



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Criminal Jurisdiction)

Monday, the Seventeenth day of October Two Thousand Sixteen

PRESENT

The Hon`ble Mr.Justice S.NAGAMUTHU
and

The Hon`ble Mr.Justice M.GOVINDARAJ

CRL MP(MD) No.9266 of 2016

IN

CRL A(MD) No.351 of 2016

P.RAMESH

... PETITIONER/SOLE ACCUSED

Vs

THE STATE REPRESENTED BY
THE INSPECTOR OF POLICE,
RURAL POLICE STATION,
VIRUDHUNAGAR DISTRICT
CR. NO. 21 OF 2014

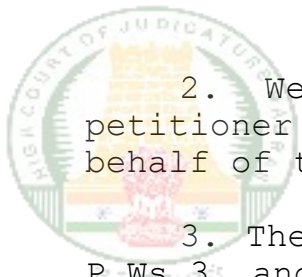
... RESPONDENT/COMPLAINANT

Petition praying that in the circumstances stated therein and in the petition filed therewith the High Court will be pleased to suspend the execution of sentence imposed by the District Judge, Fast Track Mahila Court, Virudhunagar District at Srivilliputhur by a judgment passed in SC NO. 73 of 2015 dated 24.06.2016 pending disposal of the Criminal Appeal and thus render justice.

Order : This petition coming on for orders upon perusing the petition filed in support thereof and upon hearing the arguments of M/S.P.DANESWARAN, Advocate for the petitioner and Mr.R.RAMACHANDRAN, Additional Public Prosecutor, on behalf of the Respondent the court made the following order:-

[Order of the Court was made by **S.NAGAMUTHU, J.**]

The petitioner is the sole accused in S.C.No.73 of 2015, on the file of the learned Sessions Judge, Fast Track Mahila Court, Virudhunagar District at Srivilliputhur. He stood charged for the offences punishable under Sections 498(A) and 302 of the Indian Penal Code. By judgment dated 24.06.2016, the Trial Court has convicted him under both charges and sentenced him to undergo rigorous imprisonment for three years and to pay a fine of Rs.10,000/-, in default, to undergo simple imprisonment for six months for the offence punishable under Section 498(A) IPC and to undergo imprisonment for life and to pay a fine of Rs.50,000/-, in default, to undergo simple imprisonment for 2 years for the offence punishable under Section 302 IPC. Challenging the said conviction and sentence, the petitioner has come up with the present Criminal Appeal. Pending appeal, he seeks suspension of sentence.

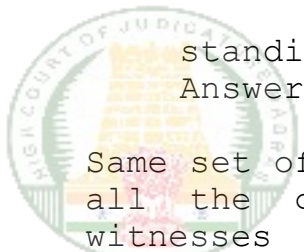


2. We have heard the learned counsel appearing for the petitioner and the learned Additional Public Prosecutor appearing on behalf of the State. We have also perused the records carefully.

3. The petitioner is, admittedly, the husband of the deceased. P.Ws.3 and 4 are their children, aged 8 years and 6 years respectively. It is the case that the petitioner had frequent quarrels with the deceased, since the deceased questioned the petitioner for his illicit intimacy with another woman. It is alleged that on the day of occurrence, the accused, the deceased and P.Ws.3 and 4 alone were there in the house. It is the further case of the prosecution that the accused attacked the deceased with a wooden log and caused her death. The occurrence was witnessed by P.Ws.3 and 4, the children, who were present in the house. P.W.3 informed P.W.1 about the occurrence immediately thereafter. P.W.1 rushed to the place of occurrence and found the deceased with injuries and she died succumbing to the injuries.

4. During trial of the case, P.Ws.3 and 4, namely, the children of the deceased were produced for examination. It needs to be mentioned that earlier, during the course of investigation, P.Ws.3 and 4 were examined under Section 164 of the Code of Criminal Procedure and their statements were recorded by the learned Judicial Magistrate. At that time, the learned Magistrate found these two witnesses as competent to depose. That is a reason why, they were examined by the learned Magistrate. But, strangely, during trial of the case, that took place after about one year, when P.Ws.3 and 4 were produced before the Trial Court for examination, the Trial Court has committed a very serious illegality in not allowing these two witnesses to depose before the Court in respect of what they have seen. The copies of depositions of P.Ws.3 and 4 have been produced before us for our inspection. It is seen from the depositions of these two witnesses, that the learned Magistrate administered oath on these two witnesses on 19.05.2015. After affirmation of oath, the Trial Court asked few questions to P.W.3-Swetha, as follows:

Question : What is your name?
Answer : Swetha
Question : What is your age?
Answer : 8 years
Question : What is your father's name?
Answer : Ramesh
Question : What is your Village name?
Answer : Chinna Perali
Question : What are you doing?
Answer : Studying
Question : Where have you come?
Answer : Court
Question : What for you have been brought to the Court?
Answer : To give evidence
Question : Do you know before whom you are



standing?

