IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31/03/2003

CORAM

THE HONOURABLE MR. JUSTICE M. KARPAGAVINAYAGAM
AND
THE HONOURABLE MR. JUSTICE A.K. RAJAN

Criminal Appeal No. 201 of 2000

Duraisamy .. Appellant

-Vs-

State rep. by
Inspector of Police,
Thoppu Police Station,
Dharmapuri District. .. Respondent

Criminal Appeal filed against the judgment dated 10.1.2000 in
S.C. No. 76 of 1999 rendered by the Principal Sessions Judge, Dharmapuri.

!For Appellant : Mr. G. Karthikeyan

^For Respondent : Mr. E. Raja
Addl. Public Prosecutor

:JUDGMENT

(The Judgment of the Court was delivered by A.K. RAJAN,J.)

Duraisamy, the appellant herein, was convicted for the offence under Sections 447 and 302 I.P.C. and sentenced to undergo one month simple imprisonment under Section 447 I.P.C. and life imprisonment under Section 302 I.P.C. Challenging the same, this appeal has been filed.

2. The case of the prosecution in brief is as follows:-

(i) The accused is the brother's son of the deceased, who was residing in a village called Yerudhukaranpatty. The deceased was having a garden house, which is just 350 feet away from the village. The deceased used to treat the disease of small children by chanting some manthras; when the accused sustained injuries, the deceased could not cure him. Therefore, the accused suspected the deceased that he, by chanting some other manthras made the injuries incurable and therefore, he entertained grudge against the deceased. The accused used to threaten the deceased that he would murder him for not curing the injuries.

(ii) While so, on 5.5.1998, P.W.1, son of the deceased and

P.W.2 wife of P.W.1 brought meals along with P.W.1's sister to the garden house where the deceased was sitting. P.W.2 served food to the deceased and afterwards, P.W.1 started eating the remaining food. Within a short time, P.W.2 heard the noise of the deceased , who was lying out side of the garden house; immediately, P.Ws. 1 and 2 came out and saw the accused stabbing the deceased with M.O.1 'Palai aruval'. On seeing that, they cried, were stunned and also fainted for 15 to 30 minutes. Hearing the cries, the villagers gathered and on seeing the villagers, the accused ran away from the scene. On the next day at about 7.00 a.m., P.W.1 went to the Village Administrative Officer's office at Elagiri and gave a complaint Ex.P1 which was reduced into writing by V.A.O./P.W.4 and obtained the signature of P.W.1. Then P.W.4 took P.W.1 to the police station at Thoppur and handed over P.W.1 and the complaint at about 9.00 a.m. The Sub Inspector of Police P.W.9 received the complaint and registered a case under Sections 447 and 302 I.P.C. Ex.P14 is the Express F.I.R. and the same was sent to the Investigating Officer P.W.10, who was holding additional charge.

(iii) On receiving Ex.P14, P.W.10 came to the scene of occurrence at about 10.30 a.m., prepared observation mahazar Ex.P2 and rough sketch Ex.P.15. He recovered blood stained earth, sample earth and hurricane light and also conducted inquest in the presence of Panchayatdars and prepared inquest report Ex.P.16. He examined P.Ws. 1 to 3, and other witnesses and recovered M.O.3 lungi from the body of the deceased under Ex.P.13. He sent the dead body at 2.30 p.m. for post mortem through P.W.6.

(iv) P.W.5 Doctor, who conducted post-mortem at about 3.30 p.m. found 20 cut injuries on the dead body; he gave post-mortem certificate Ex.P7, and gave opinion that the death would have occurred due to multiple injuries between 12 and 24 hours prior to the autopsy.

(v) P.W.10, Investigating Officer, handed over the investigation to the regular Inspector P.W.11, who arrested the accused on 9.5.199 8 and on his confession, he recovered M.O.1 aruval under mahazar Ex.P.4. After completing the investigation, he filed the charge sheet for the offences under Sections 447 and 302 I.P.C.

(vi) The trial Court framed Charges under Section 447 and 302 I.P.C. To prove the charges, the prosecution examined P.Ws. 1 to 11, marked Exs. P1 to P17 and M.Os. 1 to 7.

