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(2002) 1 ILR (Ker) 258 : (2002) 1 RCR(Criminal) 612

High Court Of Kerala

Case No: C.R.A. No. 145 of 1999

State APPELLANT

Vs

Swarnappan RESPONDENT

Date of Decision: Nov. 22, 2001

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 273, 299
- Evidence Act, 1872 - Section 145, 33

Citation: (2002) 1 ILR (Ker) 258 : (2002) 1 RCR(Criminal) 612

Hon'ble Judges: K. Padmanabhan Nair, J; J.B. Koshy, J

Bench: Division Bench

Advocate: T.P. Kunjabdulla, P.P, for the Appellant; Thomas Abraham, for the Respondent

Final Decision: Dismissed

Judgement

J.B. Koshy, J.
This an appeal field by the State against the acquittal of the accused in SC No. 79 of 1994 on the file of the I Additional Sessions Judge, Thiruvananthapuram. The offence was alleged to have committed more than two decades ago. It is alleged that accused was coming for trial after 17 years of occurrence. The advocate of the appellant who filed vakalath before this Court died and Public Prosecutor reported that his information is that accused also is dead. But despite granting time, Public Prosecutor was not able produce death certificate. Therefore, we are considering the merits of the case. To prove the case prosecution heavily depends upon Section 299 of the Criminal Procedure Code.

2. The prosecution case as summarised by the learned Sessions Judge is as follows:

"The accused was having previous enmity towards the deceased Velappan Pillai, who was conducting a medical shop. According to the prosecution, the deceased Velappan Pillai had administered injection on one Savin Pillai, who is the brother of the accused herein. Consequent to the injection, Sivan Pillai died and a case was foisted against the

deceased Velappan Pillai, who was acquitted by the J.P.C.M. Nedumangad as per the Judgment. After the acquittal, the deceased who was a Constable in the C.R.P. approached PW1, the brother of the deceased Velappan Pillai and wanted his to compensate the deceased Sivan pillai"s family. PW1 was not heeding to the demand and hence the accused declared that he would retallate. When the accused came to the native place on leave, he committed the murder of the deceased Velappan Pillai.

The occurrence took place on 17.10.1980 at about 9.30 PM. The deceased Velappan Pillai closed his medical shop at the Aryanad junction and he was proceeding to his house, while the accused waited for him near a betal shop. When the deceased Velappan Pillai was proceeding, the accused followed him and when he reached on the southern side of the old bridge about 25 feet away, the accused stabbed the deceased with a knife looking like a bionet from behind, on his head. While the deceased Velappan Pillai was turning back, he again stabbed the deceased Velappan Pillai and he sustained injuries on his right armpit and the chest. The deceased cried and fell down on his right knee. The accused thereafter, without drawing the knife fully out, withdrew the knife slightly and then again thrusts it into the chest, asked him as to whether he did not die."

3. PW1 who gave FI statement did not see the incident. He saw the deceased on the side of the road with bleeding injuries. PW1 along with others took him to Nedumangad Government Hospital. PW6 doctor examined him and declared him and declared him dead. There is no dispute reading identification of the dead body or injuries on the dead body. There were tow deep penetrating incised wounds in the chest and each of the injuries were sufficient to cause death. Those injuries as per Ext. P11 postmortem certificate issued by PW11 doctor, who conducted postmortem are as follows:

"Injury No.2: Incised penetrating wound 9 x 3 cm obliquely placed across the front of chest, the upper right end which showed tailing was 5 cm from the right nipple and the Lower left end was 2 cm below the nipple level. On dissection, two separate wound tracks were found. One penetrated the left chest cavity thought the 5th intercostal space and punctured the lower lobe on left lung (5 x 3 x 9 cm) wound track was directed downwards, back wards and to the left having a minimum depth of 10 cm. The other would track penetrated the left chest cavity cutting thought the 5th costal cartilage and sternum (3.5 cm) and punctured both ventricles of the heart for a depth of 6 cm. The wound was directed back wards and upwards form a minimum depth of 7.5 cm. The left end of the wound showed splintering and the other end was sharply cut.

