PETITIONER:
PERIYASAMY

Vs.

RESPONDENT:
STATE OF MADRAS

DATE OF JUDGMENT:
25/11/1966

BENCH:
HIDAYATULLAH, M.
BENCH:
HIDAYATULLAH, M.
MITTER, G.K.

CITATION:
1967 AIR 1027 1967 SCR (2) 122

ACT:
Criminal Procedure Code (Act 5 of 1898), s. 288-Witness implicating accused in committal, proceedings but not trial court-Witness treated hostile-No formal order transferring previous statement to record of case-If previous statement can be relied on.

HEADNOTE:
In a prosecution for murder the only eye witness having named the appellant as the assailant in her deposition in the committal court, left out his name in her evidence in the Sessions Court. She was declared hostile and was allowed to be cross-examined. The Sessions Judge questioned the appellant with reference to the statement of the witness in the committal proceedings and informed him, that it was marked under S. 288, Cr. P.C. He however did not pass an order transferring the earlier deposition to the record of the Sessions Court. Treating the previous statement as substantive evidence and relying upon the other circumstances in the case, the Sessions Court and the High Court on appeal convicted the appellant.
On appeal to this Court,
HELD : The High Court and the Sessions Court were right in convicting the appellant.
Although the technical requirement of s. 288, namely, that an order should be passed to indicate that the statement is transferred so as to be read as substantive evidence, was not complied with there was no substantial departure from the requirements of the law and no prejudice was caused to the appellant since he was informed that the statement was being used under s. 288. [124 E-G]
[Desirability of an order indicating why the earlier deposition was being transferred to the record of the trial court, pointed out. [124 C-D]

JUDGMENT:
CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 136 of 1966.
Appeal by special leave from the judgment and order dated January 18, 1966 of the Madras High Court in Criminal Appeal

No. 697 of 1965 and referred trial No. 90 of 1965.
B. D. Sharma, for the appellant.
V. P. Raman and A. V. Rangam, for the respondent.
The Judgment of the Court was delivered by
Hidayatullah, J. This is an appeal by special leave against the judgment of the High Court of Judicature at Madras, January 18, 1962, by which the High Court confirmed the conviction of the appellant Periyasamy under s. 302, Indian Penal Code, and the
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sentence of death imposed on him. The facts of the case are as follows:-
Periyasamy was charged with the murder of his wife Kaveri Ammal on the morning of May 11, 1965, at 6 a.m., at a place in Kirambur where they were residing in what is called a shed. Opposite to this shed was another shed in which Periyasamy's brother with his wife Pappayee (P. W. 1) was residing. Periyasamy and Kaveri Ammal had been married for a period of two years during which time Kaveri Ammal used to go away frequently to her parents' place, and the motive suggested is that it used to enrage the appellant Periyasamy. On the morning of the day of occurrence, Pappayee heard the cry "Ayyo, ayyo", and she states that she saw Periyasamy striking his wife with a koduval. Pappayee raised an alarm. Periyasamy thereupon threw the koduval away and retired to his shed and taking hold of a rope climbed a tree. He tied one end of the rope to a limb of the tree and another round his neck and jumped, but meanwhile the neighbours had assembled there and they caught him and cut him down from the tree and laid him on a cot. Periyasamy did not die though there is evidence to show that he had some bruises round his neck.
Meanwhile a brother of Periyasamy by name Chinna ran to their father and informed him about the occurrence. The father,. without going to verify what he had heard, went over to the police station House and lodged a report, saying that his younger son had informed him that Periyasamy had cut down his wife with a koduval and attempted to hang himself and that he was making the report. In the last sentence of this report, it was mentioned that Pappayee had witnessed the occurrence.
The prosecution examined a number of witnesses but we are concerned only with one, namely, Pappayee, P. W. 1, who is the solitary eye-witness in the case. It appears that Pappayee changed her statement in the Court of Session by leaving out the name of Periyasamy as the assailant of Kaveri Ammal. She was, therefore, declared hostile by the court and was allowed to be cross-examined under S. 145 of the Indian Evidence Act. Her previous statement was also brought on the record of the case. This statement of Pappayee forms the foundation of the case against Periyasamy, corroborated by the other evidence about his conduct and the motive for the commission of the offence.
The High Court and the court below have acted upon the statement of Pappayee made in the committal court in preference to the statement she made in the Court of Session, and have based the conviction by accepting her previous version. In this appeal, Mr. B. D. Sharma naturally attacked the evidence of Pappayee from various angles and also, tried to establish that the judgment of the
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High Court did not satisfy the standards for an appellate judgment as laid down by this Court, particularly in a case dealing with the -confirmation of a death sentence. We shall, therefore, examine these contentions in detail.

