The State of Mysore Vs. Subhappa and ors.

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Court : Karnataka

Decided On : Jul-13-1960

Reported in : 1961CriLJ653

Judge : A. Narayana Pai and ;M. Ahmed Ali Khan, JJ.

Appellant : The State of Mysore

Respondent : Subhappa and ors.

Judgement :

A. Narayana Pai, J.

1. The respondents before us, five in number, were tried by the Additional Sessions Judge, Mysore, in Mysore Sessions Case No. 3 of 1958, for offences punishable under Sections 143, 147 and 302 read with Section 149 of the Indian Penal Code. They were all acquitted by the order dated 19th day of April, 1958. This appeal is by the State against the said order of acquittal.

2. The case for the prosecution was that early in the morning of 2nd December, 1957, Puttaswamappa, a resident of Chandravadi village, had been to the neighbouring village of Nellithalapurada house to fetch some jute seeds for himself and a small pup for his 9 year-old child Mallesh, and was returning to his village Chandravadi accompanied by Varadanaika carrying jute seeds in a gunny bag and Mada carrying the pup in a basket, and that at that time the 5 accused acting with

the common object of murdering the said Puttaswamappa did commit his murder; the first 3 accused are said to have taken actual part in the assault, the first of them piercing the neck of Puttaswamappa with a dagger and the 3rd cutting it with a chopper on his being felled to the ground by the second while the 4th and the 5th accused were present on the scene and actively instigated the commission of the offence.

The defence was one of total denial, with the suggestion that the entire case has been foisted upon the accused by one Madappa, the patel of Kurubundi village by putting up persons inimically disposed towards them as witnesses in support of the prosecution.

3. The prosecution examined as many as 35 witnesses. A considerable portion of the evidence bears upon the alleged enmity between the accused on the one hand, and the deceased on the other-Among the witnesses examined on this subject is I.W. 25 Subbanna, the patel of Nellithalapura. There is also the evidence of 6 OF 7 witnesses be-sides the investigating officer relating to the discovery of a dagger M.O. 1, allegedly at the instance of the first accused, and the recovery of a chopper M.O. 2, blood-stained baniyan M.O. 21, a Silver Karadige M.O. 11, 3 gold shirt-buttons M.O. 12 and a gold ring M.O. 13, allegedly at the instance of the third accused; M.Os. 11, 12 and 13 are said to have been on the person of the deceased Puttaswamappa at the time of the offence.

The really substantial evidence however, on which the prosecution case in our opinion, rests, consists of the evidence of Varadanaika and Mada examined as P.Ws. 17 and 18 respectively who, according to the prosecution, were in the company of the deceased at the time of the offence and had actually witnessed the fatal assault on him. Certain other witnesses have been examined to probabalise the presence of the eye-witnesses at the time of the occurrence, viz., P. W. 19 Devamma, the mother of Varadanaika, and P.W. 20 Malaya, the father of Mada and certain others who met them or to whom they narrated the details very shortly after the incident, such as P. W. 24 Machasetty alias Dose, P.W.' 31 Channaveerachari and P.W. 32 Nagappa, the shanbhog of Nellithalapura.

4. The trial Judge took the view that what may be described as motive evidence in this case was entirely insufficient to establish the existence of any ill-will between the deceased on the one hand and one or more of the accused on the other. He discounted, the evidence relating to the discovery of material objects as highly interested, bristling with improbabilities and contradictions, and was inclined to accept the argument on behalf of the accused 'that, in all probability, these material objects might have been planted by persons interested in the prosecution rather than discovered on the information furnished by the accused. Regarding the eye witnesses P.Ws. 17 and 18, he stated that he was convinced that they were not speaking the truth and that the several circumstances discussed by him in his judgment gave rise to a reasonable doubt whether the incident had happened in the manner spoken to by them,

5. In his arguments in support of the appeal, the learned Additional Assistant Advocate-General has very fairly and, in our opinion, rightly taken the stand that the prosecution case must stand or fall upon whether or not the evidence of the eye witnesses P.Ws. 17 and 18 is accepted by us as believable and reliable, and that if, in the proved circumstances of the case, we should come to the conclusion either that the eye-witnesses could not have been present at the occurrence or that their evidence is for other reasons open to doubt, neither the evidence relating to motive nor that relating to the discovery of articles would be sufficient in itself to establish the charges against the accused.

