Mandesan Vs. State of Kerala

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Court : Kerala

Decided On : Mar-15-1994

Reported in : 1995CriLJ61

Judge : K.T. Thomas and; K.J. Joseph, JJ.

Acts : Evidence Act, 1872 - Sections 25, 126 and 128; Criminal Procedure code - Sections 162 and 313

Appeal No. : Crl. A. No. 464 of 1990

Appellant : Mandesan

Respondent : State of Kerala

Advocate for Def. : T.V. George, Public Prosecutor

Advocate for Pet/Ap. : V.K. Mohanan, Adv.

Disposition : Appeal allowed

Judgement :
ORDER

K.T. Thomas, J.

1. Adultery ranging to incest was attributed to this appellant by his sister-in-law Rajamma when the paternity of her new born child was in question. Upon such

allegation being hurled, appellant backed her (Rajamma) as well as her new born child to death on the morning of 7th October, 1988. This is the gravamen of the story. Appellant was convicted of double murder by the trial court and was sentenced to imprisonment for life.

2. Following is the synopsis: Rajamma was married to appellant's younger brother Sreedharan and a daughter (PW.21 Sunitha) was born to them about sixteen years before the occurrence in this case. Rajamna's husband Sreedharan had undergone vasectomy some time after the birth of Sunitha and was leading a wayward life. This caused estrangement in the matrimonial life and eventually Sreedharan had deserted Rajamma when Sunitha was in infantile age. A few years later Rajamma became pregnant and the news created a flutter and grave concern in the family circles. When she delivered the baby she made prevaricative versions regarding the paternity of the child. Once she said that it was the appellant and later she said that it was appellant's son who was responsible for her pregnancy. Appellant could not stand the insult and made some efforts-to shirk off the responsibility, but he found him self in a catch 22 situation. To wriggle out of it he determined to exterminate both the mother and her new born child. In furtherance thereof he gate-crashed into Rajamma's house on the morning of 7-10-1988 armed with a chopper and killed them both. He straightway proceeded to the police station with the blood stained chopper and surrendered himself to the police.

3. Prosecution had depended on circumstantial evidence to establish the case against the appellant, as nobody had witnessed the occurrence. Appellant denied his involvement in the murder when he was questioned under section 313 of the Code of Criminal Procedure. Learned Sessions Judge found that prosection has succeeded in establishing the case on the strength of circumstances arranged against the appellant.

4. Shri, Prabhanandan, learned counsel who argued for the appellant contended that the trial court has relied on materials which are totally inadmissible in evidence and if such inadmissible materials are excluded there is nothing left to establish the complicity of the appellant.

5. There is undisputable evidence to show that Rajamma and her new born child were murdered by somebody on the morning of 7-10-1988. Exts.P31 and P32 are the postmortem certificates pertanining to the bodies of Rajamma and the child respecitvely. The ante motem injuries noted down by the doctors in the certificates show that the deceased were done to death by cutting them with sharp weapon.

6. The foremost among the circumstances which prosecution arrayed to establish the guilt was that the appellant went to the police station on the morning of the date of occurrence and told the police that the murders were committed by him. He handed over the chopper to police which was found to be stained with human blood. But first part of the said evidence is clearly inadmissible in view of the unequivocal interdict contained in Section 25 of the Evidence Act. The statement which appellant has given to the police is entirely inculpatory in character and there is no scope of culling out any exculpatory portion therefrom. Legal position is well settled that the inculpative statement made by an accused even though it forms part of the first information Statement in the case is inadmissible in evidence (vide A. Nagesia v. Bihar State, AIR 1966 SC 119 : 1966 CRILJ 100.

7. In the process of sifting the chaff from the corn we could retrieve only one circumstance annexed to the conduct of appellant in going over to the police station on the fateful morning. He handed over to the police a blood stained chopper and told them 'do whatever is necessary in the matter'. We have no difficulty to rely on the aforesiad circumstance as proved in this case. It has been spoken to by PW.l and a pose of policemen who were present in the police station then (PWs. 24, 25 and 26).

8. The next circumstance proved is that appellant was found proceeding to the police station with the chopper. PWs. 10 and 16 saw him walking with the chopper along the road. Nothing could be pointed out to disbelive their testimony.