3. When the accused was questioned under Section 313 Cr.P.C., about the incriminating circumstances against him, the accused denied his complicity in the crime.

4. The trial Court after considering the evidence available on record, found the accused guilty of the offences under Sections 447 and 3 02 I.P.C. and sentenced him thereunder. Challenging the same, the accused has preferred this appeal.

5. Mr. Karthikeyan, learned counsel for the appellant, took us through the entire evidence on record. He contended that no importance can be given on Ex.P1 complaint, since it has been given after a very long time.

Further, he contended that the complaint was prepared at the police station after consulting the Inspector of Police and other Police officials on the ground that P.W.2 admits that a complaint was prepared at the scene of occurrence after the police came to the scene of occurrence in the presence of the V.A.O. Therefore, the counsel would contend that the other complaint has been suppressed; and the suppression of material aspects would affect the case of the prosecution.

6. He would further contend that P.Ws. 1 and 2 would not have been present at the scene of occurrence; had they really been present, they would not have allowed the accused to cause 19 injuries on the deceased; they would have prevented the same; the fact that P.Ws. 1 and 2 did not prevent the accused shows that they were not present at the scene of occurrence; the recovery of M.O.1 aruval does not help the prosecution because P.W.4 Village Administrative Officer, mahazar witness, who witnessed the recovery of M.Os. 1 and 2 did not support the case of the prosecution and he turned hostile. Therefore, there is no evidence for recovery of M.O.1 aruval. Further, the aruval was not found to contain human blood. Thus, there is no acceptable evidence to connect the accused with the crime in question. Therefore, the accused is entitled for acquittal on this ground.

7. We have heard the learned Additional Public Prosecutor on these contentions.

8. We have given our careful consideration to the rival contentions urged by the learned counsel for the appellant and the Additional Public Prosecutor.

9. We are unable to accept the contentions of the learned counsel for the appellant for the following reasons.

10. P.Ws. 1, 2 and Valarmathi along with the deceased were living in the house, which is just 350 feet away from the garden house. In the evidence of P.W.1, it is seen that they used to take food in the garden house and some times they used to sleep there itself. P.W.1 clearly states that the deceased took food earlier and thereafter, P. W.1 started taking food and at that time, the accused came and attacked the deceased. After hearing the cry of the deceased, they came outside and saw the occurrence. P.W.1 also stated that even earlier, on more than 10 occasions, the accused came and threatened his father that he would kill the deceased and therefore, they had taken it lightly that it was only an empty threat and he would not cause any harm to the deceased. Therefore, only on hearing the cry of the father, they came out and saw the accused cutting his father with the aruval. On seeing this, he became unconscious for some time and recovered only after 15 to 30 minutes. This evidence of P.W.1 appears natural and there is no reason to suspect its veracity.

11. The argument of the learned counsel for the appellant that the son could have prevented the accused from inflicting more injuries cannot be accepte`1`07`d because, the reaction of the person would differ from man to man. Since he never expected that the accused would do any harm, on seeing the accused cutting the father of P.W.1, he got shocked and fainted. The occurrence took place at 8.30 p.m. The V. A.O. was residing at Elagiri which is 3 k.m. away from the scene of occurrence. There may be ever so many reasons for not approaching the V.A.O. during night. It is natural for the son, when the father has been murdered in such a manner, not to leave the body of the deceased and proceed to give a complaint immediately. He had waited

over night and early in the morning, he went to Elagiri and gave a complaint to the V.A.O., P.W.4, who reduced it into writing and thereafter, P.W.4 took him to the police station and gave the complaint. Thus, the delay in giving the complaint has been explained. Merely because there is delay in giving the complaint, it does not affect the case of the prosecution.

12. Learned counsel for the appellant then submitted that P.W.2 in her cross examination admitted that after the arrival of the police to the scene of occurrence, the complaint had been drafted by the P.W.4 Village Administrative Officer and in that, the signature of P.W.1 was obtained and therefore, there was another complaint. On this aspect no question has been put to P.Ws. 1 and 4. On the other hand, the evidence of P.Ws. 1, 4 and 9 would go to show that no such complaint was prepared at the scene of occurrence and Ex.P1 is the only complaint. Therefore, much importance cannot be given to the answer obtained from P.W.2 in the cross-examination.