His principal grievance against the judgment of the Court below is that the reasons stated for disbelieving the eye-witnesses are insubstantial and some of them inaccurate and opposed to the record, and that in coming to the conclusion against accepting the evidence of the eye-witnesses too much reliance has been placed upon information elicited from P.W. 18 after he had been recalled at the instance of accused 1 to 3 under Section 540 of the Code of Criminal Procedure and upon the evidence of 3 witnesses, P.W. 20 Malaya, P.W. 25 Subbanna and P.W. 32 the Shanbhog, who had demonstrably turned hostile to the prosecution, but whom the trial Judge refused to grant permission to the prosecution to cross-examine. He strongly urges that in recalling both the eye-witnesses for further cross-examination under Section 540 of the Code of Criminal Procedure one of whom

could not be so further cross-examined for the reason that he was ill and had to be carried to the court in a stretcher despite the opposition of the Public Prosecutor, the trial Judge has stated no reasons whatever and has acted in contravention of the principles stated by this Court in Criminal Revn. Petn. No. 322 of 1956, the relevant portion of the judgment in which is extracted in Govinda Reddy v. The State 36 Mys LJ 278 at p. 307 : AIR 1958 Mys 150 at p. 167, and that in refusing permission to the prosecution to cross-examine P.Ws. 20, 25 and 32 the trial Judge has committed an error of law which has operated to defeat the very purpose of a trial, viz., discovering truth.

He also makes the suggestion that there are in the recorded evidence sufficient indications showing that, in all probability, these witnesses -- particularly P.W. 32 the Shanbhog must have been got at or tampered with by persons interested in the accused. The answer on behalf of the accused-respondents is that both in the matter of recalling and re-examining a person already examined and in the matter of granting or refusing to grant permission to the prosecution to cross-examine witnesses whom they consider to be hostile, the Court has very wide discretion, to be exercised for the purpose of ascertaining the truth and arriving at a just decision on the case and that in the present case, such discretion has been rightly and properly exercised by the trial Judge furnishing no valid grounds for interfering with that discretion in appeal.

It is further contended that the eye-witnesses have been disbelieved for very good reasons and that even assuming, though not admitting, that the reasons actually stated therefore in the judgment of the trial Court may be said to be weak or inadequate, there are very substantial reasons why no reliance can be placed upon the evidence of those witnesses. It is finally submitted that this being an appeal against an order of acquittal, we should give proper weight and consideration to such important matters as, the views of the trial Judge as to credibility of the witnesses, the slowness of the appellate Court in disturbing the findings of fact arrived at by the trial Judge who had the advantage of seeing the witnesses and, above all, the presumption of innocence in favour of the accused and his right to the benefit of any reasonable doubt that may arise on the evidence.

6. In the light of these arguments and contentions, the principal points for consideration by us in this appeal obviously are-

(1) whether the trial Judge has acted rightly and justly in recalling the eye-witnesses for further examination at the instance of the accused and in refusing permission to the prosecution to cross-examine P. Ws. 20, 25 and 32; and

(2) whether the grounds stated by the trial Judge for disbelieving the eye-witnesses are not substantial ones and whether, independently of what the trial Judge has stated in his judgment, there are no grounds or reasons available in the evidence sufficient to show that the evidence of the eye-witnesses is unworthy of credit or open to serious doubt.

7. For a correct appreciation of the contentions, it is necessary first to briefly summarise the evidence relied upon by the prosecution bearing on the incident.

Then after discussing evidence his Lordship proceeded.

