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Mohamed Ghouse Vs. the State

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Court : Karnataka

Decided On : Aug-07-1964

Reported in : 1965CriLJ288

Judge : H. Hombe Gowda, C.J. and ;M. Santhosh, J.

Appellant : Mohamed Ghouse

Respondent : The State

Judgement :

H. Hombe Gowda, C.J.

1. Appellant Bombay Ghouse alias Mohammad Ghouse of Bangalore City has been convicted of an offence of murder under Section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life by the second Additional Sessions Judge, Bangalore, in Bangalore Sessions Case No. 26 of 1962.

2. The accusation against the appellant is that he caused the death of one Abdul Sattar by stabbing him with a Knife M. O. 1 in the early hours of 13th June 1962 in front of Sir Mirza Ismail Oval just opposite to Krishnarajendra Market of Bangalore. It is the case of the prosecution that deceased Abdul Sattar was witnessing the 'Thamasha' in connection with the last day of Moharram on the night of 12/13th June 1962 in front of the City Market along with some of his friends, who are examined as prosecution witnesses near the City Market. It is stated that at about 1 a. m, on 13th June 1962 the appellant came along with a number of persons

shouting 'din din' and pushed aside the people that had gathered there to witness the 'thamasha'. In particular the appellant pushed Abdul Sattar and his friends who were standing at the place.

It is stated that the appellant and his followers toad no 'punja' with them at the time. Abdul Sattar who was pushed by the appellant and his followers objected to their act in shouting 'din din' without carrying 'punja' and pushing him and his followers without any justifiable cause while they bad come to see the 'thamasha'. Afterwards there were exchange of hot words between Abdul Sattar and the appellant. The appellant abused Abdul Sattar in foul language and he retaliated. It is stated that Immediately thereafter, the appellant pulled out a knife M. O. 1 from his pocket and pressed the button which resulted in the opening of the blade and flourished the same at Abdul Sattar and the knife caused an injury on the left side of the neck just below the ear. It is alleged that the appellant flourished the knife once again and inflicted an injury on the back of the deceased and Abdul Sattar cried out 'Amma Amma' and walk-ed a few paces and fell down motionless.

The appellant, according to prosecution case, threw away M. O. 1 and ran towards the taxi-stand. Mohammad Ziauddln and other friends of Abdul Sattar who were at the place rushed to the place where Abdul Sattar was lying and found that he was lying motionless and did not respond to the call and hence they removed him to the Victoria Hospital which is just a few yards from the place for medical aid. Abdul Khaleel, a cousin brother of Abdul Sattar, came to the place. Dr. T. V. Mariappa who was in the Emergency Ward examined Abdul Sattar and declared that he was dead. At the instance of Khaleel, Mohammad Ziauddin and others proceeded to the Market police Station to lay the information about the incident. The Head Constable who was in charge of the Police Station sent for the Sub inspector of police who was on his rounds and he came to the place.

The Sub Inspector of Police recorded the statement of Mohammad Ziauddin and registered a case for an offence punishable under Section 302 of the Indian Penal Code against the appellant and proceeded to the Hospital. He found Abdul Sattar lying dead at the place. He came back to Sir Mirza Ismail Oval and inspected the place of the incident. He collected panchayatdars and got the place searched and

found M. O. 1 the knife which was stained with blood lying in a bush and recovered the same under a mahazar.

In the meanwhile the appellant who had sustained a number of profusely bleeding injuries on his person was taken in a car by P. W. 14 Sheik Ameer, to the police station at Kalasipatyam. P. W. 14 Sheik Ameer informed the Sub Inspector of Police that the appellant fell down almost exhausted near his car, which he had parked near the Taxi-stand when he was being chased by a large number of persons and that he put him into his car and brought him to the Police Station. The Sub-Inspector of Police found profusely bleeding injuries on the person of the appellant and therefore, he directed the Head Constable to take him to the Victoria Hospital for necessary treatment in the same car. The appellant was accordingly removed to the Victoria Hospital and was admitted for treatment. He was an in-patient in the Hospital for 14 days and was subsequently discharged.

The Sub Inspector of Police and the Inspector of Police attached to the Market Police Station carried on the investigation. They examined P. W. 15 Mohammad Ziauddin, P, W. 16 Abdul Sameed, P. W. 17 Mohammad Hussain and P. W, 18 Ameer who had witnessed the incident and many others. After completing the investigation, a charge sheet for an offence punishable under Section 302 of the Indian Penal Code was placed against the appellant in the Court of the City Magistrate, Bangalore.

The learned Magistrate, who perused the documents filed by the prosecution under Section 173 of the Code of Criminal Procedure framed a charge for an offence punishable under Section 302 of the Indian Penal Code against the appellant and committed him to take his trial in the Court of Sessions at Bangalore. When the case came up for trial before the Second Additional Sessions Judge, Bangalore he framed a charge against the appellant under Section 302 of the Indian Penal Code and it is in respect of the charge so framed by the learned Judge that the appellant was put on his trial.