Answer : I do not know.

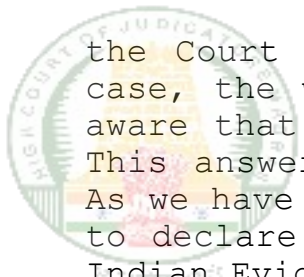
Same set of questions were asked to P.W.4 also. He has also answered all the questions except the last question. Since these two witnesses did not say that they were standing before a Judge presiding over the Court, the Trial Court found them incompetent to give evidence. Accordingly, the Trial Court refused to allow them to depose further.

5. In this regard, we have to say a few words about Section 118 of the Evidence Act, which reads as follows:

"118. Who may testify.- All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

6. The above provision came to be interpreted for more than a century and half by various Courts including the Honourable Supreme Court. It has been consistently held by the Honourable Supreme Court that a witness, irrespective of his age, shall be presumed to be competent to testify before the Court. But, on account of tender age, if it is found by the Court that the witness is prevented from understanding the questions put to him, or from giving rational answers to those questions, then only he can be declared to be incompetent to depose. But, in this case, though these two witnesses have answered all the questions in a rational manner, simply because, they told the truth that they did not know that the one, who was presiding over the Court, was a Judge, the Trial Court refused to record their evidence. The Trial Court has not even recorded its opinion that they are incompetent for reasons, which are enumerated in Section 118 of the Indian Evidence Act. We are unable to understand as to how the Trial Court administered oath on these two witnesses, even before testing their competence to give evidence on account of tender years of age. It is strange to note that these two witnesses were found to be competent to depose by the learned Magistrate one year before when they were examined under Section 164 of the Code of Criminal Procedure.

7. When that be so, we are unable to understand as to how the Trial Court was able to give such a finding that these two witnesses were incompetent, simply because, they did not know that one, who was presiding over the Court, was a Judge. The Trial Court has failed to understand that the questions put to a witness are not as a measure to test their memory or to test their general knowledge. It may be true that a witness may not know that a particular person presiding over the Court is a District Judge, Subordinate Judge or a Judge at all. Lack of knowledge to know about the position of the one who is presiding over the Court would not indicate that the answer given by the witness is irrational. If some answer is given so irrelevantly indicating that the answer is irrational, then only,



the Court can declare the witness incompetent. But, here, in this case, the witness has very tacitly told the truth that she was not aware that the one, who was presiding over the Court, was a Judge. This answer is a rational answer expressing the lack of knowledge. As we have already pointed out, lack of knowledge cannot be a ground to declare a witness as incompetent in terms of Section 118 of the Indian Evidence Act.

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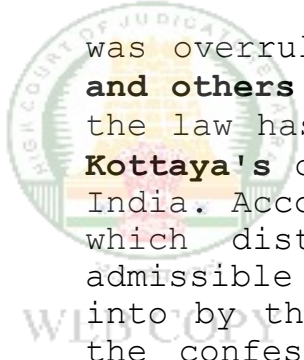
8. It is quite shocking for us that the learned Public Prosecutor, who conducted the case before the Trial Court, did not raise any objection in respect of the refusal of the Trial Court to permit P.Ws.3 and 4 to depose further, when they were on oath. It is also shocking to know that the prosecution did not take steps to challenge the order of the Trial Court refusing to allow P.Ws.3 and 4 to depose, though the Trial Court has already administered oath on them. Thus, not only the Trial Court, the learned Public__Prosecutor has also not discharged his duties, as expected of, in law. As a result, two natural witnesses, who had allegedly seen the occurrence and who had earlier given statements under Section 164 of the Code of Criminal Procedure, have been denied an opportunity to depose before the Court. Thus, very valuable pieces of evidence of eye witnesses have been lost by the prosecution.

