In Re: Kumaraswami Naicker

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Court : Chennai

Decided On : Jan-23-1963

Reported in : (1963)1MLJ390

Appellant : In Re: Kumaraswami Naicker

Judgement :

P. Ramakrishnan, J.

1. Kumaraswami Naicker was convicted by the learned Sessions Judge, Ramanathapuram Division at Madurai in S.C. No. 108 of 1961 for the offence of murder under Section 302, Indian Penal Code and sentenced to imprisonment for life. He appeals from the conviction and sentence.

2. The facts of the prosecution case are brief. The deceased Velammal was the wife of the accused. She and her mother, who hailed from a village called Vellappottal, had come to Rajapalayam. The accused belongs to Rajapalayam. At Rajapalayam, Velammal contracted illicit intimacy with P.W. 8 (Pandi alias Subbiah) before her marriage to the accused. After the marriage, the accused and Velammal stayed for about a year at Rajapalayam doing ghee business. Then he and Velammal went to Vellappottal where they stayed for some time. Velammal fell ill of typhoid and then returned to Rajapalayam for treatment. There she again came in contact with Pandi P.W. 8 and they were living together for about three months when she became pregnant. At that time the accused came to

Rajapalayam and persuaded Velammal with some reluctance to go with him to Vellappottal. That was 10 or 15 days before the occurrence.

3. At Vellappottal the couple were living in a house abutting a north to south street which is shown in the rough sketch Exhibit P-25. P.Ws. 1, 3 and 4 are neighbours' There is evidence that the accused and his wife used to quarrel during the short time they were living in Vellappottal.

4. On 17th June, 1961, P.W. 2 the elder brother of Velammal saw the accused going towards his house at 4 p.m.

5. On 18th June, 1961, at 4 a.m. P.W. 1 heard an alarm coming from Velammal's house. This alarm also awakened the neighbours P.Ws. 3 and 4. Now there is great deal of discrepancy in the evidence as to what these persons actually saw after the, alarm which was raised at 4 a.m. in the house, where the accused and the deceased were living. The main point to note here is that the version of these witnesses P.Ws. 1, 3 and 4 as to what they saw after hearing the alarm has undergone a material transformation between the stage of Committal Enquiry and the Sessions Trial. P.W. I, in the course of his examination under Section 164, Criminal Procedure Code, stated that he saw the accused coming out of his house and running south. In the Committal Court, a portion of his statement, which appears to have been marked at the Sessions Trial as Exhibit P-2 (reference to the procedure adopted by the learned Sessions Judge, will be made a little later in the judgment) is:

I saw the accused coming out of her house and ran (run) towards south. I switched a battery light and I saw the accused running towards south. I saw him wearing a shirt. I did not notice any blood-stains or weapon with him. He first ran towards south and then towards west.

But in the Sessions Court, the evidence of P.W. 1 was that the person, whom he saw, resembled the accused, that he questioned him about his identity, but that he did not reply.

6. P.W. 3 stated in the Committal Court that the accused Kumaraswami came out from his house, and that P.W. 3 and others chased him, but in the Sessions Court he stated that he saw a person running out of the accused's house and that himself and P.W. 1 chased him. It should be noted that in the Sessions Court he did not even mention that the person, who ran, bore any resemblance to the accused. P.W. 4 appears to have deposed in the Committal Court that he saw the accused coming out of the house and running away, but in the Sessions Court he did not at all refer to seeing any person going out of the accused's house, but deposed that when he came out on hearing the alarm, P.W. 1 asked him to bring a light saying that a person was running away.

7. Before we discuss the procedure adopted by the learned Sessions Judge in relying upon the evidence of the above mentioned witnesses, we will also refer to the evidence of P.W. 5 briefly. He deposed that at about dawn there was some noise in the village, that he saw P.Ws. 1, 3 and 4 chasing the accused, that P.W. 1 had a torch light with him, that they were raising an alarm that the accused was running away after stabbing, that he (witness) stood in front of the accused and saw the accused having a knife with him, that the accused threatened him with the knife, and that he saw blood-stains in the accused's dhoti and shirt. A suggestion was made in his cross-examination that he was deposing falsely at the instigation of P.W. 2 but he denied the suggestion.

8. The learned Sessions Judge has in paragraph 27 of his judgment, summarised the evidence in the case by stating that P.Ws. 1, 3 and 4 deposed in the Sessions Court that on hearing the alarm, they saw a person like the accused coming out of the accused's house and running away. But this summary of the evidence made by the learned Sessions Judge is clearly an incorrect one with reference to the record, because according to evidence on record, the gist of which is given above, P.W. 3 referred to a person running away, but did not state that the person resembled the accused. Further, P.W. 4 did not refer to his seeing any person running away. He was only told by P.W. 1 that a person ran away. To say the least, we are of the opinion, that such an incorrect summary of the evidence should not have crept into the judgment of the lower Court and we had therefore to re-examine the evidence to satisfy ourselves about the correct state of the

evidence that was recorded.