The first contention raised by Mr. Sharma is that the Sessions Judge did not comply with the provisions of s. 288 of the Code of Criminal Procedure inasmuch as he did not pass any order transferring the earlier statement to the record of the Sessions trial. We have not been able to find in the original record of the case, which was brought to our notice, any order specifying the transfer of the earlier deposition to the record of the Sessions Court under s. 288. It appears, however, that the practice of this Court is to ,contradict a witness with the earlier statement and parts there of, after declaring him hostile and then to use the record of the earlier statement as substantive evidence. It may be stated that it is highly -desirable that the court should, before the transfer of the earlier statement to the record of the Sessions case under s. 288, indicate in ,a brief order why the earlier deposition was being transferred to the record of the trial. This will make it quite clear to the accused that the earlier statement is likely to be used as substantive evidence against him. If the matter had rested with the use of the earlier -statement without this notice to the accused, we would have found it difficult to rely upon the earlier deposition. We find, however, that Periyasamy was questioned with reference to the statement of Pappayee made before the Committing Magistrate which, the Judge informed him, was marked under s. 288 of the Code of Criminal Procedure, and he was asked what he had to say about it. Therefore, although the technical requirement of the section, namely, that an order should be passed to indicate that the statement is transferred so as to be read as substantive evidence, was not complied with, there does not appear to be any substantial departure from the requirements of the law. There is also no likelihood of any prejudice to Periyasamy since he was informed. while he was being examined that the statement was being used under s. 288, Criminal Procedure Code, and was invited to say what he wished to say in defence. We are, therefore, of the opinion that the High Court and the court below were right in using the statement as substantive evidence -which undoubtedly the Code of Criminal Procedure does allow.

Mr. Sharma next contended that it has been laid down in a series of cases that when the solitary witness in a case has made ,conflicting statements, it is very risky to rely upon any of the versions and has drawn our attention to a case reported in re Muruga Goundan(1) decided by a Division Bench in which the present Chief Justice of this Court delivered the judgment. We entirely agree.

(1) A.I.R 1949 Mad. 628.

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But there are cases and cases. If the matter rests upon the statement of a witness, who has changed the version and there is nothing further to connect the accused with the offence with which he is charged, there is good ground for acquitting him. We do not think that this is such a case. The facts here go further. Pappayee's two statements, when they are compared, disclose that the whole of her testimony as given in the court of the Committing Magistrate was again repeated in the Court of Session, except that she left out the name of Periyasamy as the assailant. This appears to have been the result of some pressure upon her. Although she was induced to say in the Court of Session that she had made the earlier statement under pressure of the police and the police threatened to involve her in the murder, we find other clear circumstances from which we can say that the statement made earlier by Pappayee, is definitely to be preferred in the circumstances of this case. We proceed

now, to enumerate what those circumstances are.
The two sheds are situated opposite to each other and the door of the shed in which Kaveri Ammal was done to death is a kind of matting which Pappayee had stated was then open. This would be so in May, which, being a hot month, makes the people open their doors early in the morning. Therefore, whatever happened inside the shed would be visible to persons living in a shed across the road and Pappayee states in both the statements that she was able to see the occurrence. The fact that she is a close relation must weigh considerably against Periyasamy and we must turn, therefore, to see whether he gave any reasonable explanation why Pappayee should have given the evidence at all against him. His version is that he had gone to fetch some kerosene oil for working a pump and when he came back he found that his wife had been cut to pieces, apparently by some one in his absence. He further added in answer to a question that he was "on talking terms" with Pappayee before he married, suggesting thereby that Pappayee was enraged on being neglected by him after he married Kaveri Ammal. This motive and the explanation about his absence are his explanations to avoid the implications of Pappayee's incriminating statement.
In our opinion, neither of these circumstances is clear enough to make us discard the evidence of Pappayee brought on the record under s. 288 of the Code of Criminal Procedure. It seems too much of a coincidence that an unknown murderer lay in wait to kill Kaveri Ammal during the short time her husband was away to buy kerosene oil. Further, it seems difficult to believe that Pappayee was making this statement because she was jilted in some manner by Periyasamy. There is nothing to show that what Periyasamy alleged was at all the truth, and looking to the circumstances of the case, we feel that this is just something which he has thought out in defence without being true. This conclusion is further streng-
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thened by his subsequent conduct on the discovery by him of the murder. What did Periyasamy do? He does not seem to have questioned any one as to how this happened during the short time he was away. On the other hand, he snatched up a rope, tied it to the limb of a tree and tying the other end to his neck jumped down in an attempt to commit suicide. He was fortunate (but not quite so) that some neighbours arrived at the critical moment and saved him from hanging himself. This conduct clearly indicates a feeling of fear or, may be, of remorse. It induced him to attempt to take his own life after he had taken that of his wife. Mr. B. D. Sharma suggested a number of persons who might be the likely assailants of Kaveri Ammal, suggesting the father of Periyasamy or the uncles of the girl and even Pappayee herself. But these suggestions cannot be accepted in the light of the circumstances. If they had been true, the husband would have stood his ground and attempted to see that the right offender was brought to book and not attempted to commit suicide at the first sight of his wife lying murdered at the hands of some one else.
Mr. B. D. Sharma argued that the judgment of the High Court had not taken into account all these circumstances. Perhaps, the High Court thought that the case was clear enough and did not embark on a detailed judgment. After looking into the record of the appeal case and considering every aspect of the argument which has been advanced before us, we are satisfied that no other conclusion was possible and that the charge had been completely proved against Periyasamy.

We, accordingly, order
the appeal to be dismissed.
R.K.P.S.
Appeal dismissed.
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