1983 P Cr. L J 778

[Supreme Court (A J & K)]

Present: Abdul Majeed Mallick and Sher Zaman Chaudhry, JJ

MUNSHI KHAN-Appellant

Versus

THE STATE-Respondent

Criminal Appeal No. 6 of 1975, decided on 11th January, 1983.

(On appeal from the judgment of the High Court, dated 24-1-1974, in Criminal Appeal No. 15 of 1973).

(a) Criminal Procedure Code (V of 1898) ----

Ss. 464 & 465-Trial of insane person---Maxim: Audi alteram partem-Provisions of Ss. 464 & 465 being shield against trial of insane persons, based on principle that an accused must know or understand charge and extend explanation, are allied to principle of 'audi alteram partem'.

(b) Criminal Procedure Code (V of 1898)-

-- Ss. 464 & 465--Trial of insane person-Holding of an inquiry ---Condition precedent-Trial Court believing an accused insane, to stop trial and hold inquiry about insanity-Such an inquiry be in judicial fashion and belief of Court must be based on tangible evidence and a tentative satisfaction of Court a condition precedent to inquiry in insanity.

(c) Criminal Procedure Code (V of 1898)-

---- Ss. 464 & 465-Trial of insane "person 'Duty of Court-Trial Court, held, not required to stop trial of accused and embark upon inquiry of insanity merely on pointing out by defence that accused is insane or insanity is feigned Court to have its own satisfaction.

(d) Penal Code (XLV of 1860)-

S. 302 and Criminal Procedure Code (V of 1898), Ss. 464 & 465-Evidence, appreciation of-Record showing accused not raising question of insanity before trial Court nor pleading insanity before High Court-Incident a day light occurrence and ample evidence available to connect accused with commission of murder - No contradictions and discrepancies found in evidence of eye-witnesses or defect in mode of recoveries-Conviction maintained.

(a) Penal Code (XLV of 1860)-

S. 302-Scrutiny of evidence-No error or non-reading, misreading and misinterpretation of evidence---Court seldom taken upon itself scrutiny of evidence.-[Evidence].

Kh. Muhammad Saeed for Appellant.

Sardar Rafique Mahmood, Additional Advocate-General for the State.

JUDGMENT

ABDUL MAJEED MALLICK. J.-This appeal was lodged with the Registry of Judicial Board on 2-12-1974, and remained pending as the impugned judg ment was passed by the Chairman of the Board. On creation of Supreme Court it was transferred to this Court. For some reasons none of the Judges was competent to hear this case, consequently it awaited disposal till appoint ment of new Judges.

2. Munshi Khan appellant, has been convicted and sentenced to death on the charge of murder of Karam Dad. An unhappy state of relationship preceded the incident as the deceased, an elder of the village, had repri manded the culprit couple of names for his undesirable activities in the village. Consequently, on the day of occurrence, when Karam Dad was engaged in conversation with one of the eye-witnesses, convict arrived on the spot, he offered Slaam to them and caused rapid blows to the victim and fled away. He was chased, caught and handed over to the police. The incident took place on the road side, in broad daylight.

3. Sessions Judge, Mirpur, found him guilty of murder, and awarded penalty of death on 19th September, 1973. The sentence was confirmed by the High Court, vide its order dated 24th January, 1974. Conviction is based on the testimony of eye-witnesses corroborated by circumstantial evidence.

4. It is contended by the learned counsel for defence that at the time of trial the appellant was insane and incapable of making his defence. It was brought to the notice of the Court but the learned trial Judge despite taking notice failed to inquire as to whether the accused was of unsound mind and incapable of making his defence. This error vitiated the trial.

5. Provisions relating to insanity of accused during trial are contained in sections 464 and 465 of the Criminal Procedure Code. The provisions o sections 464 and 465 are a safeguard against the trials of insane persons. Legislature has provided a shield so that no person suffering from insanity A was tried and awarded punishment. The provisions are based on the principle that an accused must know or understand the charge and extend explanation (including innocence) if any. The rule is allied to the principle of audi alters partem.