13. P.W.11, Inspector of Police, has stated that M.O.1 was recovered at the instance of the accused and the Doctor, P.W. 5 in his evidence also stated that M.O.1 would have caused the injuries found on the deceased. Merely, because P.W.4 the mahazar witness for the recovery of the aruval has been treated as hostile, his evidence cannot be rejected in toto; in fact he speaks about the arrest of the accused and his statement; he has also admitted his signature in the recovery mahazar; PW11's evidence provides the necessary link to prove the recovery of the weapon; we cannot disbelieve the evidence of P.W.1 1 on this aspect. Though M.O.1 was not proved to contain human blood, the evidence available on record is sufficient to prove that the accused had caused the injuries on the deceased with the said M.O.1. The evidence of P.Ws. 1 and 2 that the accused had caused the injuries on the deceased with the aruval is sufficient to prove that the accused caused injuries using an aruval. Therefore, the available evidence prove the charges against the accused beyond reasonable doubt. There is no reason to alter the conviction and sentence imposed on the accused by the trial Court.

14. Before parting with this case, we have to refer to an important aspect with regard to examination of witnesses during the trial of sessions cases. In the case on hand on a number of occasions, some of the witnesses had remained silent when questions were put to them. The learned Sessions Judge has recorded that "the witness did not answer". Even to some important questions for which the answers are necessary for the Court to find out the truth, witnesses were allowed to remain silent and no answers were elicited.

15. In this respect, section 132 of the Indian Evidence Act stipulates as follows:

" 132. Witness not excused from answering on ground that answer will criminate: A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any Civil or Criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind. "

Proviso: "Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

That is, the witness shall not be excused from answering any question as to

any matter relevant to the matter in issue in any suit or in any Civil or Criminal proceeding, provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

16. The provision of section 132 has been interpreted as early as 18 78 by a Full Bench of Madras High Court in the case of THE QUEEN v. GOPAL DOSS (I.L.R. 3 Madras 271) , wherein it has been held as follows:-

" If a witness does not desire to have his answers used against him on a subsequent criminal charge, he must object to answer, although he may know beforehand that such objection, if the answer is relevant, is perfectly futile, so far as his duty to answer is concerned and must be over-ruled. "

In the same judgment, as per TURNER, C.J. :

" Again, with regard to the section, we are now considering, it will be observed that it does not in terms deal with all criminatory questions which may be addressed to a witness, but only with questions as to matters relevant to the matter in issue. Irrelevant questions should not be allowed, and it may be implied from the limitation in this section that a witness should be excused from answering questions tending to criminate as to matters which are irrelevant. To understand this section, it is desirable to consider it in connection with the subsequent sections 146, 147, 148, inasmuch as they together embrace the whole range of questions which can properly be addressed to a witness. By Section 138, it is enacted that a witness must be examined and cross-examined as to relevant facts, and by Section 146, it is enacted that, in cross-examination, he may also be asked any question which may tend to test his veracity, or to discover who he is and what is his position in life, or to shake his credit by injuring his character, though the answer may tend directly or indirectly to criminate him. If any such question relates to a matter relevant to the suit or proceeding, by which I understand no more than was meant by relevant to a matter in issue, the provisions of Section 132 are by Section 147 declared applicable to it. If the question is as to a matter relevant only in so far as affects the credit of the witness by injuring his character, the Court is by Section 148 directed to decide whether or not the witness is to be compelled to answer, and may (I presume if it does not think fit to compel him to answer) warn the witness that he is not obliged to answer it. The decision of the Court as to whether or not it shall compel an answer is to be governed by the considerations declared in the section. When there is a question asked to which the answer may tend to criminate a witness, he may object that it is not as to a matter relevant to a matter in issue, or that, if relevant, it is relevant only as affecting his credit by injuring his character.

In the former case, if the question is insisted on, the Court will compel the witness to answer it; in the latter, it will determine whether or not, in reference to the rules which are to guide its decision, it should or should not compel the witness to answer. "

Further, it has been held,

" The Indian Act gives the Judge no option to disallow a question as to matter relevant to the matter in issue. It gives him an option to compel or excuse an answer to a question as to matter which is material to the suit only so far as it affects, the credit of the witness."

