(1986) 02 KL CK 0038

High Court Of Kerala

Case No: Criminal A. No. 355 of 1983

Kuttikrishnan and Others		APPELLANT
	Vs	
State		RESPONDENT

Date of Decision: Feb. 10, 1986

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 164, 164(2), 164(4), 281
- Evidence Act, 1872 - Section 30
- Penal Code, 1860 (IPC) - Section 302, 34

Citation: (1986) 23 KLJ 375

Hon'ble Judges: S. Padmanabhan, J; K.G. Balakrishnan, J

Bench: Division Bench

Advocate: M.N. Sukumaran Nair, B Raman Pillai, Sunny Varghese and S. Vijayakumar, for the Appellant;

Final Decision: Allowed

Judgement

Padmanabhan, J.

Appellants are accused 1 to 3 in Sessions Case 32 of 1983 on the file of the Sessions Judge, Palghat. They were convicted for an offence punishable u/s 302 read with section 34 of the Indian Penal Code and sentenced to imprisonment for life. The prosecution case may be by summarised thus: Accused 1 and 3 are the sons and 2nd accused is their aged mother. 1st accused married deceased Pankajam about 7 years prior to the incident which took place on 3-10-1982. Two children were born out of the wed-lock. The last child was born 15 days before the incident and it died shortly after birth. Pankajam was the daughter of P.W. 7, a retired Sub Inspector of Police in Tamil Nadu. He is none other than the brother of the 2nd accused At the time of marriage he gave twenty sovereigns of gold ornaments to Pankajam. Out of this he got back 15 sovereigns subsequently. Since P.W. 7 did not return the ornaments the accused persuaded the deceased in vain to get them back. It was the

helplessness or rather indifference of the deceased in getting back the ornaments that motivated accused to murder her.

2. In furtherance of their common intention, the mother and her two sons, decided to kill her. On the evening of 3-10-1982 she was given Oleander seeds with some edibles in the form of sweet cake. Since the desired result could not be achieved they gave her some sleeping pills in coffee. Thereafter a poisonous leaf called ''Oduku'' was pasted and given to her mixed with water as if it is some medicine. This action was also not successful in bringing about the desired result. Therefore by about 1.30 in the night, inside a room in the residential house, the first accused made a noose at the end of a rope, put it on her neck and hanged her in the rafter with the help of accused 2 and 3 who lifted her body. The second accused is also alleged to have flashed a torch while helping the third accused to push the body up. Pankajam died as a result of asphyxia due to strangulation,"

3. The defence version is that consequent on her failure to get back the ornaments from her father there was quarrel in the house and due to frustration, she attempted to commit suicide at first by consuming poisons and thereafter hanging herself by a rope in the rafter. It is the further defence version that these acts were done by the deceased without being known to anybody else and the other inmates came to know of it only the next morning. Accused 1 and 3 say that they were not in the house itself. The defence has also alleged that over and above the frustration on account of the above mentioned quarrel there was another reason also. The deceased was having illicit intimacy with P. W 1 who is a close neighbor. This became known to everybody in the locality. The lose of reputation on account of this scandal is said to be an additional reason which prompted the deceased in committing suicide.

4. Whether it is a case of homicide as alleged by the prosecution or a case of suicide as contended by the defence, it is not disputed that Pankajam died as a result of hanging on the night of 3-10-1982 Autopsy was conducted by one Dr. Kuttappan and Ext. P7 is the post-mortem certificate. After obtaining the report of chemical examination he has also issued Ext. P8 certificate mentioning the cause of death. Dr. Kuttappan was not available for examination since he is abroad. Exts P7 and P8 were therefore proved through a colleague examined as P.W. 11. In Ext. P7 Dr. Kuttappan reserved his opinion as to the cause of death pending report of chemical examination. The result of chemical examination of the viscera contends was that it contained nitracepam in the stomach, uterus, liver, spleen and kidneys. P.W. 11 said that nitracepam is the chemical name of nitravet tablets which is a tranquiliser and sedative Ext. P7 shows that ligature mark found on the neck of the dead body was transverse at the lower part of the front of neck on both sides. P.W. 11 said that in cases of suicidal hanging ligature mark will be usually oblique and it will be transverse in the case of homicidal hanging. Anyhow whatever be the reason it is proved beyond doubt that Pankajam died that night as stated above.

