Dhanabal And Anr vs State Of Tamil Nadu on 13 December, 1979

Equivalent citations: 1980 AIR 628, 1980 SCR (2) 754, 1980 2 SCC 218, AIR 1980 SUPREME COURT 628, 1980 MADLW (CRI) 204, 1980 (2) SCC 84, (1980) ALLCRIR 257, (1980) ALL WC 337, 1980 CRI. L. J. 439, 1980 2 SCC 84, 1980 2 SCR 491, 1980 CRI APP R (SC) 41, 1980 SCC(CRI) 340, 1980 ALLCRIR 257, 1980 ALL WC 337, (1980) ALLCRIC 115

Author: Syed Murtaza Fazalali

Bench: Syed Murtaza Fazalali, P.S. Kailasam, A.D. Koshal

PETITIONER:
DHANABAL AND ANR.

Vs.

RESPONDENT:
STATE OF TAMIL NADU

DATE OF JUDGMENT13/12/1979

BENCH:
FAZALALI, SYED MURTAZA
BENCH:
FAZALALI, SYED MURTAZA
KAILASAM, P.S.
KOSHAL, A.D.

CITATION:
1980 AIR 628 1980 SCR (2) 754
1980 SCC (2) 84

ACT:

Benefit of doubt-When there is no legal evidence to show the overt act of the accused the benefit of doubt must necessarily follow.

Evidence-Transposition of the evidence given in the committal Court to the record of Sessions Court, admissibility of-Whether attention of witnesses should be brought to the contrary statement passage by passage as required under Section 145 of the Evidence Act- Code of Criminal Procedure, 1898, Section 288.

Recording of statements by Magistrates-Mere fact that the police had reasons to suspect that the witness might be gained over and that it was expedient to have their statements recorded by the Magistrate would not make the statements of the witnesses thus recorded tainted-Criminal

Procedure Code, section 164.

HEADNOTE:

The appellants and the third accused were brothers of the deceased Rasayal. They were charged for the offence of committing the offence of murder and were found guilty and sentenced under section 302 read with section 149 I.P.C. to imprisonment for life by the Sessions Court. In appeal the High Court, acquitted the third accused but confirmed the conviction and sentence of the appellants.

In appeal by special leave, three contentions were raised namely (i) the conviction of the two appellants based entirely on the retracted evidence of PWs. 1,2, 3 and 5 marked in the Sessions Court was wrong (ii) the evidence marked under section 288 was inadmissible as it was only read in full to the witnesses and had not been put to them passage by passage as required in s. 145 of the Evidence Act and (iii) the case of the second appellant was similar to that of the third accused and ought to have been acquitted giving him the benefit of doubt.

Accepting the appeal of the 2nd appellant and dismissing the appeal of the first, the Court

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HELD: 1. Talking into account the facts and the probabilities of the case it is clear that it was the first appellant who caused the fatal injury and needed no instigation from the second appellant. There was no evidence as to any overt act, except the presence of the second appellant along with the third accused. It was most unlikely that the second appellant instigated the first accused as a result of which the first accused caused the fatal injury. The second appellant is entitled to the benefit of doubt. [495E-G]

2. The requirements of section 288 of the Criminal Procedure Code would be fully complied with if statements of the witnesses are read in extenso to them

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and they admit that they have made those statements in the Committal Court. The required procedure has been followed in this Case. [497F-G]

Tara Singh v. State of Punjab, [1951] S.C.R. 729, Bhagwan Singh v. State of Punjab, [1952] S.C.R. 812 State of Rajasthan v. Kartar Singh, [1971] 1 SCR 56; referred to.

3. During the investigation the police officer, sometimes feels it expedient to have the statement of a witness recorded under section 164 Code of Criminal Procedure. This happens when the witnesses to the crime are closely connected with the accused or where the accused are very influential which may result in the witnesses being gained over. The 164 statement that is recorded has the endorsement of the Magistrate that the statement had been

made by the witness.