9. Another circumstance which has come out in evidence is that appellant was very much perturbed when deceased Rajamma attributed paternity of the child to Saji (son of the appellant). Appellant then approached a nurse (PW. 14) and sought her help to have the semen of his son tested. (PW.l4 in turn consulted Dr. John Abraham of the Public Health Centre, Varappetty (PW. 12) who advised her

of the futility of such a venture). Appellant approached a document writer (PW.22) and consulted him about the feasibility of wangling a document from Rajamma disowning Saji's involvement in the conception of the child. But the document writer did not give him much hope to get over the impasse.

10. Appellant, therefore approached advocate Shri, Narayans wanry (PW. 13) for legal consultation. PW.l3 has of course stated in his evidence what transpired between him and the appellant. We have to consider whether the said material is admissible in evidence. Section 126 of the Evidence Act contains a legal bar that no advocate 'shall at any time be permitted' to diclose any communication in the course and for the purpose of his employment as such, except with the 'express consent' of the client. Nor can the advocate be permitted to disclose any advice given by him by his client in the course of such employment. Learned additional Public Prosecutor contended that the said part of the deposition is admissible in evidence since appellant did not claim any privilege in the trial court when PW.23 gave evidence, nor did his counsel in the trial court raise any objection thereto. It may be true that when the communication was disclosed in the trial court accused's counsel did not raise any objection. But failure to raise objection would not remove the lid of confidentiality attached to such communication between the advocate and his client. The privilege embodied in Section 126 of the Evidence Act is not liable to melt down on the principle of waiver or acquiescence. This can be more understood from section 128 of the Act which says that by giving evidence, a party shall not be deemed to have consented to such disclosure as is mentioned in Section 126. It is only when the party calls such advocates as a witness that the party shall be deemed to have consented to such disclosure, that too only if he questions the witness about it. Section 126 uses strong language in imposing the prohibition. No advocate 'shall at any time be permitted' to disclose such communication 'unless with his client's express consent'. A failure on the part of the client to claim privilege cannot be stretched to the extent of amounting to 'express consent' envisaged in the provision (Bhagwani v. Decoram, AIR 1933 Sind 47).

11. One of us while sitting as single Judge has held in Rev. Fr. Barnad v. Ramachandran Pillai 1986 K.L.T. 1240 that express consent envisaged in the

section does not mean that the consent must be in writing and such consent can be inferred from facts or circumstances. In that case, when the petitioner's advocate sent a reply notice to another advocate certain imputations were mentioned and the client was prosecuted for defamation. As the reply notice indicated in clear terms that it was issued under instructions from his client, it was found to be sufficient to establish that there was express consent from the client to disclose the contents. But the position here is different, since there is absolutely nothing on record to show that accused in this case accorded any consent, much less express consent, to the advocate for disclosing the professional communication. On the contrary, the counsel who cross-examined PW.13 asked him about the propriety of divulging the communication in court to which the witness gave his own legal view regarding the ambit of the privilege envisaged in Section 126. PW. 13's view regarding the privilege is ostensibly faulty and we are not deposed to use this judgment for a discussion on that aspect since neither side has raised any contention to support such a view.

12. Nor can there be any legal justification for them deposing to the said communication on the premise that the confidentiality had already been lost since appellant would have disclosed it to the police during investigation stage. Even if appellant had disclosed it to the police during interrogation it remains in limbo as parliament has imposed a ban through Section 162 of the Code of Criminal Procedure against any use of such statement. Even the limited use permitted by the section is of no avail as for a statement made by the accused to the police.

13. We are therefore, of the definite view that the communication made between the accused and his advocate (P.W.13) must remain undisclosed and we treat the same as not divulged. Hence, it cannot be treated as evidence in this case.

14. In re-capitulation the following are the circumstances proved against the appellant: (1) Appellant was much perturbed when Rajamma told others that appellant's son is the father of her new born baby. (2) Murder of Rajamma and the new born baby must have taken place on the morning of 7-10-1988, (3) Appellant walked to the police station holding a chopper in his hand on the same forenoon and handed over the chopper to the police and requested them to do whatever is

necessary in the matter. (4) The chopper was stained with human blood.

15. The above circumstances when put together cannot form a chain much less a completed chain for drawing the irressistible inference that the deceased were murdered by the appellant and none else. There is paucity of legal evidence to reach the exclusive conclusion regarding the guilt of the appellant.

In the result, we allow this appeal and set aside the conviction and sentence passed on the appellant. We acquit him and direct that he be set at liberty forthwith unless he is required in any other case.