5. P.W. 11 was not in a position to say that presence of transverse ligature marks by itself could be taken as conclusive proof of homicide. He confessed in the box that he had no prior occasion of dealing with such cases. It has also to be noted that he was not the person who conducted autopsy and the doctor who conducted autopsy has not stated whether it is suicide or homicide. Without any further material before us we are not in a position to enter a finding that the presence of transverse ligature marks could be taken as positive proof that this is not suicidal hanging or that it is homicidal hanging Therefore no finding based on medical evidence is possible in this case. Benefit of that doubt also must be available to the accused in the circumstances of this case.

6. The main evidence in the case is that of P.W. 1. According to the defence version he is the actual villain of the play. The fact he is an immediate neighbour is not in dispute. We have earlier stated about the defence version that one of the reasons which prompted the deceased to commit suicide was the scandal on account of her illicit connection with this witness. Viewing his evidence even independent of this background, we feel that it is full of artificialities. According to him he went for the second show film that night. While returning home at about 1.30 he heard a cry from the house of the deceased. He was not able to specify the identity of the person who cried. Therefore it could be either from the deceased or from P.W. 6. P.W. 6 is none other than the younger sister of accused 1 and 3 and daughter of the second accused. Immediately P.W. 1 went to the house and saw P.W. 6 weeping in verandah. Going by his own version it is improbable that P.W. 6 might have cried aloud to alert the neighbours So also the prosecution story is that on account of administration of different kinds of poison from the evening onwards and the persistent vomitting resulting therefrom the deceased has become completely helpless. Therefore a cry from the deceased is also next to impossibility in the circumstances. It appears to us that the version a P W. 1 that he was attracted to the house by the cry itself is artificial.

7. We have to bear in mind that if the prosecution story is accepted the attempt to murder Pankajam must have continued for about 71/2 hours in the house. P.W. 6 was admittedly an inmate of that house. According to the prosecution story she was hundred percent against the acts of accused 1 to 3. P.W. 1 has stated that as soon as he went to the house he questioned P.W. 6. His version is that she gave a graphic description of everything that transferred in the house right from the evening upto 1.30 in the night. Administration of Oleander poison in the form of cake, giving sleeping pills, again giving Oduku leaves are all matters alleged to have been narrated by P W. 6 to P. W 1. So also she did not forget to say that Pankajam was throughout vomitting and at last when every attempt failed they hanged her by the neck inside the room. If that be so, P.W. 6 must have witnessed all these acts including the process of hanging before she came out to the verandah and cried aloud thereby alerting P.W. 1. It must have taken some more time for P.W. 1 to reach the house, elicit information from P.W. 6 and then go and open the window.

But after the lapse of so much time what he saw was only the preliminary stages of hanging namely putting the noose on the neck, then tying the rope and accused 2 and 3 pushing up the body of the deceased and second accused also Hashing the torch. If P.W. 1 has seen all these acts, what P.W. 6 saw before coming out to the verandah must have been only a rehearsal that preceded. It has to be remembered that P.W. 6 turned hostile and refused to support the version of P.W. 1 to any extent. P.W. 1 says that he cried aloud and attempted to push open the door unsuccessfully. It was thereafter that he went to the residence of P.W. 2 and took him also to the house of the deceased. By that time the entire process of hanging was over. The deceased was untied and she was laid in a mat inside the room. In this respect also we feel that the evidence of P.W. 1 is highly artificial and next to impossibility also.

8. The common case of P.Ws.1 and 2 is that they returned to the house of occurrence together. The door was lying open and P.W. 6 and the second accused were in the verandah. While both of them said that the second accused kept silent to their queries, the version of P.W. 2 is that P.W. 6 again narrated the entire incident from beginning to end. P.W. 1 did not agree with P.W. 2 in this respect. We feel that P. Ws. 1 and 2 were only giving exaggerated versions. If their versions are accepted the accused who attempted to poison and murder the deceased must have placed spit pan also near the deceased enabling her to vomit in that pan after consuming poison administered on her It is highly improbable to think that murderers will make such stage arrangements also in an attempt to commit murder. Further we feel that there is a strong element of improbability in the incident having taken place in the manner spoken to by P.W. 1 Second appellant, if she participated in a murder, cannot be expected to be in the verandah so coolly even after knowing that P.W. 1 has seen everything.