[499 A-C]

4. The mere fact that the police had reasons to suspect that the witness might be gained over and that it was expedient to have their statements recorded by the Magistrate, would not make the statements of the witnesses thus recorded tainted. If the witness sticks to the statement given by him to the Magistrate under section 164 Code of Criminal Procedure, no problem arises. If the witness resiles from the statement given by him under section 164 in the committal court, the witness can be cross-examined on his earlier statement. But if he sticks to the statement given by him under section 164 before committal enquiry and resiles from it in the Sessions Court, the procedure prescribed under section 288, Code of Criminal Procedure will have to be observed. It is for the Court to consider taking into account all the circumstances including the fact that the witness had resiled, in coming to the conclusion as to whether the witness should be believed or not. The fact that the Police had section 164 statement recorded by the Magistrate would not by itself make his evidence tainted. [499 C-F]

Ram Chandra & Ors. v. State of U.P. [1968] 3 SCR 354; explained and relied on.

5. Section 157 of the Evidence Act makes it clear that the statement recorded under section 164 of the Code of Criminal Procedure can be relied on for corroborating the statements made by the witnesses in the committal court. Though the statements made under section 164 of the Code of Criminal Procedure, is not evidenced, it is corroborative of what has been stated earlier in the committal court. [499 F-G]

State of Rajasthan v. Kartar Singh, [1971] 1 SCR 56; followed.

6. A statement recorded under section 288 of the Code of Criminal Procedure of one witness can corroborate the statement of another witness under section 288. The statements are treated as substantive evidence in law and there is no flaw in treating the statement of one witness as corroborative of the other. [500 A-B]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 406 of 1976.

Appeal by Special Leave from the Judgment and Order dated 1-9-1975 of the Madras High Court in Criminal Appeal No. 823/74.

A. N. Mulla, A. T. M. Sampath and P. N. Ramalingam for the Appellant.

A. V. Rangam for the Respondent.

The Judgment of the Court was delivered by KAILASAM, J. This appeal is by Special Leave by accused 1 and 2 in S.C. 26 of 1974 on the file of Sessions Judge, South Arcot Division, against their conviction and sentence imposed by the High Court of Judicature at Madras in Criminal Appeal No. 823 of 1974 dated 1st September, 1975.

The two Appellants and Muthuthamizaharasan were accused Noc. 1-3 in the Sessions Court. The first appellant was found guilty under S. 302 I.P.C. and sentenced to imprisonment for life. The second appellant and the third accused were found guilty of an offence under S. 302 read with S. 149 I.P.C. and sentenced to imprisonment for life. On appeal by the two appellants and the third accused, the third accused was acquitted by the High Court and the appellants Nos. 1 and 2 are before us.

The deceased Rasayal is the sister of appellants and the third accused. The first accused Dhanabal is the eldest and the second appellant and the third accused are his younger brothers. The second appellant married Laxmi, the daughter of Rasayal. Rasayal owned about 5 acres of land in Keelakkarai village. She executed a general power of attorney Exh. P. 15 on 31st August, 1970 in favour of the second appellant. Rasayal, after she lost her husband, started leading an immoral life which was disliked by her brothers. As a result, Rasayal began to cultivate her own land inspite of the power of attorney executed in favour of the second appellant. There was misunderstanding between the parties and Rasayal had complained to the Police stating that her brothers had threatened to do away with her.

On the date of the occurrence at about 1.30 p.m. on 5th December, 1973, when Rasayal and her farm servant Parmasivam, P.W. 4 were working in her field removing weeds, the two appellants and the third accused converged to the place where Rasayal was working. The first appellant was armed with Veecharuval, the second appellant was armed with a spade and the third was unarmed. On seeing them, Rasayal ran towards the channel running adjacent to her fields. The third accused instigated the first appellant to cut her saying that she was leading an immoral life and that she should not be left. Thereupon, the first appellant cut Rasayal on the right side of her neck with the Veecharuval and she fell down in the channel, raising an alarm.

