

STATE BY INSPECTOR OF POLICE, T. NADU

v.

RAKIAPPAN AND ORS.

(Criminal Appeal No. 140 of 2003)

OCTOBER 21, 2008

[DR. ARIJIT PASAYAT, C.K. THAKKER AND
LOKESHWAR SINGH PANTA, JJ.]

Penal Code, 1860 – ss.302 and 307 r/w s.34 – Homicidal death – PW2, an injured child witness – His statement recorded by PW6, Investigating Officer – Trial Court recorded conviction placing reliance upon the evidence of PW2 – High Court directed acquittal holding that PW2 was not in a fit condition to give the purported statement before PW6 – Propriety of – Held, not proper – Evidence of PW17, the doctor, showed that PW2 was in conscious state and in a position to give statement before PW6 – High Court did not indicate any plausible reason to discard the evidence of PW2 – Matter remitted to High Court for fresh consideration.

The prosecution case was that the accused-Respondents caused the homicidal death of two persons. PW2, aged 12 years at the relevant time, was allegedly an eye witness to the occurrence. He received injuries during the incident and was taken to hospital where his statement was recorded by the Investigating Officer (PW6).

Placing reliance upon the evidence of PW2, the Trial Court convicted the Respondents under ss.302 and 307 r/w s.34 IPC. On appeal, the High Court acquitted the Respondents holding that PW2 was not in a fit condition to give the purported statement before PW6. Hence the present appeal.

Allowing the appeal and remitting the matter to the

A High Court, the Court

HELD: 1.1. The High Court appears to have proceeded on surmises to hold that it was not possible on the part of PW2 to give any statement. He was admitted on 08.12.1995 as an indoor patient. The evidence of PW17 shows that he was in a position to give a statement as he was conscious. PW17 categorically stated that on 9.12.1995, 10.12.1995 PW2 had regained consciousness and therefore the hypothetical conclusion of the High Court that PW2 was not in a fit condition to give any statement on 13.12.1995 is clearly unsustainable. [Para 4] [304-C, D]

1.2. The High Court had not indicated any plausible reason to discard the evidence of PW2. The High Court did not examine the acceptability, credibility and truthfulness or otherwise of PW2's evidence by analysing the evidence *vis-a-vis* the other factors and materials on record. In the circumstances, the matter is remitted to the High Court to consider the appeal afresh and decide whether the evidence of PW2 is sufficient to fasten the guilt on the accused persons as projected by prosecution. [Para 5] [304-F, G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 140 of 2003.

From the final Judgment and Order dated 25.4.2002 of the High Court of Judicature at Madras in Criminal Appeal No. 281 of 1998.

WITH

Crl. A.No. 141 of 2003.

M. Karpaviniyakam, Sr. Adv., S. Thananjayn, P.N. Ramalingam, Anil Kaushik, Shiv Prakash Pandey and Deepak Jain for the Appellant.

V. Krishnamurthy, Sr. Adv., T. Harish Kumar, P. Prasanth and V. Vasudevan for the Respondents.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Heard.

2. These two appeals are directed against the judgment of a Division Bench of the Madras High Court allowing the appeal filed by the respondents i.e. Criminal Appeal No. 281/1998. The respondents faced trial for allegedly committing homicidal death of two persons (hereinafter referred to as D1 and D2 respectively). The occurrence according to the prosecution took place on 7.12.1995 around 7.30 P.M. All the four accused persons entered into the house of the deceased Nos. 1 and 2. A-1 held Nachimuthu Gounder while A-2 inflicted blows on the neck and cheek. A-4 threw down Saraswati while A-3 caught inflicted blow on her head, face and the eye. PW2 who was about 12 years then was an eye-witness to the occurrence. Ramu i.e. PW2 tried to avoid the attack which was made on him because of the instigation of A1. A2 inflicted blows on the head of PW2. The injured persons were taken to the hospital, PW2 regained consciousness and his statement was recorded by PW6 the investigating Officer on 13.12.1995. On completion of the investigation, charge sheet was filed. Since the accused persons pleaded innocence, trial was held. The Trial court relying on the evidence of PW2 held the accused persons guilty and convicted each under Section 302 and 307 read with Section 34 IPC. Each was sentenced to undergo imprisonment for life for the first offence, nine years for the second offence. The accused persons preferred appeal before the High Court which as noted above directed acquittal. The primary reason which appears to have weighed with the High Court to direct acquittal was that PW2 was not in a fit condition to give the statement. Reference was made to the seriousness of the injuries sustained by him as stated by the Doctor PW17.

3. Learned counsel for the appellant-State in Criminal Appeal No. 140/2003 submitted that the conclusion of the High Court was based on surmises and conjecture. Many salient factors have been lost sight of by the High Court. There was

A nothing infirm in the evidence of PW2 to discard the same on
the hypothetical ground that he was not in a position to give any
statement. Learned counsel for the respondent-accused
persons supported the judgment of the acquittal. It was
submitted that PW2 was a child at the time of occurrence. Child
B witnesses are prone to be tutored and entire statement of PW2
purported to have been recorded is the outcome of such
tutored. It was also pointed out with reference to the evidence
regarding nature of injuries, that it is highly improbable that PW2
was in a fit condition to give any statement.

C 4. As rightly contended by learned counsel for the appellant
the High Court appears to have proceeded on surmises to
hold that it was not possible on the part of PW2 to give any
statement. He was admitted on 08.12.1995 as an indoor
patient. The evidence of PW17 shows that he was in a position
D to give a statement as he was conscious. PW17 categorically
stated that on 9.12.1995, 10.12.1995 PW2 had regained
consciousness and therefore the hypothetical conclusion of the
High Court that PW2 was not in a fit condition to give any
statement is clearly unsustainable. To add further vulnerability
E the statement of PW2 reached the concerned court on the next
date i.e. 14.12.1995. This is a very significant factor.

F 5. In view of the above, we find that the High Court had
not indicated any plausible reason to discard the evidence of
PW2. The High Court did not examine the acceptability,
credibility and truthfulness or otherwise of PW2's evidence by
analysing the evidence vis-a-vis the other factors and materials
on record. In the circumstances while setting aside the
impugned judgment of the High Court we remit the matter to
G the High Court to consider the appeal afresh and decide
whether the evidence of PW2 is sufficient to fasten the guilt on
the accused persons as projected by prosecution.

6. The appeals are allowed to the aforesaid extent.

H B.B.B.

Appeals allowed.