9. If there is evidence in support of the commission of crime, motive need not be taken very serious note of. But in this case the suspicious nature of the evidence of P.W. 1 warns us that the sufficiency of the motive also will have to be taken into account. The only fault alleged on the part of the deceased is that she failed in getting back 15 sovereigns of gold ornaments from her father. P.W. 7 is the father and he admitted having taken 15 sovereigns of ornaments from his daughter. He said that he did not return the ornaments because his daughter believed that it will be either sold or given to his sister by the first accused. Therefore whether there was some controversy on the question of the ornaments is a matter which is not seriously disputed. On this score it is improbable to believe that an aged mother and an younger brother will join hands with the husband to make a long drawn out attempt lasting for 71/2- hours to commit murder of an innocent lady. The part attributed to the second accused was pushing the body up and flashing the torch. We think that it may not be proper on our part to believe such an incredible story. We do not mean to say that it is an impossibility. We are also not unaware of the fact that sufficiency of motive may vary from case and person to person. In spite of all those facts we feel delicate to accept the case and evidence.

10. The trial court, in our opinion, has misconstrued the evidence in he case. In para. 13 of the Judgment it is stated that medical evidence shows that there was sufficient poison inducted in the system of the deceased to render her helpless. It was also Stated by the Sessions Judge that it is certain that after the effect of the poison had started, the deceased could not hare hanged herself. We are afraid that the Session Judge has gone beyond the evidence in coming to the above said conclusions. Vomit found at the scene of occurrence and the various objects were collected and Send for chemical examination. Ext. P9 is the report. It shows the presence of poison of Oleander seeds and Oduku leaves. So also nitracepam (nitravet tablets) was also found. After post mortem examination evidenced by Ext. P7, the Viscera contents Were examined and Ext. P12 is the report. That Shows only the presence of nitracepam which is a mild sleeping pills. That means no poison went inside the system of the body. All poisonous materials were vomitted out. It is not known on what evidence the Sessions Judge found that medical evidence is that there was sufficient poison inducted in the system of the deceased to render her helpless and thereafter she could not have hanged herself. The Sessions Judge also found that the medical evidence conclusively proves that cause of death was Asphyxia and that Ext. P2 along with the evidence of P.W. 5 proves that the accused had purchased Nitravet tablets. This is also a conclusion without any evidence at all. Ext. P2 is a prescription in the letter head of P.W. 5. It does not bear the date and it was not signed also he name of the patient to whom it was issued is also not there. When examined in the box P.W. 5 said that he is absolutely Unaware as to whom Ext. P2 was issued by him. If that be so we wonder how the Sessions Judge came to the conclusion that Ext. P2 along with the evidence of P.W. 5 proves that accused purchased the nitravet tablets That finding will have to be totally discarded. The deposition of P. Ws. 3 and 4 regarding the alleged movements and conduct of the first accused after the incident cannot have any bearing in deciding the guilt or innocence.

11. Then what remains is only Ext. P5 confession made by the first accused to the Magistrate.

12. The first accused was arrested on 4-10-1982. On 5-10-1982 the Circle Inspector requested the Magistrate to record the confession of the first accused who was by that time in the Sub jail. On 5-10-1982 when the first accused was produced the Magistrate warned him and Send him back to the Sub jail. Confession was recorded only the next day when he was again produced from the Sub jail the Session Judge found that the confession is voluntary. It was used as evidence not only against the first accused but against the two co-accused also. We are of opinion that the Sessions Judge went wrong in this respect a also.

13. Recording of the confession is under Sec. 164 of the Criminal Procedure Code. It can be recorded by the Magistrate during investigation or at any time thereafter before commencement of the enquiry or trial. Formerly recording of Judicial

confession was governed by circular''s issued by the High Court. Judicial confession is a weak form of evidence unless the procedural safeguards are strictly complied with. That is because normally no offender will voluntarily make a confession and expose him to punishment unless it is extracted in some form from him. It is the fundamental duty of the courts to see that whenever a confession is recorded, it must be after full satisfaction that it is voluntary. This aspect of the matter has come up for consideration in the decision reported in Paramewsaran Pillai v. Sirkar (1949 K. L. T. 198) and it was observed thus:

The omission to record the specific words of the Magistrate is only an irregualarity. The conditions to be observed by the Magistrate who proceeds to record a confession are given in the Criminal Circular No-3 of 1072 issued by the High Court. The Magistrate is bound to strictly observe the provisions mentioned in the above circular. It was his duty to record every question put to the accused and every answer given by him. The Magistrate has not certified that he has examined the person of the accused with a view to ascertain that the confession is a voluntary one and no question was put to him regarding the treatment he had at the hands of the police. Therefore it is not safe to rely on such evidence.