The second appellant stated that she should not be left at that and that her head should be severed from her body, she being an immoral woman. Thereupon, the first appellant caught hold of her hair by the left hand and cut her neck with the Veecharuval, severing the head from the trunk. The occurrence was witnessed by Ramalingam P.W. 1 and Ramakrishnan, P. W. 2 who were returning at that time after spraying insecticides in the fields of P.W. 1 Chelladurai, P.W. 3 who was coming to the field of Rasayal with food for P. W. 4 also saw the occurrence. Nagappan P.W. 5 who was going towards the scene of occurrence to meet Ramakrishnan P.W. 2 for getting arrears of wages also saw the occurrence. Soon after the occurrence, the first appellant left taking away the Veecharuval with him and second appellant leaving the spade near the feet of the deceased Rasayal.

P. W. 4 gave a report Ext. P. 7 to the Sub-Inspector of Police, Kamaratchi at 3 p.m. on the same day. The Sub- Inspector recorded the narration of P. W. 4, read it over to him and obtained his signatures. After registering a case under S. 302 I.P.C. he took up the investigation and proceeded to the scene of the occurrence and held the inquest. The Doctor who conducted the post-mortem was of the view that the deceased appeared to have died of severance of the head from the trunk. During investigation, the Police had S. 164 Cr. P. C. Statements recorded from P.Ws. 1 to 5 before the Sub-Magistrate, Chidambaram on 24-12-1973. During the committal proceedings, P.W. 4 turned hostile but P.Ws. 1, 2, 3 and 5 gave evidence supporting the prosecution. After committal, P.W. 1, 2, 3 and 5 resiled from the evidence they gave in the Committal Court. They were treated as hostile by the Prosecution and their evidence before the Committing Court was admitted in evidence under S. 288 of the Code of Criminal Procedure. The High Court relying on the evidence of P.Ws. 1, 2, 3 and 5 which was marked under S. 288 of the Criminal Procedure Code, found that it was satisfactorily established that the first appellant cut the deceased on the right side of the neck, that the second accused instigated the first accused to cut her saying that she was an immoral woman and the first appellant caught hold of her hair by the left hand and cut her neck with the Veechruval, severing the head from the trunk and left the place alongwith other accused. The High Court acquitted the third accused on the ground that in the F.I.R. it was not mentioned that the third accused instigated the first accused to cut the neck of the deceased. He was given the benefit of doubt and was acquitted.

Mr. Mulla, learned counsel for the appellants, submitted that the conviction of the two appellants based entirely on the retracted evi-

dence of P.W. 1, 2, 3 and 5 marked in the Sessions Court under S. 288 cannot be sustained. Secondly, the Learned Counsel submitted that the High Court was in error in taking into account the statements recorded from the witnesses under S. 164 of the Code of Criminal Procedure in coming to the conclusion that the evidence given in the Committal Court could be relied upon. Lastly, the Learned Counsel submitted that in any event the case of the second appellant is similar to that of the third accused and that the second appellant ought to have been acquitted.

We have been taken through the relevant evidence of the witnesses, their statements under S. 164 of the Code of Criminal Procedure and the evidence given by them in the Committal Court which was transposed to the record of the Sessions Court under S. 288 of the Code of Criminal Procedure. Before considering the questions of law raised by the Learned Counsel, we find that the plea of the learned counsel on behalf of the second appellant has to be accepted. The case for the prosecution is that the two appellants and the third accused went to the scene of occurrence-the first appellant armed with Veecharuval, the second appellant with a spade and the third accused unarmed converged on Rasayal and the first accused gave a cut which resulted in severance of her head. We feel that when the three brothers went to the scene determined to do away with Rasayal, any instigation was most unlikely. The first accused who actually caused injury is the eldest brother. It is difficult for us to accept that before he actually caused the injury, he needed the instigation of the second appellant. In the deposition of Ramalingam P. W. 1, which was marked under S. 288, Code of Criminal Procedure, Ext. P. 2, he stated that first accused came with Aruval, A-2 with a spade and alongwith A-3 went towards Rasayal Ammal. A-1 with the Veecharuval cut Rasayal Ammal on her right neck. The other persons were standing there. Thus the instigation attributed by the

prosecution to the second appellant is not found in the evidence of Ramalingam. Taking into account the facts and the probabilities of the case, we feel it is most unlikely that the second appellant instigated the first accused as a result of which the first accused caused the fatal injury. The second appellant is entitled to the benefit of doubt. His appeal is allowed and his conviction and sentence are set aside. He is directed to be set at liberty.