3. The appellant pleaded not guilty to the charge and claimed to be tried. He stated that he was attacked by Khaleel, the cousin brother of Abdul Sattar and some of the prosecution witnesses while he was near B. T. Ramaiah's Hotel a

place quite near the place of the incident and that he received a number of injuries which were found on his person on account of the stabbing with a knife by his assailants. He denied that he inflicted injuries with M. O. 1 to Abdul Sattar and was responsible for his death.

4. The prosecution examined 20 witnesses including the Investigating Officers to establish the charge against the appellant. The learned Sessions Judge, who scrutinized the evidence, held that the prosecution had established a clear case for an offence punishable under Section 302 of the Indian Penal Code against the appellant and convicted and sentenced him as stated above. It is against this Judgment that this appeal has been filed by the appellant.

5. The fact that Abdul Sattar, who was hale and healthy, succumbed to the injuries which he received at the hands of some one at about 1-15 or 1-30 a.m. on 13th of June 1962 is not disputed. It is not also disputed that the incident which re-suited in the death of Abdul Sattar took place just in front of the City Market, Bangalore in Sir Mirza Ismail Oval. The fact that it was the last day of the Muharram and that a large number of persons had gathered at the Oval to witness the 'Thamasha' namely, people coming with the 'punjabs' shouting 'din din' in groups and proceeding one after another is admitted. It is clear from the evidence of the eye witnesses that deceased Abdul Sattar was one of the persons who was standing neat the Syed Nabibi Darga witnessing the 'thamasha'. The evidence of P. W. 15 Mohammad Ziauddin, P. W. 16 Abdul Sameed, F. W. 17 Mohammad Hussain and P. W, 19 Ameer in this regard is not controverted.

The evidence of these four witnesses makes it clear that the appellant came to the place shouting 'Din din' at about 1-15 a.m. and pushed all these witnesses and deceased Abdul Sattar who were standing in the crowd and that was the beginning of the trouble. According to the version of the eye witnesses deceased Abdul Sattar on observing the appellant coming with his followers without the punjabs shouting 'din din' and pushing them unnecessarily, told him (appellant) that they had also come to witness the 'thamasha' and there was no reason for him to push them in such a manner. Immediately thereafter, according to the version of these witnesses, the appellant used foul language against Abdul Sattar

and started the quarrel. Abdul Sattar it is alleged stated in reply to vulgar abuse of the appellant.

why do you want to spoil my woman; you go and spoil the women in your house.

The appellant then took out M.O. 1 from his pocket, pressed its button which resulted in the opening of the blade and flourished the same against Abdul Sattar, it is stated that Abdul Sattar tried to avoid the blow by turning aside but yet the blow fell just below his ear and caused the injury. These witnesses further state that the appellant flourished the weapon once again and inflicted an Injury on the back of Abdul Sattar and that he fell clown. According to the version of these eye witnesses, they attempted to catch hold of the appellant but could not do so as he (appellant) pointed out the Knife at them; that immediately thereafter the appellant threw M.O. 1 at the place and ran away towards the taxi stand and that he was chased by some persons who were at the place.

Abdul Sattar succumbed to the injuries as is clear from the medical evidence on record. Though the prosecution did not examine Dr. T. V. Mariyappa who examined Abdul Sattar and declared that he was dead when he was removed in an injured condition by P, W, 15 Mohammed Ziauddin, P. W. 16 Abdul Sameed, P. W. 17 Mohammed Hussain and f. W. 18 Ameer to the Hospital, the other evidence on record establishes conclusively that Abdul Sattar died on the spot and his dead body was taken to the Hospital.

6. P. W. 2 Dr. A Vasudeva Rao conducted the post mortem examination over the dead body of Abdul Sattar on 13th June 1962, He found four injuries and they are (1) an abrasion 1/2' x 1/2' below the left lower eye lid in its middle; (2) an incised wound 3/4' x 1/2' skin deep behind the pinna of the left ear; (3) a lacerated wound 8' x J' x i' below the left ear lobule and (4) an incised penetrating wound 1' x 1 /10' x 1/2' opening into the left pleural cavity situated on the left side of the back 8' above the iliac crest and 2 1/2' from the spinal column. On internal dissection the Doctor found that the tenth inter-vertebral disc showed a linear cut 1' long on the left side; that the left pleural cavity contained 30 ozs. of fluid and clotted blood; that pleura was penetrated in the tenth intercostal space 2' medial to the spinal column; that the left lobe of the diaphragm showed an opening J' in diameter and that the

lower lobe of the left lung was lacerated on its posterior aspect in its lower part measuring 1' x 1/4' x 1/4'.