14. Now we need not go to the circulars. They are superseded by the Criminal Rules of Practice. These rules were there in the Travancore-Cochin State and they were more or less incorporated in the Kerala rules. Sec. 164 (2) of the Criminal Procedure Code says that before recording any such confession the Magistrate will have to explain to the person making it that he is not bound to make a confession and that, if he does so, it may be died as evidence against him. So also it is stated that the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily. Sec. 164 (4) provides that recording of the confession shall be in the manner provided under Sec. 281. The substance of the examination of the accused for the purpose of recording the judicial confession will have to be in the form of a memorandum to be signed by the maker and the Magistrate. The whole of such examination including every question put to the accused and every answer given by him will have to be fully recorded by the presiding Judge or Magistrate himself. It will have to be shown or read over to the accused and if he does not understand, it will have to be explained to him. Clear guidelines are given for this purpose in Chapter X of the Criminal Rules of Practice. Rule 70 says that until the Magistrate has first recorded in waiting his reasons for believing that the accused is prepared to make the statement voluntarily and until he has explained to the accused that he is under no obligation to answer any question that it is not intended to make him an approver and that anything he says may be used against him, his statement shall not be recorded. The Magistrate has first to question the accused. By this process and by other methods he will have to bring out facts and circumstances to have the satisfaction that the accused is prepared to make the statement voluntarily. He must be specifically made known that he is under no obligation to make a confession or

even answer any question at all. He must be asked whether the police offered to make him an approver. The Magistrate will have to tell him that he himself is, the person who is competent to tender pardon and that the recording of the confession statement was not at all intended to make him an approver. Otherwise he may sometimes go under the assurance given by the police that he will be made an approver and he may not have to shoulder the responsibility of the crime. Since normally an accused may not give a voluntary confession statement, if he knows that it will expose him to punishment, the court must by a process of questioning rule out all the possibilties of extraction. It is the duty of the Magistrate to elicit the circumstances under which the confession is going to be made. The position which the police had with the accused also will have to be ascertained in order to avoid the possibility the statement being influenced by the police. Rule 70 (3) of the Criminal Rules of practice has formulated some of the questions to be put to the accused before recording the confession statement. The accused must be asked when he was taken to custody, how long he was in police custody, how often he was questioned by the police, where he was detained, whether he was urged by the police to make a confession and all such aspects. It is the duty of the Magistrate to take all precautions to remove the accused from the influence of the police and sufficient time given to him for reflection. If even after these formalities are undergone, still any doubt lingers in the mind of the Magistrate he will have to remand the accused to the Sub jail again before recording the statement. Though ordinarily the period provided for this purpose is 24 hours that can vary this side or that side depending upon the facts and circumstances of each case. The questioning and the suggestions should never be in the presence of the concerned police officer or any co-accused. Except for exceptional reasons the questioning and recording of confession will have to be in open court also. All the questions and answers will have to be recorded in first person and the fullest possible details will have to be eliciated in the confession to avoid all possible doubts. It is the duty of the Magistrate to reveal his identity to the accused and convince him that no consequence is going to follow even if he refuses to make the confession or answer the question.

15. On going through Ext. P5 and the evidence of the Magistrate who recorded the same, we are not satisfied that these procedural formalities we re strictly complied with. The Magistrate had first asked the first accused whether he knows who he is The answer was in the affirmative. From this answer the Magistrate must have possibly gone under the impression that his identity as a Judicial Officer became known to the accused. We do not feel that there is any guarantee for that assumption An illiterate accused need not necessarily know the person who is asking the question. He can very well go under the impression that the person who is asking the question is a higher police official. Therefore the Magistrate ought to have informed the accused that he is the Judicial officer competent to record the confession and that a refusal to confess will not expose him to any risk at all. That was not done. On the first day the last question asked was in the form of a warning