8-23. We must now examine whether the further contention that no reliance should have been placed on the evidence of these witnesses in the manner the lower court has done, without permitting the prosecution to cross-examine them, is or is not justified.

24. The statutory provision directly bearing on the question is Section 154 of the Indian Evidence Act, but certain other sections of the same Act, viz., 137, 138, 141, 142 and 143 are also of relevance on the topic. Section 137 states that the examination of a witness by the party who calls him shall be called his examination-in-chief, his examination by the adverse party shall be called his cross-examination and his examination subsequent thereto by the party calling him shall be called his re-examination. Section 138 provides:

Witnesses shall be first examined-in-chief, then if the adverse party so desires cross-examined, then if the party calling him so desires re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified

on his examination-in-chief.

The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the court, introduced, in re-examination, the adverse party may further cross-examine upon that matter.

Section 141 defines a leading question as one suggesting the answer which the person putting it wishes or expects to receive. Section 142 prohibits the asking of leading questions in examination-in-chief, if objected to by the adverse party, or in re-examination except with the permission of the court; the same section, however, states that the court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved. Section 143 permits leading questions being asked in cross-examination. Section 154 reads as follows:

The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

25. The basic idea underlying the provisions restricting the chief-examination only to relevant facts and the re-examination to the explanation of answers elicited in cross-examination and the prohibition in ordinary circumstances against asking leading questions or questions in the -nature of cross-examination by the party calling a witness, is that by calling that witness the said party must be taken to represent to the Court that the witness called by him is worthy of credit and is likely to speak the truth in respect of facts touching matters under enquiry by the Court. Though this may be the normal position in a majority of cases, occasions may not infrequently, arise where a party may be obliged out of pure necessity to examine a witness, with whom he may have no privity and of whose general character and credibility he may not be fully aware or informed.

In such cases it will not only be absurd to assume that he represents such a witness to the Court as worthy of credit but also, in the highest degree, unfair and unjust. At the same time, it will be opposed to sound policy to permit a party to put a witness in the box in support or in substantiation of his case or claims and then take steps to impeach his credit the moment the witness gives answers

unfavourable to his case or claims. Witnesses are expected to speak the truths and not merely give answers favourable to the case of the party calling them without regard to truth. It is the exclusive province and duty of the Court to discover as well as it can whether the witnesses are speaking the truth or not.

These shortly are the reasons why a party calling a witness cannot impeach the credit of that witness or put to him questions in the nature of cross-examination, except with the permission of the Court. As already stated, the mere fact that the witness has given certain answers not wholly favourable or even adverse to the case of the party who has called him is never considered sufficient ground for permitting the party to cross-examine him. Such permission is granted only when the witness is said to be hostile to the party calling him. The opinion of the party as to the hostility of a witness is not final. The Court, on a consideration of all factors relevant to the question, must form its own opinion that the witness really bears a hostile animus to the party calling him.

Among those factors are the manner in which the witness answers questions, his demeanour while answering questions, his desire or intention disclosed in one or more of the modes aforesaid or otherwise to seriously damage the case of the party calling him, or to wholly or to a very great extent resile from a prior statement made by him on the strength of which the said party has chosen to call him as his witness. Although the demeanour of a witness and the manner of his answering questions may, in a large number of cases, be a safe guide to the Court in deciding whether he is hostile, it is not wholly unlikely that a clever witness may show a splendid demeanour and yet by the nature and content of his answers cause serious damage to the case of the party calling him.

It is considerations like these that make it impossible for the statute to lay down any conditions or rules of guidance to be observed by the Court while deciding this question. The law, has therefore, advisedly left the matter entirely at the discretion of the trial Judge who has the benefit of watching the, witness in the box and hearing him giving evidence. It is hardly necessary to state that such discretion, like any other discretion vested] in a Court, has to be exercised judicially, and having regard to the ultimate objective of taking evidence namely, to discover the

truth to the best of one's ability, it is obvious that that principle alone should be the one to guide and direct the exercise of the Court's discretion and not any considerations bearing upon whether the granting or refusing to grant permission to cross-examine a witness in a particular instance will be favourable or unfavourable to the case of the one Or the other party before Court.