We will now take up the first contention of the learned counsel that the conviction based on statements marked under s 288 of the Code of Criminal Procedure is not sustainable for consideration. S. 288 of the Code of Criminal Procedure runs as follows:-

> "The evidence of a witness duly recorded in the presence of the accused under Chapter XVIII may, in the discretion of the Presiding Judge, if such witness is produced and examined be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act, 1872".

The plea of the Learned Counsel is that the evidence marked under S. 288 is inadmissible as it was only read in full to the witnesses and had not been put to them passage by passage as required by S. 145 of the Evidence Act. The procedure that was adopted in the Sessions Court was that when the witnesses stated giving a version hostile to the prosecution, he was asked whether he was examined in the Committal Court. The evidence marked as given by him in the Committal Court was read over to the witnesses by the Public Prosecutor. The witness admitted that he had given evidence as found in the Exh. and that he had signed it. The evidence given in the Committal Court was transposed to the record of the Sessions Court under S. 288 of the Code of Criminal Procedure.

The procedure adopted was challenged on the ground that S. 288 contemplates that the evidence given during Committal proceedings can be treated as evidence in the case subject to the provisions of the Indian Evidence Act, and, therefore, each and every passage on which the prosecution relies on should have been put to the witnesses before the passages can be marked and treated as substantive evidence. S. 145 of the Evidence Act, runs as follows:-

> "A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved be called to those parts of it which are to be used for the purposes of contradicting him."

Reliance was placed on the decision of this Court in Tara Singh v. State of Punjab, wherein it was held that the evidence in the Committal Court cannot be used in the Sessions Court unless the witness is confronted with his previous evidence as required under S. 145 of the Evidence Act. The Court observed that if the prosecution wishes to use the previous testimony as substantive evidence then it must confront the witness with those parts of it which were to be used for the purpose of contradicting him and then only the matter can be brought in as substantive evidence under S. 288. On the facts of the case the Court found that all that happened was that the witnesses were asked something about their previous statements and they replied that they were made under coercion. It

does not appear that the entire previous statements of the witnesses were put to them and they were asked whether they, in fact, made the statements.

In Bhagwan Singh v. State of Punjab,, this Court distinguished the case of Tara Singh v. State of Punjab (supra) and observed that resort to S. 145 of the Evidence Act is necessary only if a witness denies that he made the former statement. When the witness admits the former statement, all that is necessary is to look to the former statement on which no further proof is necessary because of the admission that it was made. Hidayatullah, C.J. in State of Rajasthan v. Kartar Singh, while dealing with the procedure to be adopted in treating the statement in the committal court as substantive evidence observed that the witnesses should be confronted with their statements in the Committal Court which are to be read over to them in extenso. The Chief Justice pointed out that the witnesses in the case admitted that their statements were truly recorded in the Committal Court but denied that they were true statement because they were made to depose that way by the Police. It would have been useless to point out the discrepancies between the two statements because the explanation would have been the same and in the circumstances, the requirements of S. 145 of the Indian Evidence Act were fully complied with.

It is thus clear from the authorities referred to above that the requirements of S. 288 would be fully complied with if statements of the witnesses are read in extenso to them and they admit that they have made those statements in the committal Court. The required procedure has been followed in this case and the attack made by the learned counsel has to fail.

