place the accused's Shawla and Rumal were also discovered and were seized. The mediatornamas pertaining to the dead body and the Rumal are Exs. P-7 and P-4 respectively dated 9-8-1958. Apart from this evidence there is the evidence of two shop-keepers at Bhainsa, P.

W. 6 Amritlal and P. W. 7 Madan, who testify to the fact that the accused came to them to sell the ear-rings. On seeing the ear-rings both of them had, at different times, told the accused that they were brass ear-rings and that they would not purchase them.

2. It may at this stage be mentioned that the prosecution led evidence of the previous conviction of the accused for an offence of theft of ear-rings from a child for which he was awarded two months' imprisonment. Copy of the judgment of the Sessions Court, Nanded dated 3-12-1952 proving this fact is Ex. P-8. Apart from the production of this documentary evidence, P. W. 5, one of the witnesses who identified the rumal found at the scene of the offence as that belonging to the accused was made to say even in his examination in chief that the accused committed dacoity on a previous occasion also when he cut off the ear-rings of a child from. Mudhol and he was convicted in that case 5 or 6 years ago.

The Sessions Judge in the examination of the accused under Section 342, strange to say, put to the accused his previous conviction. It is an elementary principle of criminal jurisprudence that the previous convictions of an accused are not relevant and cannot be proved unless the good character of the accused is relevant under Section 54 of the Evidence Act or unless the prosecution, under Section 75 I. P. C. prays for an enhancement of the sentence.

When it is required that the accused should be dealt with severely because of a previous conviction, there must he a specific charge under Section 75 I. P. C. Section 310 Cr. P. C. is meticulous enough to enjoin on the Courts, whether it is a trial by a Jury or a Judge that the accused is charged with an offence and further charged that he is by reason of a previous conviction liable to enhanced punishment or to punishment of a different kind for such subsequent offence, such further charge shall not be read out in Court and the accused shall not be asked to plead thereto, nor shall the same he referred to by the prosecution, or any evidence adduced thereon unless and until he has been convicted of the subsequent offence or in the case of a trial by a jury, the jury have delivered their verdict on the charge of the subsequent offences, or in the case of a trial by the Judge himself, the Court may, in its discretion, proceed or refrain from proceeding

with the trial of the accused on the charge of the previous conviction.

In this case, the prosecution, quite rightly, did not ask for enhanced sentence, because Section 75 I. P. C. would be inapplicable. The sentence awarded to the accused under the previous conviction was only two months, while the minimum that is required for enhancement of punishment is 3 years under Section 75 I. P. C., so that the previous conviction of the accused could not be proved against him or any evidence allowed to be adduced thereof, even where he was charged under Section 75, unless the Court came to the conclusion that the offence with which he is charged has been proved. In this case Section 75 I.P.C. and Section 310 Cr. P. C. have no application and the bar of Section 54 of the Evidence Act comes into play. The evidence of a previous conviction led at the trial by the prosecution is calculated and is likely to prejudice the accused. It is equally clear that anything which prejudices the case of the accused, does vitiate the trial.

3. In this case, the accused was put before the Magistrate for a confession which was recorded under Section 164 on 16-8-1958. The Sessions Judge rejected this confession on cogent reasons, firstly, because though the accused was remanded to judicial custody, the police seemed to have had access. Secondly the accused himself at the time of making the confession clearly told the Magistrate that he was maltreated and beaten and was asked to make a confession. A confession recorded in these circumstances loses its voluntary character. Further, he did not inform him that he will not be handed over to the police. Even if he had said so, it would have been a misnomer. The judicial lock-up situated as it is in the Magistrate's Court is guarded by the Police Constables to which the Investigating Officer, as is shown in this case, could have had easy access. A confession made in those circumstances cannot certainly be given weight that would be accorded to that made when the accused had been free from the interference of the police.

