NAMARATNE AND ANOTHER

v.

THE STATE

COURT OF APPEAL
HECTOR YAPA J.
KULATILAKA J.
C.A. 24-25/99
H.C. AVISSAWELLA 48/95
JULY 3RD, 4TH, 2000

Murder - Penal Code S.296 - Identification of the deceased body - Post mortem report - probative value of omission - Effect on the credibility of witnesses - Grave and sudden provocation.

The two Accused-Appellants were indicted for murder under S.296 Penal Code. The Accused Appellants after trial were convicted and sentenced to death.

At the Appeal, it was contended that:

(1) There was no proper identification of the dead body;

(2) There was misdirection regarding the probative value of omissions and their effect on the credibility of the prosecution witness Kumari.

(3) Failure to appreciate items of evidence which would have enabled the Accused Appellant to get the benefit of the mitigation plea of grave and sudden provocation.

Held :

(i) In the post mortem report (PMR) the doctor had not entered the names of the persons who had identified the dead body in the relevant column.

However the P.M.R. clearly indicates that the doctor had performed the examination at the request of the Actg Magistrate, on the date he conducted the post mortem he was aware of the date and the time of the death. He has also put the name of the deceased in the respective column. In the circumstances the P.M.R. speaks for itself. Further a sister of the deceased had stated in evidence that she identified the body as that of her brother.

(ii) The trial Judge had the benefit of observing the demeanour and deportment of witness Kumari which is an all important factor and was pleased with her testimonial trustworthiness. In this country mere abuse, even if unaccompained by physical violence made in certain circumstances afford sufficient provocation to reduce the offence of murder to culpable homicide not amounting to murder, and the question whether such provocation was grave enough to mitigate intentional killing of a man is a question of fact to determine.

(iii) Attendant circumstances of this case would entitle the accused appellants to the benefit of exception (1) to S.294 Penal Code.

Appeal from the High Court of Avissawella.

Cases referred to :

1. *Bandaranayake vs. Jagetheesan and others* - 1984 - 2 SLR 397.
2. *Regina vs. Piyasena* - 57 NLR 226.

Dr. Ranjith Fernando with Ms. Anoja Jayaratne and Ms. Sandamali Munasinghe for Accused - Appellants.

P.G. Dep. Additional Solicitor-General, for the Attorney-General.

Cur. adv. vult.

September 20, 2000

P.H.K. KULATILAKA, J.

The two accused-appellants were indicted in the High Court of Avissawella for committing the murder of Matota Gamaralalage Podi Appuhamy on 15 May 1989, an offence punishable under Section 296 of the Penal Code. The learned High Court Judge sitting without a jury found both accused-appellants guilty of murder and accordingly convicted and sentenced them to death. The accused-appellants have appealed against the conviction and the sentence.

It was on a complaint lodged by Matota Gamaralalage Inohamy on 18.3.89 to the effect that her brother Matota Gamaralalage Podi Appuhamy was missing that the police commenced investigations and discovered the body of the

deceased buried in the back yard of his own house and when the body was exhumed the complainant had identified the body as that of her brother. This is a case of patricide. The two accused-appellants are the sons of the deceased.

At the argument the counsel who appeared for the accused-appellants endeavoured to impugn the judgment of the learned trial Judge on the following grounds, namely

(1) that there was no proper identification of the dead body.

(2) that the learned trial Judge erred in law by misdirecting himself regarding the probative value of omissions and their effect on the credibility of the prosecution witness Kusum Kumari.

(3) that the learned trial Judge erred in fact and law by failing to appreciate items of evidence which would have enabled the accused-appellants to get the benefit of the mitigatory plea of grave and sudden provocation.

In view of the aforesaid contentions urged by the learned counsel it becomes necessary for us to examine with care the testimony of Kusum Kumari before the High Court. Kusum Kumari is a grand daughter of the deceased and she is also a niece of the two accused-appellants. Being an eye witness, even though she did not see a part of the assault on the deceased by the two accesed-appellants she had seen the main part of the incident and at the trial she had come out with a vivid description of the events that led to this gruesome murder. She was apparently a grade 4 student at the time she witnessed the incident and when she gave evidence at the non-summary proceedings she was 12 years and was 19 years of age when she testified before the High Court.

Three months prior to the incident her parents living elsewhere had left Kusum Kumari with her grand parents for schooling. Her grand mother Eminona, two accused-appellants, their sisters and children were living in the same house, whereas the deceased was living separately in a hut in the same garden.