The Doctor was of the opinion that the death of Abdul Sattar was the result of shock and haemorrhage resulting from the injuries to the vital organs and that the death was instantaneous. Exhibit p-6 is the post mortem certificate issued by P. W. 2 Dr. A. Vasudeva Kao. The Medical Officer has further stated that the injuries found on the dead body of Abdul Sattar could be caused with M.O. 1 shown to him. The evidence of the Doctor has remained almost unchallenged. It is, therefore, clear that Abdul Sattar met with his unnatural death just to front of the Krishnarajendra Market at about 1-15 A.M. on 13th June 1962. This version of the prosecution case is not seriously challenged by Mr. Devadas, the learned Counsel who argued the appeal on behalf of the appellant.

7. Before parting with this aspect of the case, we would like to point out a grave illegality committed by the learned Sessions Judge in admitting Exhibit P-7 - the Accident Register - Ex. P-7(a) and Ex. P-7(b) - the entries in the Accident Registers purported to have been made by Dr. T. V. Mariyappa who was working as an Assistant Surgeon in the Victoria Hospital on 13th of June 1962 under Section S3 of the Evidence Act. Dr. T. V. Mariyappa was in charge of the Emergency Ward on the night of the incident and he examined Abdul Sattar when he was brought to him by P. W. 15 Mohammed Ziauddin, P. W. 16 Abdul Sameed, P. W. 17 Mohammed Hussain and F. W. 18 Ameer and declared that he was dead. Thereafter Dr. T. V. Mariyappa made the entries in the Accident Register as per Ex. P-7(a). He also admitted that the appellant when he was brought in a car on the 13th of June 1962 he made the entries in the Accident Register in regard to the injuries that he observed on the person of the appellant as per Ex. P-7 (b). He also issued Ex. P-8 the wound certificate in respect of the injuries that he found on the person of the appellant.

When the case came up for trial Dr. T. V. Mariyappa was not in Bangalore. It is stated that he was at Delhi undergoing his higher training, Hence he was not examined before the trial Court. In order to prove the entries made by him in the Accident Register and also to the fact that Exhibit P-8 (the wound certificate) was

in the handwriting of Dr. T. V, Mariyappa, the prosecution examined P. W. 3 Dr. K. C. Maribasappa who according to them was quite conversant with his (Dr. T.V. Mariyappa's) handwriting. The prosecution purported to adduce this evidence under Section 33 of the Evidence Act. The learned Sessions Judge has not only admitted this evidence but has also acted upon the same. It is urged by Mr, Devadas the learned Counsel for the appellant that this evidence was clearly inadmissible under Section 33 of the Evidence Act and the learned Sessions Judge was not justified in the circumstances proved in the case in permitting the prosecution to rely upon this part of the evidence.

8. It is seen that the learned Counsel who appeared for the appellant in the trial Court did not take any objection in regard to the admissibility of the evidence but yet the question for consideration is whether the learned Sessions Judge was justified in admitting this piece of evidence under Section 33 of the Evidence Act. Section 33 of the Evidence Act enables the evidence of the witness who is dead or cannot he found or is incapable of giving evidence or is kept out of the way by the adverse party or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case, the court considers unreasonable, may be admitted.

The prosecution in this case could not Justifiably contend that it was not possible for them to secure Dr. T. V. Mariayappa who was at Delhi and examine him as a witness before the Court, without any unreasonable delay. It is not made out that Dr. T. V. Mariyappa could not come to Bangalore for giving evidence or his presence could not have been obtained without an amount of delay or expense which under the circumstances of the case the Court considers unreasonable. In these circumstances, we are of the opinion that the learned Sessions Judge was entirely wrong in allowing the prosecution to adduce evidence relating to Exhibits P-7, P-7(a), P-7(b) and P-8 under Section 33 of the Evidence Act. The question as to whether such medical evidence can be brought on record under Section 33 of the Evidence Act and acted or relied upon was considered by the former High Court or Mysore in Abdul Samad v. Govt. of Mysore 51 Mys HCR 266. Venkataramana Rao C. J. who spoke for the Bench observed as follows:

As pointed out by Lord Goddard in a recent decision of the Privy Council in Chainchal Singh v. Emperor where it is desired to have recourse to Section 33 of the Indian Evidence Act on the ground that a witness is incapable of giving evidence that fact must be proved and proved strictly. The learned Lord further observed as follows:It is an elementary right of an accused person or a litigant in a civil suit that a witness who is to testily against him should give his evidence before the court trying the case which then has the opportunity of seeing the witness and observing his demeanour and can thus form a far better opinion as to his reliability than is possible from reading a statement or deposition. It is necessary that provision should be made for exceptional cases where it is impossible for the witness to be before the Court and it is only by a statutory provision that this can be achieved. But the Court must be careful to see that the conditions on which the statute permits previous evidence given by the witness to Be read are strictly proved. In a civil case a party can if he chooses waive the proof put in a criminal case strict proof ought to be given that the witness Is incapable of giving evidence.

