State Of Tamil Nadu Etc.Perajmal ... vs Suresh (A-2) & Anr.State Of Tamil Nadu & ... on 5 December, 1997

Equivalent citations: AIR 1998 SUPREME COURT 1044, 1998 (2) SCC 372, 1998 AIR SCW 819, 1997 (7) SCALE 402, 1998 CRIAPPR(SC) 22, 1998 SCC(CRI) 751, 1998 CRILR(SC MAH GUJ) 239, 1998 CRILR(SC&MP) 239, (1998) 1 CURCRIR 158, (1998) 1 RECCRIR 180, (1997) 7 SCALE 402, (1997) 3 CHANDCRIC 169, (1997) 4 CRIMES 414, (1997) 10 SUPREME 426, (1998) 1 ALLCRILR 710, (1998) SC CR R 593, (1998) 1 MADLW(CRI) 17, (1998) 1 SCJ 685, (1998) 36 ALLCRIC 585

Bench: M.K. Mukherjee, K.T. Thomas

PETITIONER:
STATE OF TAMIL NADU ETC.PERAJMAL BALLAJI & ORS.

Vs.

RESPONDENT:
SURESH (A-2) & ANR.STATE OF TAMIL NADU & ORS.

DATE OF JUDGMENT: 05/12/1997

BENCH:
M.K. MUKHERJEE, K.T. THOMAS

ACT:

HEADNOTE:

JUDGMENT:

THE 5TH DAY OF DECEMBER, 1997 Present:

Hon'ble Mr.Justice M.K. Mukherjee Hon'ble Mr.Justice K.T. Thomas N.Natarajan, Sr.Adv., V.G.Pragasam, (S. Tripathi) Adv. for Ms. Rani Jethmalani, Ms. Binu Tamta, Ranjit Kumar advs. with him for the appearing parties.

J U D G M E N T The following Judgment of the Court was delivered:

WITH CRIMINAL APPEAL NOS. 155-156 OF 1991 THOMAS, J.

A young enceinte housewife fell from the top of a four- storeyed building down on the payment of a street at Madras during the odd hours on the night of 9-6-1987, and died in a trice with her skull and the bones extensively broken into pieces. Initially it was taken by the neighbours and the police as a case of suicide, but eventually it became a case of gruesome murder. Her husband, a flourishing businessman at Madras (now Chennai) and his brother (another businessman) and two of their employees were put on trial in the Sessions Court for criminal conspiracy, rape and murder. One of the culprits was made an approver and he gave evidence in support of the prosecution case. The Sessions Court acquitted the husband of the deceased, but convicted the other two persons of murder and rape and sentenced both of them to death.

A Division Bench of the High Court of Madras heard the reference which was made under Section 366 of the Code of Criminal Procedure on the sentence of death, along with the appeals preferred by the appeals preferred by the convicted persons as well as the appeal preferred by the State in challenge of the acquittal. the Division Bench confirmed the acquittal and set aside the conviction and sentence passed by the Sessions Court. Hence the present appeals by special leave.

First accused Ramesh Kumar and his younger brother Suresh Kumar (A-2) hailed from Rajasthan, and they have settled down in Madras. Each of them acquired separate business establishments. Ramesh Kumar, the eldest, had married Kamla Devi (the deceased) who was then only 19 and belonged to a less affluent family in Rajasthan, about four years before her death. Thereafter the couple lived on the top floor apartment of a multi-storeyed building situated on Thulasinga Mudali Street at Madras. Second accused Suresh Kumar got married to a girl from Rajasthan a few months before the occurrence but he did not bring his wife to Madras from Rajasthan. He too was residing with his eldest brother Ramesh Kumar on the 4th floor of the building. Kamla Devi (deceased) had a little child (Sandeep) who was only 4 years old when she died.

As the business of first accused expanded he started entertaining a feeling that if he had married from a rich family he would have got a handsome dowry. This led to some estrangement between the spouses. Second accused Suresh Kumar did not see eye with Kamla Devi (deceased) for certain reasons of his own, one among them alone has come to the forefront in evidence that he believed that Kamla Devi was injecting hatred in the mind of his brother that A.2 was becoming a habitual drunkard.

