In Re: Sainambu

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Court : Chennai

Decided On : Dec-12-1952

Reported in : AIR1953Mad564; (1953)IMLJ467

Judge : Govinda Menon and ;Basheer Ahmed Sayeed, JJ.

Acts : Madras Criminal Rules of Practice - Rule 85; Code of Criminal Procedure (CrPC) , 1898 - Sections 164; Indian Penal Code (IPC), 1860 - Sections 300; Evidence Act, 1872 - Sections 27

Appeal No. : Criminal Appeal No. 416 of 1952

Appellant : In Re: Sainambu

Advocate for Def. : M.A. Mandanna, Adv. and Asst. Public Prosecutor

Advocate for Pet/Ap. : B. Prasada Rao, Amicus Curiae

Judgement :

1. The appellant has been found guilty of an offence under Section 302, Penal Code, for having murdered, on 6-8-1951, a girl by name Umal Regina, aged 7 years, by cutting her with an 'aruval', and sentenced to transportation for life by the learned Sessions Judge of Ramanathapuram division. The prosecution case is briefly as follows:

2. The girl left her house after taking her midday meal for attending her classes in the school. At about 4 or 4-30 p. m. she and two other school children by name

Mahariba and Ibrahim were seen going to the house of the accused and a little later Mahariba and Ibrahim returned, but the deceased girl did not return. At the time of sunset that evening, the girl was seen in the house of the accused. That night she did not return and persons who went in search of her could not trace her. The next day her dead body was seen in a channel with cut injuries. Her earrings had been removed. At about 12-1(sic) p. m. on 7-8-1951 a complaint was given to the police at Tiruvadanai by P. W. 1, a relation of the deceased. The Sub-Inspector P. W. 13 reached the village at 4 p. m. and took up the investigation. He also examined witnesses. The body was sent for post mortem examination and the medical evidence shows that she had as many as twelve wounds on her person which were very serious in character and the doctor was of opinion that death was due to shock and haemorrhage.

On 18-8-1951, P. W. 13 arrested the appellant at about 9 a. m. and examined her. Then she dug out and produced a pair of earrings M.Os. 1 and 1 (a) from near a fence adjacent to her house. On 19-8-1951 she was produced before the Sub Magistrate, P. W. 6 for the purpose of recording her confession. It might also be mentioned that after the appellant was arrested, another woman by name Amina Bivi was also arrested by P. W. 13, but this woman was not sent to the Sub Magistrate at all. A confession was recorded by P. W. 6 which is marked in the case as Ex. P. 5. P. W. 6 deposes that he warned the accused that she was not bound to make a confession and that if she made one it would be used as evidence against her. Then she was given time to reflect till the next day and was kept out of the influence of the police.

The questions put to the accused and the answers given by her before the confession was recovered are contained in Ex. P. 5 from which it is seen that she was not informed that it was not intended to take her as an approver. In her confession statement, the accused admitted having assisted Amina Bivi in murdering the child and according to the statements contained in the confession it was Amina Bivi who cut the deceased. The earrings M. Os. 1 and 1(a) were identified by P. W. 2, the mother of the deceased as having been worn by the deceased when she left her house for school. The learned Sessions Judge found that the evidence against the accused was sufficient for finding her guilty of the

offence of murder, No proceedings were taken against Amina Bivi at all, as according to the police officer, the evidence against her was insufficient. Both before the committing Magistrate and the learned Sessions Judge, the appellant retracted the confession and stated that she was induced by the Sub Inspector, P. W. 13, and by P. W. 1 to make the confession on the promise that she would be taken as an approver.

3. It is argued in this Court by the learned advocate for the appellant that the confession should not have been admitted in evidence because the necessary requirement under Rule 85 of the Criminal Rules of Practice to the effect that the Magistrate, before recording the confession, should tell the person making the confession that it is not intended to take him or her as an approver, has not been complied with in this case, and hence the confession is invalid and illegal. Two decisions of this Court have been cited in support of this argument. In -- 'Govinda Subbaramayya v. Emperor', AIR 1937 Mad 321 (A) Pandrang Row J. took the view that a confession which does not strictly conform to the procedure laid down by Rule 85 of the Criminal Rules of Practice was not admissible in evidence even as against the maker. The learned Judge has considered the historical reasons for the promulgation of rule 85 and was clearly of opinion that if the Magistrate did not warn the accused that it was not intended to take him as an approver, the necessary prerequisites for the validity and legality of the confession have not been complied with.