4. That apart, the evidence in this case does not satisfy us as to the guilt of the accused. P. W. 14 is a girl of 8 years and though the evidence of a child witness can be relied upon, Courts must be careful to examine the evidence to exclude the possibility of any tutoring. In this case, P. W. 14 says that the accused took Digamber and killed him. She has no knowledge of what the accused did. All that

she could have spoken is to the accused taking the deceased. Secondly, the evidence of P. W. 10 Nagaiah is not dependable, because, he and P. W. 2 both say that when, they questioned the accused, he denied the offence and when they took him to Khande Rao, he equally denied having taken the deceased.

Subsequently without any further encouragement, merely on Khande Rao asking him to tell the truth, he is said to have broken down with remorse and said that he killed the deceased for the theft of the ear-rings. P. W. 14 says that the ear-rings were of brass and P. W. 9 a neighbour of the deceased, says that the accused used to come now: and then to the house of the deceased and that everyone in the locality knew that the ear-rings were made of brass and that all the relatives who visited them knew that they were of brass. It is, therefore, certain that the accused who was also a relative and was visiting them, must have known that the ear-rings were of brass. In those circumstances, it is inconceivable that the accused who avowedly took the child, to commit theft of the ear-rings, would have been so fool-hardy to murder the deceased for ear-rings worth two annas and yet left the body with silver armlets and silver anklets, which were of a greater value, because when the body was discovered there were silver anklets and silver Kadiyalu. Further, it is equally incongruous that when P. Ws. 6 and 7 to whom the accused is alleged to have taken the ear-rings informed him categorically that they were made of brass, that the accused would keep them in the pocket. Again, the accused is supposed to have brought out the ear-rings from his pocket in the police Station and handed them over to the Sub-Inspector P. W. 16, which circumstance is equally unbelievable, because when P. W. 2, P. Ws. 10 and 11, were informed by the accused that he had committed the murder for ear-rings, is it likely that they did not ask what he had done with them?

The witnesses want us to believe that they did not ask such questions, which only shows how unreliable their testimony is. Apart from these circumstances, which in our view militate against the evidence of the prosecution, the recovery of the Rumal appears to us to be artificial. The accused in his statement under Section 342 asserts that though the Rumal was his, it was not found at the place where the body was recovered and in fact it was taken away from him in the jail in the presence of another accused who was confined with him. Of course, that is a mere

statement of the accused, but as observed by the Supreme Court, the statement of the accused under. Section 342 is an important piece of evidence which is to be considered along with the other evidence and the circumstances brought out at the trial.

We are inclined to accept the version of the accused, because as we have already stated, it is unlikely that the accused who has gone there with the intention of committing murder, for the earrings, would leave valuable ornaments and also left the Rumal to serve as evidence incriminating him with a murder charge. The police have put forth evidence of a murder which falls short of the legal proof required to bring home the charge of murder against the accused. It appears to us that the circumstance of the accused being previously convicted for a similar theft of ear-rings weighed considerably not only in the investigation, but also in the trial with the Sessions Judge. In our view, not only on the ground of prejudice, but also due to the defect in the prosecution evidence, the conviction of the accused cannot be allowed to stand.

5. It is also necessary to remark that the examination of the accused under Section 342 is most inadequate and unsatisfactory. The Sessions Judge has not brought out the salient facts disclosed by the evidence upon which he relied in convicting the accused. It must be borne in mind that the accused, placed as he is, must be given full liberty to explain all the incriminating circumstances which appear against him and which the Judge is likely to use in support of a conviction. If he fails to do sn that again would, in our view, cause prejudice vitiating the trial.

6. Before we part with this case, we may observe that even if the conviction is based on circumstantial evidence, the view of the Sessions Judge that because of the evidence being circumstantial, the sentence to be awarded is the lesser one of life-imprisonment, to say the least, is a startling proposition and is not warranted by any provision of law.

7. In the view, we have taken, the appeal is allowed, the conviction and sentence are set aside, the accused is acquitted and directed to be released.

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