In the above backdrop, the synopsis of the prosecution case having an eerie profile, can be narrated as follows:

A couple of days prior to the death of Kamla Devi her husband Ramesh had gone abroad (Singapore) in connection with his business and before he left India he and the other three culprits had entered into a criminal conspiracy to finish Kamla Devi off during his absence. After he left, second accused informed the remaining culprits that the best way to achieve the target was to drop her down from the top floor of the building so that it would appear to the rest of the world that she had committed suicide.

On the midnight of 9-6-1987 when everybody else was asleep the three culprits (A2-Suresh, A3-Kuman Singh and PW1-Bhoparam) moved from the room on the 4th floor where they were to sleep and entered the room where deceased was sleeping with her little child Sandeep. They first gagged her mouth with a cloth but then she woke up and instinctively resisted the onslaughts of the assailants. But she was overpowered and the third accused pressed her neck and mouth on the direction of the second accused who was holding her in his grip while she was struggling to squirm out of the lethal grip. In that melee the bangles on her hand broke down. PW-1 caught hold of her legs and the second accused sexually molested her in that condition. A.3 also ravished her on being prompted by the second accused. Though PW-1 was also persuaded to do the same on her he did not do it as he found that she was unconscious. Then all the three persons lifted her up and brought her to the balcony and tried to drop her down. But somehow she regained conclousness then and gripped on the parapet frieze but the assallants exerted greater force in pushing her down and she lost her grip and fell deep down from such a height of the four storeyed building - she died instantaneously.

The entire prosecution case revolved on the solitary evidence of the approver PW-1 Bhoparam. Learned trial judge relied on his evidence with the aid of some corroborative circumstances and found A2 Suresh and A3 Kuman Singh guilty of rape and murder.

It was difficult for the High Court to act on the evidence of the approver mainly for two distinct reasons: (1) His version of the occurrence is fraught with improbabilities and hence it did not inspire confidence; (2) He being an accomplice his evidence is unworthy of credit even otherwise, as it did not receive adequate corroboration from any source. hence the conviction and sentence were set aside by the High Court.

Learned counsel for the appellant contended that the Division bench of the High Court did not make a pragmatic approach to the evidence of PW-1, and it resulted in the improper rejection of the evidence of an eye witness to such a dastardly perpetrated crime. Counsel further contended that if strict adherence to the rule of corroboration of the evidence of an accomplice witness is insisted, as done by the High Court in this case, no approver evidence would stand scrutiny in any case and the consequence would be miscarriage of justice. Learned Judges expressed a regretful note in the judgment by way of an epilogue in the following lines:

> "We are really pained to note that prosecution was not able to bring home the persons really involved in this crime. Even though there is a lurking doubt in our mind as to the involvement of one or more of the accused in this crime, they cannot be punished on such a doubt, however strong it might be , ...
>
> Following the high traditions of criminal jurisprudence in our country, we are not inclined to send the accused to gallows on mere suspicion, and on the evidence of the approver whose evidence stands uncorroborated."

We have perused the evidence carefully and considered the reasoning of the learned Judges, but we are unable to persuade ourselves to concur with the judgment of the High Court.

How Kamla Devi would have died can be inferred from the post-mortem appearances noted by PW-22 Dr. Cecila Cyril, (Additional Professor in the Department of Forensic Medicine of the Medical College, Madras) who conducted the autopsy on the dead body. The doctor found that the deceased was pregnant by 4 weeks. After listing all the ante-mortem injuries in Ext. P-41 (post-mortem certificate) the doctor opined that her death might have been on account of the head injuries as well as asphyxia due to smothering and compression of neck. There are enough data to support the conclusion that Kamla Devi would have been smothered by pressing her mouth and neck. Injuries Nos.1 to 7 are abrasions and contusions and lacerations around the lips. Nos. 17 to 24 are similar injuries on the chin and neck and also on the lower part of the nose. None of her teeth was affected. Form all the above features we can unhesitatingly accept the doctor's opinion that Kamla Devi would have been subjected to forceful smothering.