that confession statement, if given, will be used as evidence against him coupled with a further question whether in these circumstances he is still inclined to make a confession. The answer given was that he must get time for reflection. Thereafter he was remanded to judicial custody in the Sub jail and produced again at 3 p.m. the next day. On that day the Magistrate has not chosen to ask any question at all in order to elicit whether the first accused, after reflection, decided to make the confession or under what circumstances that decision was taken. The other warnings according to rules were also not given. When he was produced he was straightaway asked what he has to say regarding the case. In answer the first accused give a detailed confession statement. After recording the same and not being satisfied the Magistrate asked a further question whether he has anything more to say. It was after recording the entire confession statement that further questions were asked. There is no fun in asking all these questions and giving warnings after recording the entire body of the confession statement. That will be just putting the cart before the horse. We are not satisfied that the Magistrate acted properly in recording the confession statement from the first accused. Disagreeing with the Sessions Judge we find that the confession statement cannot be acted upon. Further there is the fact that the confession has been retracted also.

16. The confession as corroborated by other evidence was accepted by the Sessions Judge not only against the first accused but against accused 2 and 3 also. At the best the evidence adduced in the case is capable of creating only some sort of suspicion in the mind of the court that in all probability the accused must have committed the crime. But that suspicion itself is weakened by the improbabilities detailed by us earlier. The suspicion and improbabilities are further strengthened by the artificial way in which the long drawn out process was attempted to be alleged and proved by prosecution. Suspicion however strong cannot be substitute for legal testimony. As we have earlier stated the medical evidence will not completely rule out the possibility of suicide. Either in Ext. P7 or in Ext. P8 it was not stated whether it is a case of suicide or homicide. We have already discussed the evidence given by P.W. 11 who was examined as a substitute for the doctor who conducted the post-mortem examination He also did not rule out suicide as a possibility. Even accepting the prosecution case this is an instance in which the deceased was completely frustrated by her bitter experience in life. The prosecution itself alleges that she asked her husband to murder her. If that is correct her mental state is clear from that fact itself. Out of frustration or even for the purpose of wreaking vengeance on those whom she believed to have ruined her life, a lady in such a position can commit suicide. The psychological aspect was also not considered by the Sessions Judge. For all these reasons, we are of opinion that the appellants are entitled at least to the benefit of doubt.

17. Under Sec. 30 of the Evidence Act the confession of an accused affecting his co-accused could only be taken into consideration by the court. It could only be regarded as amounting to evidence in a general way, because whatever is

considered by the court in accepting or rejecting a position can be generally termed as evidence. Circumstances amounting to probabilities are also evidence in the general sense. Difference is only in the degree of acceptability for arriving at conclusions. Though confession is also general evidence under S. 30 of the Evidence Act it is not evidence as defined under S. 3. It is substantive evidence against, the maker if other conditions are satisfied. So far as a co-accused is concerned, the position is not the same. Normally nobody is bound by the confession of others. It is true that one of the essential ingredients is that the person making the confession must be incriminating himself also. That is an essential part of the confession, Confession incriminating a co-accused can arise under different situations. Sometime it may be out of bias and sometimes it may be for the purpose of self extrication. Possibilities of genuine confessions implicating co-accused also are there. Before considering the confession the court will have to first consider the evidence and form an opinion based on its quality and acceptability. Confession of a co-accused which is found to be voluntary and unbiased could be looked upon as evidence only for the purpose of lending assurance to the conclusion of guilt which the judicial mind is about to reach on the evidence. When the evidence is found balancing a voluntary unbiased confession of an accused affecting a co-accused can be accepted to tilt the balance. It cannot be treated as substantive evidence. This consideration for seeking assurance or credibility to the other evidence could be had only when the other evidence is sifted properly and the court finds an inclination to accept the same. (See Haricharan Kurmi v. State of Bihar (AIR. 1964 SC 1184). So far as this case is concerned there is absolutely no acceptable evidence incriminating not only accused 2 and 3 but even the first accused who is the maker of the confession statement. Such being the case here is no question of considering the confession at all. On a consideration of the entire evidence and circumstances we re of opinion that the Sessions Judge found the appellants guilty without sufficient acceptable evidence. Disagreeing with the Sessions Judge we find that the prosecution failed in bringing home the guilt of the appellants beyond doubt.

The result is that the Criminal Appeal is allowed, the conviction and sentences are set aside and all the three appellants are acquitted. Appellants 1 to 3 are set at liberty forthwith if not they are wanted in any other case. The bail bonds of the second appellant, who is already on bail, are cancelled.