6. The language used in the sections suggests that prima facie when there was some evidence to believe or it so appeared, that an accused person was insane and consequently incapable of making his defence, it was enjoined upon the trial Court to stop the trial and first hold independent inquiry into the question of such insanity. The words "has reason to believe" used in section 464 and the words "appears to the Court" used in section 465 are B synonymous. In both the sections except that the forums are different, spirit of law is common. The discretion vested in the Magistrate or the Court has to be exercised in judicial fashion. The words "has reason to believe I 1appears to the Court" are to be construed to suggest that there must be some tangible evidence of insanity of accused person, The belief of the Court must not rest on imaginative, speculative, hypothetical or arbitrary grounds. A tentative satisfaction of Court is a condition precedent to the inquiry in insanity. The trial Court is not obliged to stop trial and embark upon the inquiry or insanity merely on pointing out of defence counsel that accused was insane or when insanity was feigned. It should have its own satisfac tion on the question.

7. It is a matter of common experience that prosecution and defence find pretexts to prolong trials. Sometimes such pretexts may be genuine but generally they are not. Likewise, possibilities cannot be excluded when accused persons may feign insanity. It is in this view of the matter that dis cretion allowed to trial Magistrate or Court is desired to be exercised i judicial manner. Its obvious benefit is that chances of, abuse of power o the Court and misuse of right of defence are reduced.

8. In the instant case, what happened is that at the initial stage, the learned defence counsel pointed out to the trial Court that the accused suffered from insanity and was not capable of making his defence. The learned Judge recorded the objection but proceeded to record statement of the accused under section 242, Cr. P. C. A direction was also issued to D. H. O. to keep the accused under observation with intimation of results to the. Court. Mean while, Sessions Judge was transferred. The District Health Officer sent his report wherein he disclosed that, in view of his observations, general position of the accused appeared to be of sound mind. Nevertheless it was suggested that the accused may be examined by a psychologist. By the time medical report was sent, the next Sessions Judge had assumed the charge. He felt satisfied that the accused was of sound mind, consequently proceeded with the trial. In his detailed order; the learned Sessions Judge, stated that he himself talked to the accused and was satisfied that the accused was of perfectly sound mind and capable of making his defence. Reference to medical report also appeared in the order, but his satisfaction exclusively rested on his conversa tion with the accused.

9. The question arises as to what is the legal value of the subsequent order of the trial Court. The answer is that the first order, discussed above, does not fall within the scope of the words "appears to the trial Court": Because in that case it was imperative for the Court to step into the next stage and constitute independent inquiry into the question of "unsound mind". of the accused. This was not done and instead the Court proceeded with the trial and recorded statement of the accused. In other words the accused person did not appear to the Court to be of unsound mind and consequently incapable of making his defence. And we find that on the next date when another Judge had taken over he was apprised of the plea of insanity but the learned Judge rejected the plea and proceeded with the trial feeling satisfied that insanity was feigned. We have already construed the relevant words of the section and laid down that there must exist some evidence in order to make the Court believe that accused appeared to be of unsound mind. Applying the principle to the instant case, we find no fault with the trial.

10. In addition to the aforesaid details, record shows that when the learned Sessions Judge decided to proceed with the trial no objection of insanity was ever raised. On conviction the appellant preferred his appeal to the High Court and ultimately to this Court. . The appeals were lodged g through Jail Superintendent, under the signatures of the appellant. Insanit was not pleaded at all and it is conceded by the defence that plea was no raised before the High Court. This is a clear pointer to the fact that the appellant feigned insanity at trial stage and the trial Court rightly ignored it.

11. Ch. Muhammad Saeed suggested that violation of mandatory pro vision of law vitiates the trial but instead of remanding the case for proper trial the defect may be considered as a mitigating circumstance to commute the sentence. We are not impressed by the suggestion of the learned counsel. Firstly it is already maintained that the trial of the case was held in legal fashion; secondly, if the trial is found violative of lave conviction cannot be sustained. And lastly, it 'is settled by now that only extenuating and mitigat ing circumstances may warrant commutation of sentence. An illegal trial, as suggested by the defence, cannot be brought within the scope of extenuating circumstances.

12. Last argument of the defence relates to discrepancies occurring in the testimony of eye-witnesses and defect in the mode of recoveries. Discrepancies pointed out to us are minor and ignorable. There are no contradictions and discrepancies in material particulars. Minor discrepancies are but obvious as it depends upon the standard and degree of observation of each individual in the light of one's power of perception and retention: Moreover, it is a question of fact. In absence of error of non-reading, misreading and misinterpretation of evidence, this Court seldom takes upon itself the scrutiny of evidence. It is a case of daylight murder. There is ample ocular evidence which connects the appellant with the crime of, murder.

The appeal, being devoid of force, is therefore, rejected. A copy off the judgment shall be sent to the prisoner through Superintendent Jail.

Appeal dismissed.

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