The skull of the dead body had extensive fractures and brain matter was found protruding. There were fractures on the sternum and on the ribs. While giving evidence the doctor concurred with the suggestion of the prosecution that "there was very good chance of the victim being alive after sustaining the injuries due to smothering and compression of neck when she would have been in a condition of shock. After smothering and compression of neck she could have been alive for a few minutes depending upon her power of volition,"

> PW-1 Bhopparam narrated the evidence which preceded and succeeded the occurrence and gave a complete picture on the vivid details of the occurrence. It would be unnecessary to repeat his evidence as it is consistent with the prosecution story summarised above. PW-1 deposed that the neighbours and relatives of the deceased were informed of the death of Kamla Devi and they all arrived and her husband A-1 also flew down from Singapore He further said that on the third day he went o the house of his brother-in-law (PW-6) and stayed there for 6 days and then went to Mahabalipuram (a suburb of Madras) where he got a temporary employment in the tea shop of Pw-15. On 24-6-1987 he happened to notice his photo in a Tamil daily and then he rushed back to PW-6's house and made a shrift to him of all what happened and with the help of Pw-6 he surrendered to the police.

The High Court seems to have accepted the contention of the defence counsel that PW-1 would have been in police custody from 10-6-1987 till 25-6-1987 (When he was produced before the magistrate). The following reasons were advanced by the high Court for accepting the said define contention. First is, as first accused had offered money to PW-1 for carrying out the operation PW-1 would normally have remained in the house until the money was paid. (PW-1 could not have remained in the same house as tension would have been mounting up in his mind and it was only natural that he would have moved out of that jinxed house instead of lingering on there as money could have been collected even at a later stage). Second is that PW-1, was unable to remember the names of PW-6's employees, and if was unable to remember the names of PW-6's employee, and if he had really stayed in that house he could have remembered those names. (This is too fragile a reasoning as one may or may not remember the names of such employees particularly his mind would then have been preoccupied with thought about the horrendous crime committed by them). The third is that he failed to disclose the incident to PW-6 or to his employer Pw-15. (It is too much to expect that PW-1 would have readily divulged it to any one else at the first instance because the whole episode was perpetrated by the culprits in secrecy). Fourth reason is that PW-1 did not read newspapers during the interregnum and that indicates his absence in the free world. (There is nothing on record to show that this employee of A.1 was regular newspaper reader, without which such an inference is out of place).

All the above reasons are hence very tenuous grounds for disbelieving the version of PW-1 that he had stayed with Pw-6 and PW-15. Learned Judges of the High Court should have appreciated his testimony in the light of the evidence of PW-6 and PW-15 against which nothing has been pointed out either by the High Court or before us as to why those two witnesses should have perjured in court about PW-1's sojourn with them.

The High Court did not believe the case of PW-1 that A-

2 and A-3 would have sexually ravished Kamla Devi. The sole circumstance which learned Judges highlighted on that score is the absence of semen or supermatozoa in the vaginal swab collected from the dead body as the result of laboratory analysis of the swab showed. The High Court seems to have overlooked the following data available in the post-morterm report which is a very telling circumstance regarding the sexual molestation the victim would have been subjected to;

"Bruising of tissues on right side of vagina 2x1x1/2 cms. Bruising is reddish blue in colour. Bruising 1x1/2x1/2 cms. over the anterior lip of the cervix."

Dr. Cecila Cyril (PW-22) had no doubt that the above features are consistent with the victim offering resistance against forcible sexual intercourse. The doctor witness emphatically repudiated the suggestion that such bruises could have been caused in a fall. In view of the above, the High Court went wrong in negativing the version of PW-1 regarding sexual ravage merely on the basis of

non-detection of semen or supermatozoa in the vaginal swab. There could be more than one explanation for absence of semen in the vaginal swab. We have no doubt that Kamla Devi would have been made a victim of a forcible sexual assault.

One of the points which dissuaded the High Court from believing the version of PW-1 is the most abominable and despicable act attributed to A.2 vis-a-vis his own sister- in-law. High Court has stated thus on that aspect:

> "Even if there was some reason for A.2 to end the life of the deceased with a view to secure peaceful life for his brother, certainly he would not have resorted to the most inhuman method of committing rape on his own brother's wife that too, along with two of his servants."