Injury No. 8: Incised penetrating wound 4 x 1x 5 cm. obliquely placed on the back of chest across the milline at the level of 3rd thoracic spine. The upper right end showed contusion and the lower left end was sharply cut. The wound perforated the back of 4th thoracic vertebra, entered the spinal canal and served the right half of spinal cord 1.5 x 1 cm. The wound was directed forwards, downwards and to the left."

The Session Judge correctly found that he died as a result of the above injuries.

4. Prosecution relied on direct evidence. According to the prosecution, PW2, CW2 and CW3 saw the incident. PW2 deposed that he did not see the incident at all. He did not implicate the accused at all. He turned hostile. No part of his evidence was helpful to the prosecution. CW2 and CW3 were not examined. According to the prosecution, they died. Therefore, prosecution relied on their deposition given before the Judicial I Class Magistrate Court, Kattakkada (PW9) u/s 299 of the Criminal Procedure Code. They were marked as Exts. P7 and P8. Deposition given before the Magistrate u/s 299 even though can be accepted as evidence if the witness died before trial, it is the duty of the prosecution to prove their death or non-availability. Section 273 of the Code of Criminal Procedure provides that all evidence shall be taken in the presence of the accused or in the presence of his pleader when his personal attendance is disposed with. Section 299 of the Cr. P.C. reads as follows:

299. Record of evidence in absence of accused:-

(1) If it is proved that a accused person has absconded and that there is no immediate prospect of arresting him the Court competent to try or commit for trial, such person for the office complained of may, in his absence, examine the witnesses (if nay) produced on behalf of the persecution, and record their deposition and any such deposition may, the arrest such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged. If the deponent is dead or incapable or giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) If it appears that na offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the first class shall hold an inquiry and examine any" witnesses who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dad or incapable of giving evidence or beyond the limits of India".

5. Section 299 is an exception to the general rule that evidence has to be taken in the presence of the accused as he has by his own conduct chosen to be absent. (See Tahsildar Singh v. State (AIR All 214). This Section also is an exception to Sections 33, 145 and other provisions of the Evidence Act incorporating the general rule that the evidence of a witness which a party had no right and opportunity to which cross examination is not legally admissible. (See Emperor v. Labbai Kutti AIR 1939 Mad 1990). The object of Section 299 is to preserve evidence, on account of long delay in the trial due to the absconding of the accused in a serious offence in the interest of ultimate justice. It is settled law that before an exception can be crated all the conditions prescribed by the statute should strictly be complied with. (See Sheoraj Singh Vs. Emperor Evidence recorded under this section can be availed of only when the witness is

dead or cannot be procured. The full burden is on the prosecution to prove that those ingredients are satisfied. In AIR 1946 1 (Privy Council) the Privy Council held that in such cases strict proof is necessary. In Nirmal Sing v. State of Haryana AIR 2000 SCW 1111 even though their Lordships were satisfied on the facts of that case that the burden was discharged by the prosecution. The Court held as follows:

"....There possibly cannot be any dispute with the proposition of law that for taking the benefits of Section 299 of the code or Criminal Procedure, the conditions precedent therein must be duty established and the prosecution, which proposes to utilise the said statement as evidence in trial, must therefore, prove about the existence of the preconditions before tendering the evidence...."

6. For application of Saction 299 there should be a definite finding to the effect that witnesses died at the time of trial or became incapable of giving evidence. Here, the learned Sessions Judge had taken evidence in this regard and came to a definite finding of fact that prosecution did not establish that CW2 and CW3 dies at the time of trial or unable to be procured. In view of statutory mandate u/s 299, there is no infirmity in the evidence acceptable under that Section despite lack of cross examination. In spite of absence of cross examination, probative value of evidence acceptable u/s 299 is like any other acceptable evidence, but as a rule of evidence, like other admissible evidence court may require ti to be corroborated by circumstances of the case ad other evidence adduced in the case. Its is the duty of the court to appraise evidence adduced in the case as a whole. Hence PW2, the only other occurrence witness examined by the prosecution turned hostile and denied his presence. This is a point against the prosecution. The prosecution also failed to prove that CW2 and CW3 were dead or unable to be procured at the time of trial.