On the day of the incident Kusum Kumari had come home after school. It was around 2.30 p.m. The deceased had come to the main house and wanted one of his grand daughters Leelawathie to fetch him his sarong which he had kept inside a suitcase. Since she did not oblige the deceased had gone inside the house brought the suitcase to the verandah and when he was in the process of getting his sarong out a frock which was inside the suitcase had fallen on the floor. The grand daughter (Leelawathie) had complained about it to the first accused who was sleeping at the time. The first accused-appellant had come out in a rage, tried to hit the deceased with a chair but had thrown it out to the compound without hitting him. Thereafter the second accused-appellant also had come out and slapped the deceased on his face. Then they (accused-appellants) had assaulted him and tied him up to a "kundira" cocount tree and mercilessly beat him with hands. The deceased had pleaded with them not to beat him on his back-side as he had a broken spine. Yet they continued to hit him saying that they would break his spine again, whereupon the deceased had pleaded with them to kill him at once. Then they untied him and made him to place his face against a bee-hive box. Thereafter they themselves had forced his face against the bee-hive box while the bees stung him and the deceased cried in pain. The two accused-appellants had then proceeded to a thovil house close by. The deceased had attended to his wounds, had come back and made the following warning to his wife Eminona who is the mother of the two accused-appellants. It was to the following effect:

> "You have got the children to tie me up to a tree and beat me. One day the same fate will befall on you."

At that point of time deceased's wife Eminona had proceeded to the thovil house and met the two accused-appellants. Shortly afterwards they had come home in a rage shouting at the deceased. Seeing the accused coming the deceased had run away towards a thicket with a torch in hand. The two accused-appellants had chased after him and caught him. It appears that the witness Kusum Kumari had not seen what followed until the two accused-appellants carried the

deceased on to the road and left him there. The deceased was unconscious. Thereafter the first accused-appellant had shouted "I have killed him bring a lamp to see." Kusum Kumari saw her grand father bleeding. Both first accused-appellant had lifted the deceased and then the first accused-appellant bodily carried the deceased his father on his shoulder and dropped him on his back at the door step. The first accused-appellant then had inserted a piece of firewood through the deceased's throat and the deceased had thrown out blood. Thereafter they had covered his body with a mat and placed a piece of charcoal on it.

It is manifest that the learned counsel for the accused-appellants raised the issue that the dead body was not identified for the reason that in the post mortem report prepared by Dr. S.M. Panagoda he had not entered the names of persons who had identified the dead body in the relevant column. But the post mortem report clearly indicates that the Doctor had performed the post mortem examination at the request of Mr. S. Wattegama, Acting Magistrate of Avissawella and on the date he conducted the post mortem i.e. 20.3.1989 he was aware of the date and the time of death. In that column he has put the date as 15.3.1989 and on the post mortem report he has put the name of the deceased person as Mathota Gamaralalage Podi Appuhamy. Hence the post mortem report speak for itself for the reason the Doctor was well aware of the fact that he was performing the post mortem on the body of Matota Gamaralalage Podi Appuhamy. Further Matota Gamaralalage Enohamy who made the first complaint to the effect that her brother Matota Gamaralalage Podi Appuhamy was missing, in her evidence has categorically stated that when the body was exhumed she identified the body as that of her brother. (Vide pages 56 and 57 of the original record). Hence we do not see any merit in the submission made by the learned counsel regarding the identity of the body of the deceased.

Learned counsel urging the second point advanced by him that the learned trial Judge has failed to consider vital omissions in Kusum Kumari's evidence referred us to omissions marked as V4, V5, V6 and V7. All these omissions were directed at her

evidence in the trial Court that the accused-appellants had made the deceased to keep his face against the bee-hive box and they themselves had forcibly placed his face against the bee-hive box for the bees to sting. The learned counsel vehemently argued that this witness was coming out with such a story for the first time in the High Court 9 years after the event. It appears that these omissions have been marked in the High Court trial in relation to her statement made to the police on 22.3.89 when she was just 10 years old. In this regard the learned trial Judge was very much aware and mindful of the circumstances under which Kusum Kumari had made her statement to the police at that point of time. According to Kusum Kumari's evidence when the accused-appellant had warned this witness that if she comes out with what had happened they would kill her and put her to the same grave. She further testified that she was not allowed to go out, not even to her school after the incident. Thus at the time she made her statement to the police she was virtually a prisoner in the hands of the accused-appellants and their mother. In order to test the correctness of the submission made by the learned counsel that it was for the first time 9 years after the incident Kusum Kumari had come out with such a story, at the High Court trial, we perused the non-summary proceedings which were available to the learned counsel for the accused-appellants as well. On 17.01.92 Kusum Kumari giving evidence at the non-summary proceedings had described how the two accused-appellants dragged the deceased to the bee-hive box, opened it and forced him to keep his face against the bee-hive box and how the bees stung him and how the deceased cried in pain. (vide page 20 of the non-summary proceedings). Therefore it would appear that the submission made by the learned counsel is without any merit and substance. Further it may well be that the learned trial Judge had the benefit of observing the demeanour and deportment of witness Kusum Kumari which is an all important factor and was pleased with her testimonial trustworthiness. In this regard vide the judgment of Justice Colin Thome in *Bandaranaike vs. Jagathsena & Others.*[1]