9. The more important point to which our attention was drawn by the learned Counsel for the accused as well as by the learned Public Prosecutor, is the omission on the part of the learned Sessions Judge to comply with the procedure and formalities of Section 288, Criminal Procedure Code. The judgment of the learned Sessions Judge does not specifically refer to Section 288, Criminal Procedure Code but nevertheless he seems to have rejected the evidence of P.Ws. 1, 3 and 4 given in the Sessions Court, and accepted some of their statements made in the Committal Court. Before he could treat their evidence in the Committal Court as substantive evidence at the Sessions Trial, it was essential that the formalities in Section 288, Criminal Procedure Code should be complied with strictly. What appears to have been done during the Sessions Trial in this case was to mark a portion of the previous statement of P.W. 1 in the Committal Court as Exhibits P-2 and P-3 for the purpose of contradiction of his testimony in the Sessions Court. But even such an attempt was not made in the case of P.Ws. 3 and 4, to mark at the Sessions Trial, the contradictory portion of their testimony in the Committal Court. The difficulty we find in this case is that it is not clear from the judgment of the learned Sessions Judge, that he has proceeded under Section 288, Criminal Procedure Code for rejecting the testimony of these witnesses in the Sessions Court and accepting their evidence in the Committal Court instead. If he had really intended to do so, he should have complied with the necessary formalities. These formalities, briefly stated, require the who fe of the evidence of the witnesses given in the Committal Court to be filed, so that the Court could come to a conclusion whether it could exercise its discretion and treat the earlier evidence given in the Committal Court as evidence for all purposes at the Sessions Trial (vide Ayyanperumal v. Emperor : AIR1926 Mad879 . Next, an earlier line of decisions had taken a certain view about the use of Section 145, Indian Evidence Act t5 a case to which Section 288, Criminal Procedure Code has to be applied. It is not necessary to state that view, as the position has now been made clear by the decision of the Supreme Court in Tara Singh v. State (1951) S.C.J. 518 : (1951) 2 M.L.J. 291 that the evidence in the Committal Court can not be used in the Sessions Trial unless the witness is confronted with his previous statement as required by Section 145 of the Indian Evidence Act. This means that

after the whole of the deposition in the Committal Court has been marked in evidence, it will be necessary to draw the attention of the witness to those portions of the deposition in the Sessions Court which are in conflict with the earlier statement, and in regard to which the earlier statements are proposed to be relied upon by the prosecution.

10. What the learned Sessions Judge has done in this case, is, as mentioned above to reject the evidence of P.Ws. 1, 3 and 4 given in the Sessions Court and give weight to portions of their testimony in the Committal Court, but without making any attempt to comply with the provisions of Section 288, Criminal Procedure Code. That is a mandatory provision and unless it is complied with, it will not be open to the Sessions Court to reject the evidence given before it and rely in its place on the evidence given by the witnesses in the Committal Court. The trial in this case is clearly vitiated on account of these circumstances.

11. The next question for consideration is whether there is adequate evidence in this case to convict the accused, or whether a re-trial is called for. The learned Sessions Judge has referred to the evidence of P.W. 5 as providing a valuable piece of circumstantial evidence to connect the accused with the crime, but two circum- stances have to be taken into account in connection with the evidence of P.W. 5. One, as pointed out by learned Counsel for the accused is this:--The time was before dawn and it was quite dark. P.Ws. 1, 3 and 4 were chasing the accused with the help of an electric torch which would have thrown light behind the accused, but P.W. 5 was standing in front of him. The back of the accused would have been illuminated, but not his front side. Therefore there is some justification for the attack made by the learned Counsel for the accused on the evidence of P.W. 5, that it is very unlikely that P.W. 5 could have noticed blood-stains on the accused's clothes or seen a knife held in his hand. Secondly, it is seen from Exhibit P-2 the portion of the statement of P.W. 1 given in the Committal Court that he clearly saw the accused with the help of his battery light, and he was sure that the accused did not have any weapon with him and he did not notice any blood-stains on the accused's clothes. Therefore this will be a material contradiction between the evidence of P.W. 1 given in the Committal Court, and the evidence of P.W. 5. Even if the evidence of P.W. 1 in the Committal Court is to be marked in

evidence, there will be this glaring contradiction between P.W. is evidence in the Committal Court and that of P.W. 5. Therefore it will not be safe to act upon the evidence of P.W. 5.

12. Further, the deceased is the younger sister's daughter of P.W. 5. Obviously he is interested in the deceased and this will be another circumstance which will make it unsafe to accept his evidence. Therefore, the prosecution is left with the evidence of P.Ws. 1, 3 and 4 who, in view of the different versions they had given at different stages, have proved themselves to be unreliable persons. We are of the opinion that no useful purpose will be served by ordering re-trial. The appeal is allowed. The conviction and sentence are set aside. The accused is acquitted and directed to be set at liberty.