This decision was followed by a Bench of this Court in -- 'Venkatareddi v. State', (B) which is to the effect that the

omission to warn the accused who was about to make a confession that it was not intended to take him as an approver is fatal to the admissibility of the confession, as it causes grave doubt on the voluntary nature of the confession. The learned Judges point out that especially in cases where there are more than one accused, there will be reasonable grounds for supposing that confessions might have been made on the assumption that the person confessing will be taken as an approver and would escape punishment. In a more recent case in --- 'Ramaswami v. State', (C), a Bench of this court,

consisting of Mack and Krishnaswami Nayudu JJ. was not prepared to go to the extent to which the previous decisions went but was of opinion that failure to warn the accused that it was not intended to take him as an approver would not render the confession inadmissible.

There is, therefore, some difference of opinion in this Court regarding the admissibility of a confession which did not conform strictly with the requirements of Rule 85 of the Criminal Rules of Practice. It may be mentioned that Rule 85 is not a rule which has the force of a statute but is one promulgated by the Government under the powers conferred on them under the Criminal Procedure Code for the purpose of regulating the procedure in Criminal Courts. Rule 85 amplifies the provisions of Section 164, Criminal P. C. and lays down what the Magistrate should do when recording statements and confessions under Section 164, Criminal P. C. All these decisions do not seem to have taken note of Section 533, Criminal P. C. which lays down that if any of the provisions of Section 164 or Section 364, Criminal P. C. with regard to the recording of a confession have not been complied with by the Magistrate recording the statement, evidence has to be taken that such person has duly made the statement recorded and that such statement shall be admitted in evidence if the error has not injured the accused as to his defence on the merits.

It may be a matter of decision on the facts of the particular case whether the failure to strictly comply with the provisions is a matter which has caused prejudice to the accused. In the present case we feel that since the police had arrested another person in connection with this crime at the very beginning, it is possible that the complicity of that person also should have been properly investigated. On the facts of the present case we feel that it was the duty of the Magistrate to have warned the accused that it was not intended to take her as an approver. As a general rule of practice we wish to point out that where there are more than one person charged with a crime & one of such persons wants to make a confession statement, it is the duty of the Magistrate to specifically warn the person making the confession that it was not intended to take him or her as an approver.

But where it is quite clear from the circumstances that only one person is involved in the crime and such a person wants to confess, the failure to warn the person regarding the fact that it was not intended to take him as an approver would not amount to a serious irregularity. The distinction arises only when there is a plurality of accused and not in cases of single delinquents. Therefore it seems to us that a hard and fast rule cannot be laid down regarding the compulsory nature of the warning to be given. Considering the facts of the present case, we feel that the Magistrate should have told the accused that it was not intended to take her as an approver. Her statement throughout has been that P. Ws. 1 and 13 had told her that she would be taken as an approver and pardoned. If true, this was an inducement and the confession cannot be considered to be a voluntary one. In such circumstances we rule out the confession from the record.

4. The question then arises whether the other evidence in the case is sufficient to convict the accused. M. Os. 1 and 1(a), the pair of earrings worn by the deceased girl when she left the house have been produced by the accused after having dug out the same from a place near the fence of her house. These were recovered as a result of a statement made by her under Section 27, Evidence Act. It seems to us that the production of these material objects would not by itself be sufficient to charge the accused with the crime of murder. The evidence of P. Ws. 3, 5, 9 and 10 is not sufficient to show that it was due to the act of the accused that the deceased came by her death. We are, therefore, of opinion that the offence of murder has not been brought home to the appellant. We, therefore, set aside the conviction and sentence under Section 302, Penal Code.

But in our opinion the appellant has to be convicted under Section 404; Penal Code for having dishonestly misappropriated property knowing that such property was in the possession of the deceased person at the time of that person's death, and that it has not since been in the possession of any person legally entitled to it. If we believe the evidence of P. W. 2 that the deceased was wearing M. Os. 1 and 1(a) at the time she went out of the house to school and if we believe the other evidence that the deceased and other girls had gone to the house of the accused, the inference is irresistible that at the time she came by her death, these jewels were on her person. Moreover, the fact that when the dead body was seen, the

ear-lobes were found cut, is sufficient for us to infer that whoever removed the jewels, must have done so at the time when death took place or immediately thereafter. The materials on record are ample, in the absence of any satisfactory explanation on the part of the accused to find her guilty of an offence under Section 404, Penal Code. We, therefore, convict the appellant of an offence under Section 404, Penal Code and sentence her to rigorous imprisonment for three years.