Finally, in the course of the argument the learned counsel for the accused-appellants rightly conceded that it was the

accused-appellants who were responsible for the killing of Matota Gamaralalage Podi Appuhamy, albeit, advanced the proposition that the learned trial Judge has failed to appreciate certain mitigating circumstances that came to light in view of some items of evidence elicited from the prosecution witnesses and the dock statement of the first accused-appellant which would reduce the offence of murder to one of culpable homicide not amounting to murder. He further submitted that even though the learned Judge has considered the issue of grave and sudden provocation he has summarily dismissed it on the basis that even though provocation was available it was afforded by the mother of the accused-appellants (wife of the deceased) but not by the deceased himself personally. In this regard the learned Additional Solicitor-General conceded that because of the special relationship that existed between them (Eminona being the mother of the first and second accused-appellants), if what was conveyed by Eminona to the two accused-appellants was of such a nature sufficiently grave enough to give provocation, then, it would entitle the accused-appellants to get the benefit of the Exception I to Section 294 of the Penal Code.

According to the testimony of the prosecution witness Kusum Kumari what had prompted Eminona to take off in search of the two accused-appellants was the deceased's utterance. Namely, "you have got the children to tie me up and beat me, one day the same fate will befall on you." Learned counsel for the accused-appellants submitted that the evidence of Kusum Kumari shows that she had been very much attached to the deceased her grand father and as such she did not come out with the real story. He referred us to the evidence of defence witness Kamalawathie, a daughter of another sister of the two accused-appelants who was living in the same house. According to her, prior to the second episode the deceased had come home drunk and quarelled with the grand mother (deceased's wife). The deceased had damaged the furniture, broke the glass of a cabinet and also grand mother's Buddha statue. This is suggestive of the fact that there was sufficient material to provoke the accused-appellants.

According to the dock statement made by the first accused-appellant what his mother said was "father came home drunk and smashed the Buddha statue on the floor, broke the glass of the cabinet. I don't know what really was happening there." In addition, there are certain items of evidence which if looked at objectively would support the proposition that the two accused-appellants had been provoked by what was conveyed to them by their mother. Namely, that Eminona hurried in search of the accused-appellants who were at a thovil house, that the two accused-appellants hurried back home accompanied by Eminona, that the two accused-appellants were abusing the father and were in a rage. (Vide page 103 of the record).

Furthermore the learned counsel for the accused-appellants invited our attention to the evidence of Kamalawathie in regard to what actually sparked off the first episode. Eventhough Kusum Kumari's version was that Leelawathie, a grand daughter of the deceased had complained to the first accused-appellant when a frock fell on the ground while the deceased was in the process of picking his sarong from the suitcase, Kamalawathie's version was that in order to pick his sarong the decased had thrown the contents of the suitcase on the floor.

The evidence led by the prosecution as well as the dock statements of the accused-appellants did not disclose or reveal a motive for the crime. We were invited by the counsel to examine the contents of the dock statement of the first accused-appellant. The first accused-appellant had narrated an agonizing experience his mother, his brother the second accused-appellant and he had undergone at the hands of the deceased when they were living with him under the same roof.

In this context it is pertinent to refer to an observation made by Justice Gratiaen in *Regina vs. Piyasena*[2] the following effect:

> "In this country mere abuse, even if unaccompanied by physical violence, made in certain circumstances afford sufficient provocation to reduce the offence of murder

to culpable homicide not amounting to murder: and the question whether such provocation was grave enough to mitigate intentional killing of a man is a question of fact to determine."

and at 22B -

"That the jury should decide after due consideration of the evidence of the prosecution witnesses and of the appellant whether the deceased man gave the appellant provocation, and if he did, whether such provocation was grave enough to reduce his offence to culpable homicide not amounting to murder."

Further it is to be observed that the learned High Court Judge has failed to consider these aspects of the case and also the mitigatory plea available to the accused-appellants and thereby misdirected himself in law.

In this context we take note of the Explanation contained in the Penal Code which declares that "whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact."

Viewed in this perspective we hold that the attendant circumstances of this case would entitle the accused-appellants to the benefit of Exception (1) to Section 294 of the Penal Code. Hence we set aside the conviction for murder and the sentence of death and substitute a conviction for culpable homicide not amounting to murder on the basis of grave and sudden provocation (Exception 1 to Section 294 of the Penal Code).

According to the medical expert Dr. S.M. Panagoda who performed the post mortem he found 18 injuries on the "death was due to brain injury associated with fracture of the base of the skull." Further there had been "evidence of bleeding from the nose, mouth and ears seen with the presence of altered blood." Vide cage 13 of the post mortem report marked P1. This appears to be consistent with Kusum Kumari's evidence

that the first accused-appellant had inserted a firewood through the deceased's throat which made the deceased to throw out a gush of blood. Further we take note of the fact that after the crime the body was buried, an attempt to hide the body. These circumstances would call for maximum punishment. Hence we sentence each of the accused-appellants to a term of eighteen (18) years rigorous imprisonment operative from today. Subject to the above variation, in the conviction and sentence we proceed to dismiss the appeal.

HECTOR YAPA, J. - I agree.

Conviction / sentence varied.

Appeal dismissed.