26. Ordinarily or, in many cases, permission to cross-examine a witness is sought by the party calling him in the course of examination-in-chief itself. The question has been raised in this case whether an omission to ask for such permission in the course of chief-examination or before cross-examination by the adverse party has commenced, disentitles a party from seeking such permission of the Court at a later stage or after the close of the cross-examination by the adverse party.

The reason for raising this question is whereas in the case of P. W. 25 Subbanna permission was sought at the close of the chief-examination itself, in the case of Malaya P. W. 20 and Shanbhog Nagappa F. W. 32, such permission was asked only after their cross-examination by the counsel for the accused. Section 154 itself does not specify the stage at which alone a party can seek such permission, nor does its language purport to place any restrictions on the discretion vested by it in the Court. The principles already stated by us also do not imply any such restriction.

Another reason why no such restriction can rightly be imported is that cross-examination need not be confined to the facts to which the witness has testified in his examination-in-chief. It is plain therefore that the cross-examining counsel would be entitled to elicit further facts in support of his own client's case in the course of cross-examination. It is also plain that a witness, who has in his chief examination deposed favourably or not unfavourably to the case of the party calling him, may in the course of cross-examination, show a marked predilection to give answers sought or expected by the interrogator or otherwise disclose a hostile animus against the party who had called him.

In such circumstances, the Court is not only not disabled from granting permission to the party who had originally called the witness to cross-examine him but it would, in our opinion, be improper exercise of discretion to refuse such permission

if, in the opinion of the Court, circumstances justifying its grant do exist. It has been strongly urged on behalf of the accused-respondents before us that the one compelling reason why such permission ought not to be granted after the cross-examination by the adverse party is that it would tend to destroy the advantage which the accused might have acquired by reason of the answers elicited by their counsel from the prosecution witness in the course of cross-examination.

A complete answer to this contention, in our opinion, is what we have already stated above, viz., that the sole concern of the Court in granting or not granting such permission is to discover whether the witness has been speaking the truth or suppressing the same or uttering falsehood, and that it should discharge its duty irrespective of whether the exercise of its discretion operates to the advantage or disadvantage of either of the parties before it. The only point for consideration by the Court is whether, upon the nature and content of the answers already given by the witness, whether in examination-in-chief or in cross-examination, or upon his demeanour and the manner of giving evidence, there is sufficient material to hold that the party calling the witness should, in fairness, be permitted to cross-examine him.

27. In regard to the three witnesses mentioned by us, viz., P. W. 20 Malaya, P. W. 25 Subbanna and P. W. 32 Nagappa, the contention on behalf of the appellant is that they have actually turned hostile and the material available in their evidence is sufficient to justify that assertion.

Then again after discussing evidence His Lordship proceeded.

28.-33. On a consideration of all these several circumstances, we are of opinion that in the case of Malaya P. W. 20 and Shanbhog Nagappa P. W. 32, permission should have been granted to the Public Prosecutor to cross-examine them in the interest of truth and justice. The consequence of the learned Judge's omission to grant such permission is that what they have stated in their cross-examination in chief is of little or no value to the prosecution case, and what they have stated in the course of cross-examination on behalf of the accused which is greatly damaging to, if not completely destructive of, the prosecution case, is apparently motivated by desire to help the accused. But no definite opinion about the truth or

untruth of it is possible because the same has not been subjected to the test of cross-examination. Besides, the learned Additional Assistant Advocate General has made a definite charge before us that these witnesses, particularly the Shanbhog, have in fact been got at and won over by persons interested in the accused.