7. From the evidence learned Sessions Judge found that the prosecution did not discharge this burden. Evidence in this respect were considered by the Sessions Judge in paragraphs 23 to 26 which read as follows:

"23. The death of CW2, Kamara Pillai is however, seriously challenged in this case and the accessed had denied his death. In the above circumstances, the prosecution has the burden to prove the death of Sri. Kumara Pillai beyond reasonable doubt. The best evidence to prove the death is by production of the Death Certificate and hence the prosecution marked Ext. P17, the Death Certificate which is purported to be the Death Certificate relating to Sri. Kumara Pillai. But, on a perusal of the Death Certificate and the summons issued to Sri. Kumara Pillai, I find that the father"s name and house name in those documents are different.

24. Ext. P18 is the summons issued to CW2. The address shown therein is Sri. Kumara Pillai, S/o. Madhavan Pillai, Pooyamveettu Veedu, Arayanad. But the Death Certificate, Ext. P17 would show the details of the deceased as follows: "Sri. Kumara Pillai, S/o. Mathevan Pillai, Poovammoottu Veedu, Aryanad P.O." The name of the father shown in

the summons, Ext. P18 is "Madhavan Pillai" but in Ext. P17 the death certificate is "Mathevan Pillai". So also, the house is shown as "Pooyam Poottu Veedu" in Ext. P18 whereas in ext. P17, the house name is shown "Poovam Mottu Veedu". In the light of the above discrepancy, the prosecution has a duty t prove beyond reasonable doubt that Ext. P17 relates to none other than CW2. Any way, in the light of the difference in the name of father and the house it is not possible for me to conclude positively that Ext. P17 relates to CW2 Kumara Pillai himself.

25. With respect to the death of CW3, Sri. Krishnankutty also, the evidence is of similar nature. PW 14 deposed that while working as a police constable, in the Aryaanad Police Station, he had gone in the address shown in the summons issued t CW3, but he could not serve the summons, since CW3 was reported to be dead. The death certificate is marked as Ext. P20 and the summons issued to CW3 Sri. Krishnankutty is marked as Ext. P21.

26. On going through Ext. P20 and P21, I find that there is difference in the name of the father and the address. The father''s name shown in Ext. P21 is Kochappi, whereas in Ext. P20, the death certificate, the father''s name is shown as "Kochan". The house name in the summons is "Madathuvilakam Veedu, Kottakkakom, Aryanad" whereas in Ext. P20, the Death Certificate the address is shown as "Vishnu Nagar, Kottakkakam, Kottakkakom P.O." Thus there is difference in the name of the father and the address in these two documents and the absence of explanation for the discrepancies, it is not possible to hold that Ext P20 the death certificate relates to CW23.

27 According to me, the prosecution has failed to establish beyond reasonable doubt that CW2 and CW3 in this case are no more. None of the relatives of CW2 and CW3 were examined in this case. None of the witnesses who wee examined in this case were made to speak before court that CW2 and CW3 are no more. IN the above circumstances based on Ext.P17 and P20 alone, I am not able to enter a finding that CW2 and CW3 in this case are dead."

We are in perfect agreement with the learned Sessions Judge in the above reasons. If Exts. P7 and P8 are not received in evidence, there is no evidence connecting the accused with the crime except some suspicion.

8. In the above circumstances, we agree with the findings of the learned Sessions Judge that prosecution was not able to prove the charges conclusively against the accused. Even otherwise, in an appeal against acquittal this court will not interfere with the judgment of the Sessions Court unless the finding of the court below is not a reasonable possible view. It cannot be stated that the findings of the Sessions Court are perverse or illegal or view expressed by the court is not a reasonable possible view. Hence we confirm the order of acquittal passed by the court below and dismiss the appeal.