9. The learned counsel for the petitioner has taken us through the entire judgment. The Trial Court, in paragraphs Nos.23 and 24, has extensively narrated the statements of P.Ws.3 and 4 recorded under Section 164 of the Code of Criminal Procedure and has held that these statements recorded under Section 164 of the Code of Criminal Procedure are substantive pieces of evidence, upon which, reliance can be made. The learned Judge was ignorant of the settled position of law that a statement recorded under Section 164 of the Code of Criminal Procedure, being a former statement, could be used either to corroborate the maker of the statement or to contradict him and the same could never be treated as substantive evidence. But the Trial Court went ahead not to allow P.Ws.3 and 4 to depose, but relied on the statements recorded from these witnesses under Section 164 of the Code of Criminal Procedure to hold that from their statements, it has been established that it was this accused who attacked the deceased and killed her. On one hand, the Trial Court has given a finding that these two witnesses were incompetent to depose, whereas, on the other hand, the Trial Court has relied on their statements recorded on the earlier occasion, that is about one year before, as though they were competent to depose. At any rate, the most shocking illegality committed by the Trial Court is that the Trial Court has treated the statements of these two witnesses under Section 164 of the Code of Criminal Procedure as substantive evidences to convict the accused.

10. The learned counsel has pointed out that in paragraph No.26 of the judgment, the Trial Court has again relied on the entire confession of the accused made to the Investigating Officer during investigation.

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11. The law laid down in this regard by the Madras High Court



was overruled by the Privy Council in the case of **Pulukuri Kottaya and others Vs. Emperor**, reported in **AIR (1947) Privy Council 67** and the law has been consistently followed in this country, as **Pulikuri Kottaya's** case principle has been recognized by the Supreme Court of India. According to the settled position that part of the statement, which distinctly leads to the discovery of a fact alone is admissible and the other portions of the confession cannot be looked into by the Trial Court. But, in this case, though the portion of the confession, which led to the discovery of a fact alone, was proved in evidence, the Trial Court has relied on the entire confession as though it was proved in evidence and she has come to the conclusion that the said confession corroborates the statements of witnesses, namely P.Ws.3 and 4 recorded under Section 164 of the Code of Criminal Procedure. This is another illegality, which shows the total ignorance of even the basic principles of criminal law by the Trial Court.

12. Though we are conscious of the legal position that while dealing with an application for suspension of sentence, we need not deal with the grounds raised in the appeal memorandum in extenso, only to justify our observation that the learned Trial Judge, who conducted the trial and delivered the judgment, needs judicial training, as she lacks even the basic principles of criminal law, we have dealt with these aspects in extenso.

13. For the above said reasons, we are inclined to suspend the substantive sentence imposed upon the petitioner.

14. In the result, the petition is allowed and the substantive sentence of imprisonment imposed on the petitioner/sole accused alone is suspended pending disposal of the above said CrI.A.(MD) No.351 of 2016 and the petitioner is directed to be enlarged on bail on his executing a bond for a sum of Rs.10,000/- (Rupees ten thousand only) with two sureties each for a like sum to the satisfaction of the learned Judicial Magistrate No.2, Virudhunagar, subject to a condition that he shall report before the Committal Court, once in a month, i.e., on the first working day of every English Calendar month at 10.30 a.m. until further orders.

sd/-

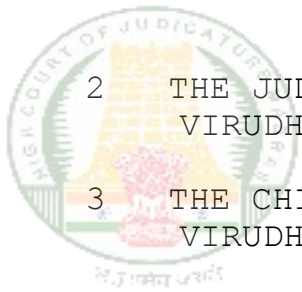
17/10/2016

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Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

TO

1 THE DISTRICT JUDGE
<https://hcservices.ecourts.gov.in/hcservices/>
FAST TRACK MAHILA COURT, VIRUDHUNAGAR
DISTRICT AT SIRVILLIPUTHUR



2 THE JUDICIAL MAGISTRATE NO.2
VIRUDHUNAGAR

3 THE CHIEF JUDICIAL MAGISTRATE
VIRUDHUNAGAR DISTRICT AT SRIVILLIPUTHUR

4 THE INSPECTOR OF POLICE,
RURAL POLICE STATION,
VIRUDHUNAGAR DISTRICT

5 THE SUPERINTENDENT
CENTRAL PRISON, MADURAI

6 THE ADDITIONAL PUBLIC PROSECUTOR,
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

COPY TO

1 THE REGISTRAR (ADMIN)
MADURAI BENCH OF MADRAS HIGH COURT,
MADURAI

2 THE SECTION OFFICER, 'B' SECTION,
MADURAI BENCH OF MADRAS HIGH COURT,
MADURAI

+1. C.C. to M/S.P.DANESWARAN Advocate SR.No.60930

JAM/18.10.16/GSV-PM/SAR I/6P-10C

ORDER
IN
CRL MP (MD) No.9266 of 2016
IN
CRL A (MD) No.351 of 2016
Date :17/10/2016