Learned counsel for the accused also repeated the same reasoning before us in support of his contention that such an act of barbarity would be unthinkable and counter to the social order for a brother to do it on his sister-in-law. We too agree that if A.2 had done those acts attributed to him then it would have been woeful and despicable of a human conduct.

We have considered the said contention with the Seriousness it deserves. One thin is clear that somebody had done it one her during that night. Whoever had done those acts during that night i.e. by sexually molesting her and then dragging her and throwing her living body down from the balcony, the assailant would have been someone who was simmering with unquenchable grudge towards her. It is extremely remote that a burglar or a stranger rapist would have gatecrashed into the house and done all those atrocities on that helpless woman when the house was occupied by 3 adult male members. It must be remembered in this context that even the defence had no suggestion that the deceased had any enemy outside, for, if she had any such enemy that fact would not have escaped from the knowledge of her husband, if not of A.2 also. If PW-1's version is true A.2 had his own grudge towards the deceased. The intensity of that grudge was known only to himself or perhaps the deceased also. If A.2 had decided to kill his sister-in-law in such a savagery manner by throwing her from the balcony that itself would indicate the superlative degree of gravity of his wrath towards her. With such a mind simmering with acerbity he would as well have thought to subject her to excruciating mental pain by devastating her womanhood in the manner it was done on her. So the degree of woefulness of the onslaught is not enough to militate against the horrendous nature of the crime.

We are hence totally unable to agree with the view of the High Court that the story narrated by PW-1 lacked probability. After all PW-1 is an accomplice and hence his narration would be incriminating to him also.

The testimony of an accomplice is, no doubt, a stigmatised evidence in criminal proceedings. It is on account of the inherent weakness which such evidence is endowed with that illustration (b) to Section 114 of the Evidence Act suggests that it is open to the court to presume that the uncorroborated testimony of an accomplice is unworthy of credit. But the legislature had advisedly refrained from including the said category of evidence within the ambit of legal presumptions but

retained it only within the area of factual presumptions by using the expression "the court may presume". In order to make the position clear the same enactment has incorporated Section 113 saying that it is not illegal to convict a person on the uncorroborated testimony of an accomplice. The raison d'etre for such legislative marshalling is to enable the court to have its freedom to act on the evidence of an accomplice in appropriate cases, even without corroboration, if the court feels that a particular accomplice evidence is worthy of credence.

Thus, the law is not that the evidence of an accomplice deserves outright rejection if there is no corroboration. What is required is to adopt great circumspection and care when dealing with the evidence of an accomplice. Though there is no legal desirable that court seeks reassuring circumstances to satisfy the judicial conscience that the evidence is true.

A Bench of three judges of this Court in Dagdu and ors. Vs. State of Maharashtra, [1977 (3) SCC 68] has laid down the legal position after making a survey of the case law by referring to Rameshwar vs. State of Rajasthan, [AIR 1952 SC 54] and a number of other decisions of this Court as well as of English courts. Chandrachud...] (as the learned Chief Justice then was) has stated for the three Judges Bench as follows:

> "There is no antithesis between Section 133 and illustration (b) of section 114 of the Evidence Act, because the illustration only says that the Court 'may' presume a certain state of affairs. It does not seek to raise a conclusive and irrebuttable presumption. Reading the two together the position which emerges is that though an accomplice is a competent witness and though a conviction may lawfully rest upon his uncorroborated testimony, yet the Court is entitled to presume and may indeed be justified in presuming in the generality of cases that no reliance can be passed on the evidence of an accomplice unless that evidence is corroborated in material particulars, by which is meant that there has to be some independent evidence tending to incriminate the particular accused in the commission of the crime.....All the same, it is necessary to understand that what has hardened into a rule of law is not hat the conviction is illegal if it proceeds upon the uncorroborated testimony of an accomplice but that the rule of corroboration must be present to the mind of the Judge and that corroboration may be dispensed with only if the peculiar circumstances of a case make it safe to dispense with it"

This is not a cases where evidence of PW-1 is totally bereft of any reassuring circumstance. This occurrence as featured by Pw-1 is supported by the following circumstances:

> (1) Post-mortem appearances noted by PW-22 Dr. Cecila Cyril. (2) broken bangles found on the floor of the room and on the balcony (3) The admission of A.2 and A.3 that they along with Pw-1 wee present in the same flat during that night. [It is quite improbable that any outsider would have made an entry into this apartment during that night and with or without the help of PW-1 would have made all those atrocious acts least disturbing the sleep of her four year old son huddling on the mother or the sleep of A.2 and A.3].