.....
The end desired, the production of evidence from unwilling witnesses, was sought by depriving them of the privilege they had theretofore enjoyed of claiming excuse; but while subjecting them to compulsion, the legislature, in order to remove any inducement to falsehood, declared that evidence so obtained should not be used against them except for the purpose in the Act declared.
Further, this Court in the case KANDASWAMY GOUNDAR (AIR 1957 Madras 727 = ILR 1957 MADRAS 715), held that, Section 132 of the Evidence Act lays down that the witnesses are not excused from answering questions on the ground that their answers will incriminate them; but the proviso is to the effect that no such answer, which a witness shall be compelled to give shall subject him to any arrest of prosecution, or be proved against him in any criminal proceedings, except a prosecution for giving false evidence by such answer.
The Division Bench of the Allahabad High Court in the case of CHOTKAN v. STATE (AIR 1960 ALLAHABAD 606) has held,

"7.a. Secondly there is a duty (called "testimonial duty," by Wigmore) in every man to give evidence arising out of the right of the public to every man's evidence; this duty has been recognized for more than three centuries. 'A person, by virtue of his very existence in civilized society, owes a duty to the community to disclose for the purposes of justice all that is in his control which can serve the ascertainment of the truth. " See Wigmore on Evidence, 3rd edition, paragraphs 2192 and 2194. It was pointed out in Blackmer v. United States, (1931) 284 US 421: 76 Law Ed.375 that it is the duty of a citizen to support the administration of justice by giving evidence.
Thus giving evidence is a matter of duty and not of compulsion and the duty cannot be treated as a compulsion within the meaning of the proviso. Compulsion may have to be resorted to for forcing a person to perform his duty, but the duty itself is not compulsion. Further, our law regarding witnesses and their duties and liabilities is all codified, and compulsion must be, whether directly or indirectly, by a statutory provision. "
The Supreme Court in RAGHBIR SINGH v. GURCHARAN (A.I.R. 1980, S.C. 13 62)it has held,
" When a witness is put in the witness box and he is questioned under oath as to any matter relevant to the issue in any suit or in any civil or criminal proceeding, in which he is called to give evidence, the witness is not excused from answering any question relevant to the matter under enquiry upon any ground including the ground that the answer to such question will criminate or may tend directly or indirectly to criminate such witness or that it will expose or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind as provided in Section 132 of the Evidence Act."
.....
Further, it has been held,
" In view of the imperative language of Section 132 of the Evidence Act, a witness cannot refuse to answer a question which is relevant to the matter under enquiry in which he is called as a witness even on the pain of self-incrimination. "
From the above decisions of the Supreme Court and of this Court, it is seen

that witnesses are not excused from answering questions put to them either by the prosecution or by the defence, on the ground that such answer will criminate that witness; giving evidence is a matter of duty.

17. Under Section 147 of the Evidence Act, the Court can compel a witness to answer the questions relating to matters referred to in Section 146 and Section 148 also provides that the Court has to decide when questions can be asked and when witness shall be compelled to answer. Therefore, where a question is put to the witness which is relevant to the point in issue before the Court, the witness so summoned is bound to answer. Even if the witness does not desire to answer, it must be over ruled and the Court must elicit an answer.

18. When a witness refuses to answer any question, it is for the prosecution to show that the question was within the powers of the public servant (a Court or a Judge or a Magistrate) and the witness is legally bound to answer it. Therefore, where the witness does not answer any question, it is the duty of the Court, Judge or Magistrate to see that the questions which are relevant to the point in issue before the Court are answered by the witness. Under the circumstances stated in the judgments, referred above, the duty of the Judge is to get the answer from the witness even by compelling the witness.

In the result, the appeal is dismissed as devoid of merits. The conviction and sentence imposed on the accused are confirmed.

Index:Yes
Web site:Yes

ra/raa/vs

To
1. The Principal Sessions Judge,
Dharmapuri.

2. The Superintendent,
Central Prison, Vellore.

3. The Superintendent,
Central Prison, Salem.

4. The Public Prosecutor,
High Court, Madras.

5. The Inspector of Police,
Thoppur Police Station,
Dharmapuri District.

6. The District Collector,
Dharmapuri.

7. The Director General of Police,
Chennai.