34. The resultant position is this. It will he unfair to the accused to rely on that part of the evidence of these witnesses which is in favour of the prosecution and reject the rest of it which is in the accused's favour, It will be unfair to the prosecution either to act upon the unverified and untested statements of these witnesses tending to help the accused or totally to reject their evidence. It will be unfair to these witnesses to condemn them as tainted witnesses without giving them a chance to explain their position or to convince the Court that they are in fact speaking the truth. In such a situation, there is no option but to direct retrial of the entire

35. The learned Counsel for the accused-respondents before us have argued that even if the evidence of these witnesses and the inferences flowing therefore are disregarded, there is enough material in the other evidence on record to support the order of acquittal. With a view to assess the position in the light of this contention we have heard long and elaborate arguments addressed to us by the learned Counsel for respondents. We are of opinion that the course suggested by the learned Counsel cannot justly be adopted for two reasons. Whichever be the manner in which the other material on record is interpreted or utilised for supporting the order of acquittal, the circumstances and arguments which are really of a clinching nature are those founded ultimately on the evidence of these very witnesses, P. Ws. 20 and 32 Secondly, if a retrial has become necessary by reason of the trial Judge's failure to permit cross-examination of these witnesses by the prosecution -- and we think it has so become necessary, -- any opinion which we may express on the other material on record is sure to embarrass either the accused or the prosecution in the course of retrial.

36. Two other arguments addressed on behalf of the accused must now be considered.

37. It is strongly urged that it is entirely a matter for the exercise of discretion by the trial Judge whether or not to permit cross examination in the manner sought by the prosecution, and the trial Judge having exercised that discretion, we sitting as an appellate Court should not lightly interfere with his discretion. There can be no doubt that in matters of discretion, the appellate Court will be slow to interfere with the exercise of discretion by the trial Judge. But, such discretion, as we, have already observed, ought to be exercised judicially and if the appellate Court, on an examination of the entire material, comes to the conclusion that there had not been a judicial exercise of discretion by the trial Judge, it will be abdicating its function as an appellate Court should it still refrain from interfering with the wrong exercise of discretion by the trial Court. With reference to the discretion under section 154 of the Evidence Act, we have stated that the ultimate object of exercising that discretion is to enable the Court to discover the truth, and an exercise of that discretion which results in depriving the Court of the material necessary for that very purpose by refusing permission to cross-examine a witness when it should properly have been granted, is eminently one which requires correction by the appellate Court.

38. It has also been strenuously contended that specially in appeals against acquittal, we should attach value to the opinions and impressions of the trial Judge about the witnesses and their evidence.

No exception can be taken to this sound rule. But in this case, the opinion and impressions of the learn ed trial Judge have obviously been based upon evidence which, for the reasons discussed by us in detail remains untested and therefore does not afford any sound basis for the formation of correct opinions or for drawing proper inferences.

39. In the view we have taken regarding P. Ws. 20 and 32, it seems to us unnecessary to deal at length with the effect of the learned trial Judge's order for recalling eye-witnesses P. Ws. 17 and 18 for further cross-examination. It is enough to say that his order on the application filed on behalf of accused 1 to 3 under Section 540 found recorded in the order sheet in the following terms--

Sri L.S. files an application under Section 540. Cri P.C. praying that P. Ws. 17 and 18 may be recalled for the reasons stated in the application. P. P. objects.

P. P. is directed to produce P. Ws, 17 and 18 today.

is totally devoid of any reason or even of an indication of the learned Judge having applied his mind and considered whether circumstances existed justifying the recall of the witnesses.

40. In the result, we set aside the order of acquittal and direct that accused-respondents before us be tried afresh for charges 1, 2, 3 and 4 as originally formulated by the learned Sessions Judge. The 5th charge framed by him was reserved for a separate trial, and we are informed that such separate trial having been held the accused Were acquitted. Our present order for retrial will have no reference to that charge.

41. This judgment shall be certified to the trial Court and all records of the case dispatched to it without delay. The trial Court will proceed with the trial expeditiously.