(4) The statement by PW-6 that on 24-6-1987 Pw-1 told him of this incident in which he involved all the three culprits.

Dealing with the last corroborative circumstance i.e. the statement made by PW - 1 to PW - 6 on 24-6-1987, we may have to consider the admissibility of the said statement Section 157 of the Evidence Act reads thus:

> "In order to corroborate the testimony of witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

The section envisages two categories of statements of witnesses which can be used for corroboration. First is the statement made by a witness to any person "at or about the time when the fact took place". The second is the statement made by him to any authority legally bound to investigate the fact. We notice that if the statement is made to an authority competent to investigate the fact such statement gains admissibility, no matter that it was made long after the incident. But if the statement was made to a non- authority it loses its probative value due to lapse of time. Then the question is, within how much time the statement should have been made? If it was made contemporaneous with the occurrence the statement has a greater value as res justea and then it is substantive evidence. But if it was made only after some interval of time the statement loses its probative utility as res justea, still it is usable, though only for a lesser use.

What is meant by the expression "at or about the time when the fact took place"? There can be a narrow view that unless such a statement was made soon after the occurrence it cannot be used for corroboration. A broader view is that even if such statement was made within a reasonable proximity of time still such statement can be used for corroboration. The legislature would not have intended to limit the time factor to close proximity though a long distance of time would deprive it of its utility even for corroboration purposes.

We think that the expression "at or about the time when the fact took place" in Section 157 of the Evidence Act should be understood in the context according to the facts and circumstances of each case. The mere fact that there was an intervening period of a few days, in a given case, may not be sufficient to exclude the statement from the use envisaged in Section 157 of the Act. The test to be adopted, therefore, is this; Did the witness have the opportunity to concoct or to have been tutored? In this context the observation of Vivian Bose, J. in Rameshwar vs. The State of Rajasthan (AIR 1952 SC 54) is apposite:

> "There can be no hard and fast rule about the 'at or about the' condition in Section 157. The main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction".

(Emphasis supplied) Here when PW-1 disclosed to his brother-in-law (PW6) on 24-6-1987 about his version of the occurrence we have not come across anything to indicate that PW-1 was either tutored

or influenced by anybody during the interregnum. Looking at the statement from that perspective we are inclined to treat it as a corroborative piece of evidence giving us a reassurance regarding the truth of PW-1's evidence in court so far as the persons involved in the episode are concerned.

Shri Ranjit Kumar, learned counsel for A.3 took much pains to impress us that PW-1's version that they trekked along a cornice to reach deceased's room, is highly incredible as they could easily have walked through the normal passage. PW 1 has an explanation for choosing that circuitous route. But we are not interested to know why they chose a longer passage to reach deceased's room. What we known is that they reached her room during that midnight hour.

The above discussion takes us to the final conclusion that the High Court has seriously erred in upsetting the conviction entered by the Sessions Court as against A.2 and A.3 The erroneous approach has resulted in miscarriage of justice by allowing the two perpetrators of a dastardly crime committed against a helpless young pregnant housewife who was sleeping in her own apartment with her little baby sleeping by her side and during the absence of her husband. We strongly feel that the error committed by the High Court must be undone by restoring the conviction passed against A.2 and A.3, though we are not inclined, at this distance of time, to restore the sentence of death passed by the trial court on the those two accused.

In the result, we allow the appeals and set aside the judgment of the High Court of Madras and restore the conviction passed by the trial court under Section 302 and 376 read with Section 34 of the IPC as against A.2 - Suresh and A.3 - Kuman Singh, and we sentence them each to undergo imprisonment for life on the first count and rigorous imprisonment for a period of 10 years on the second count. Sentences on both counts will run concurrnetly. We direct the Sessions Judge, Madras (now Chennai) to take immediate steps to put the aforesaid convicted persons in jail for undergoing the sentence