The second legal contention raised by the Learned Counsel was that the High Court was in error in taking into account the statements recorded from the witnesses under S. 164 of the Code of Criminal Procedure in coming to the conclusion that the evidence given by them in the Committal Court could be relied upon. The High Court stated "we are satisfied having regard to 164 statements of P.W. 1 to 3 and 5 that the statements given by those witnesses before the Committing Court are true and could be relied on" and proceeded to observe "that as there are more statements admitted in evidence under S. 288 of the Code of Criminal Procedure than one, the evidence of one witness before the Committing Court is corroborated by that given by others". Mr. Mulla, Learned Counsel, submitted that a statement recorded under S. 164 of the Code of Criminal Procedure indicates that the Police thought that the witnesses could not be relied on as he was likely to change and, therefore, resorted to securing a statement under S. 164 of the Code of Criminal Procedure. The statement thus recorded, cannot be used to corroborate a statement made by witness in the Committal Court. In support of this contention the learned counsel relied on certain observations of this Court in Ram Chandra and Ors. v. State of U.P. In that case, in a statement recorded from the witness under S. 164 of the Code of Criminal Procedure, the Magistrate appended a certificate in the following terms:-

> "Certified that the statement has been made voluntarily. The deponent was warned that he is making the statement before the 1st Class Magistrate and can be used against him. Recorded in my presence. There is no Police here. The witness did not go out until all the witnesses had given the statement."

The Court observed that the endorsement made is not proper but declined to infer from the endorsement that any threat was given to those witnesses or that it necessarily makes the evidence given by the witness in Court suspect or less believable. The view of the Patna High Court in Emperor v. Manu Chik, where the observations made by the Calcutta High Court in Queen Empress v. Jadub Das, that statements of the witnesses obtained under this Section always raises a suspicion that it has not been voluntarily made was referred to, was relied on by the Learned Counsel. This Court did not agree with the view expressed in the Patna case but agreed with the view of Subba Rao, J. (as he then was) in Gopisetti Chinna Venkata Subbiah, where he preferred the view expressed by Nagpur High Court in Parmanand v. Emperor, It was observed that the mere fact that the witnesses statement was previously recorded under S. 164 will not be sufficient to discard it. It was observed that the court ought to receive it with caution and if there are other circumstances on record which lend support to the truth of the evidence of such witnesses, it can be acted upon. During the investigation the Police Officer, sometimes feels it expedient to have the statement of a witness recorded under S. 164, Code of Criminal Procedure. This happens when the witnesses to a crime are closely connected with the accused or where the accused are very influential which may, result in the witnesses being gained over. The 164 statement that is recorded has the endorsement of the Magistrate that the statement had been made by the witness. The mere fact that the Police had reasons to suspect that the witness might be gained over and that it was expedient to have their statements recorded by the Magistrate, would not make the statements of the witnesses thus recorded, tainted. If the witness sticks to the statement given by him to the Magistrate under S. 164, Code of Criminal Procedure, no problem arises. If the witness resiles from the statement given by him under S. 164 in the Committal Court, the witness can be cross-examined on his earlier statement. But if he sticks to the statement given by him under S. 164 before committal enquiry and resiles from it in the Sessions Court, the procedure prescribed under S. 288, Code of Criminal Procedure, will have to be observed. It is for the Court to consider taking into account all the circumstances including the fact that the witness had resiled in coming to the conclusion as to whether the witness should be believed or not. The fact that the Police had S. 164 statement recorded by the Magistrate, would not by itself make his evidence tainted.

S. 157 of the Evidence Act makes it clear that the statement recorded under S. 164 of the Code of Criminal Procedure can be relied on for corroborating the statements made by the witnesses in the Committal Court. This Court has expressed its view that though the statements made under S. 164 of the Code of Criminal Procedure, is not evidence, it is corroborative of what has been stated earlier in the Committal Court vide [1971] 1 S.C.R. 56. The High Court was right in relying on the statement of the witnesses under S. 164 as corroborating their subsequent evidence before the Committal Court. Equally unsustainable is the plea of the Learned Counsel that a statement recorded under S. 288 of the Code of Criminal Procedure of one witness cannot corroborate the statement of another witness under S. 288. The statements are treated as substantive evidence in law and we do not see any flaw in treating the statement of one witness as corroborative of the other. The result in the question of law raised by the Learned Counsel fail. The appeal of the first appellant is rejected and his conviction and sentence confirmed. The appeal of the second appellant is allowed and his conviction and sentence set aside. He is directed to be set at liberty forthwith.

V.D.K. 1st Appellant's Appeal dismissed.
2nd Appellant's Appeal allowed.