

In Re: Kanaga Kosavan Alias Kanakachala Kosavan

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Court : Chennai

Decided On : Sep-25-1930

Reported in : (1931)60MLJ616

Appellant : In Re: Kanaga Kosavan Alias Kanakachala Kosavan

Judgement :

Horace Owen Compton Beasley, Kt., C.J.

1. It is not impossible that under these circumstances feeling desperate and depressed she asked the appellant to kill her and there is no real motive proved by the prosecution for the appellant deliberately killing her of his own free will I think that in this state of affairs he must be given the benefit of the doubt and that the whole of his confession must be accepted and that I must find that he killed the deceased at her request. What, then, is the legal position? It is argued on his behalf that on these facts the appellant is entitled to the benefit of Exception (5) to Section 300, Indian Penal Code. It reads as follows:

Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the 'risk' of death with his own consent.

2. From the evidence it is obvious that the deceased was more than 18 years of age and she was therefore able to consent to her killing. Several authorities on this point were referred to and all of them seem to me clearly to support the appellant's

contention. The first of these is *Queen v. Baboolun Hijrah* (1866) 5 W.R. (Cr.) 7, where it was held that if a man above the age of 18 years submits himself to emasculation, performed neither by a skilful hand, nor in the least dangerous way, and dies from the injury, the persons concerned in the act are guilty of culpable homicide not amounting to murder. In *Queen v. Anunto Rurnagat* (1866) 6 W.R. (Cri.) 57 the accused, and his wife being overwhelmed with grief for the loss of their child determined to kill themselves. His wife made repeated requests to him that he should kill her and after a time he did so by striking her three blows with an axe. The Sessions Judge who tried the case was of the opinion that Exception (5) to Section 300, Indian Penal Code, did, not apply to the case because he was of the opinion that the woman was killed whilst she was asleep; but on appeal it was held that the case did come within Exception (5) to Section 300, Indian Penal Code and that the accused was guilty of. culpable homicide not amounting to murder punishable under Section 304, Indian Penal Code. Then there is *Queen-Empress v. Nayamuddin* I.L.R. (1891) C. 484, where in a case in which it was found that accused persons were guilty of rioting armed with deadly weapons in a pre-meditated and pre-arranged fight which appeared to be a regular pitched battle or trial of strength between the two parties concerned in the riot and that in the course of the riot and in prosecution of the common object of the assembly, one of the accused attempted to kill a man under such circumstances that his act amounted to an attempt to murder, the question arose whether that act could be said to bear a less grave character by reason of Exception (5) to Section 300, Indian Penal Code and it was held that the case did not fall within the exception. O'Kinealy, J., was of the opinion that before Exception (5) can be applied, it must be found that the person killed was, with a full knowledge of the facts, determined to suffer death or take the risk of death and that this determination continued up to, and existed at, the moment of his death. In *Ujagar Singh v. Emperor* (1917) 43 I.C. 413 the accused killed his step-father, who was an infirm old man, with his consent in order to involve some of their enemies in trouble by charging them with the murder and it was held that the case was covered by Exception (5) to Section 300, Indian Penal Code and that the accused was guilty of an offence under Section 304 of the Penal Code. In *Emperor v. Bharat Bipari* (1920) 62 I.C. 414, the accused, the parents of a child, offered the child to the crocodiles in a tank in the

belief that though the child would-be taken away, it would be returned unharmed and thereafter would lead a charmed life and attain to a good old age, it was held that they were guilty of an offence under the latter part of Section 304, Indian Penal Code. This case, of course, is not strictly in point as this was not a case of Exception (5) to Section 300, Indian Penal Code. In *Emperor v. Ram Dayal* I.L.R. (1913) A. 26 it was held that persons actively assisting a Hindu widow in becoming a sati are guilty of the offence of abetment of suicide as defined in Section 306, Indian Penal Code, in *Emperor v. Vidyasagar Pandya* : AIR1928 Pat497 , *Emperor v. Ram Dayal* I.L.R.(1913) A. 26 was followed. In *Masun Ali v. Emperor* A.I.R. 1929 Lah. 50, a case very much in point, the accused strangled his beloved aged 16 years to death upon their decision to die together in despair of the future separation and feeling that they could not live apart and it was held that this 'was essentially the case where the spirit, if not the letter, of Exception (5) may be applied and though convicted of murder, the sentence should be transportation for life. Had the murdered girl been above the age of 18, the offence would have been culpable homicide not amounting to murder. There is an unreported Madras case, viz., Cr.R.C. No. 646 of 1925, where the wife was beaten to death in the belief that it would drive the devil out of her and it was held that the accused was guilty of an offence under Section 304, Indian Penal Code.

3. It is obvious from all these authorities, the facts of this case being as I have found them, the appellant is entitled to the benefit of Exception (5) to Section 300, Indian Penal Code and must be convicted only of culpable homicide not amounting to murder under the earlier part of Section 304, Indian Penal Code. His conviction under Section 302 of the Indian Penal Code must be set aside and also the sentence of death passed upon him and in respect of his conviction under Section 304, Indian Penal Code, earlier part, he must receive the maximum sentence, namely transportation for life.

Pakenham Walsh, J.

4. I agree.