The reason why the learned Sessions Judge admitted the said deposition is thus stated by him in paragraph 14 of his judgment:

Mr. Krishnappa P. W. 34 in the lower Court is the Sub-Assistant Surgeon who conducted the post mortem examination. He is now lying as an inpatient in the Sri Krishna Rajendra Hospital at Mysore and he is thus unable to attend the Court. The evidence given by him has been marked as Exhibit P-16.

9. The inability of the witness to attend Court is based on a medical certificate produced in Court purporting to have been given by Dr. C. Krishnaswamy Rao, Durbar Physician and Medical Officer, Krishnarajendra Hospital, Mysore, and on the evidence of the Police Inspector P. W. 34. The medical certificate states that the witness was undergoing treatment for high blood pressure as an in-patient in the said Hospital and that he was not in a position to attend the Sessions at Tumkur on 6-11-1945. The Medical certificate is not by itself evidence. P. W. 34 the Police Inspector who was asked to state in re-examination deposes thus:

The Sub-Assistant Surgeon Mr. T. Krishnappa who conducted the P. M. examination of the body is an in-patient in Sri Krishna Rajendra Hospital, Mysore, and is unable to go over to Tumkur.

Nothing is elicited from him as to why he is unable to go over to Tumkur. Even assuming that the medical certificate could be relied on, the certificate does not state that the witness would not be in a position to attend. Court at any later date because that information would be necessary to enable the learned Judge to come to the conclusion as to whether the trial could be postponed for any reasonable time without unnecessary delay to enable the witness to attend the Court. Therefore, there is absolutely no legal evidence on which the Court can come to the conclusion that the witness is incapable of giving evidence or that his presence cannot be obtained without an amount of delay which under the circumstances of the case, but court considers unreasonable.'

In the instant case, it is clear from the answers elicited in the course of the cross-examination of P.W. 3 Dr. K. C. Maribasappa that there were some interpolations in Exhibit P-7 (a) and Exhibit P-7(b) and there were some omissions in Exhibit F-8 the wound certificate issued, by Dr. T. V. Mariyappa and that P. W. 3 Dr. K. C. Maribasappa was unable to explain them. In the above circumstances, the admission of Exhibits P-7, P-7(a), P-7(b) and P-8 without the examination of the person who made those entries under Section 33 of the Evidence Act is not at all justifiable. However, the admission of this evidence, though illegal has not in any way prejudiced the case of the appellant Inasmuch as he has admitted many of the facts, found in these exhibits.

Moreover, the post mortem certificate Issued by P. W. 2 Dr. A. Vasudeva Rao, who conducted the post mortem examination over the dead body of Abdul Sattar on the afternoon of 13th June 1962 as per Exhibit F-G and Ms evidence in this regard conclusively established the fact that Abdul Sattar succumbed to the injuries which he had received at the hands of some person with a weapon like M.O. 1. It may also be mentioned that the appellant has himself produced Exhibit D-1, an extract obtained from the Accident Register Exhibit P-7 and has relied upon to show that he had received injuries as stated therein at or about the time of

the incident in Bangalore and that he was admitted into the Hospital. The only legitimate objection the appellant could urge is that on account of the non-examination of Dr. Mariyappa, he was unable to elicit answers in support of his defence that his condition was also critical at the time he was admitted into the Hospital and that the treatment given to him will show that he was in a precarious condition.

There is absolutely no room for any such objection as P. W. 20 Mr. Channe Gowda, the Circle Inspector of Police, 'D' Division, Bangalore City admitted many of! these facts in the course of his cross-examination. He had admitted that he was informed by Dr. Mariyappa who admitted the appellant as an in-patient into the Hospital that his condition was critical and that he was unable to matte any statement. What treatment was given to the appellant was recorded in Ex. P-7 (b), which shows that the Duty Doctor gave blood transfusion, which indicates that the condition of the appellant was considered to be critical at the time he was admitted into the Hospital. The appellant cannot therefore have any grievance in this regard.

10. (After considering the evidence in Para 10 the judgment proceeded :)

We agree with the trial Court that the evidence on record proves beyond all reasonable doubt that it is the appellant that inflicted the injuries with the knife to Abdul Sattar and one of them proved fatal and that Abdul Sattar died on the spot just in front of the Krishna Rajendra Market on the early hours o 13th of June 1962.

11. The only other question for consideration is whether the appellant is guilty of the offence of murder or of a lesser offence. Though the eye witnesses for the incident namely V. W, 15 Mohammed Ziauddin P. W. 16 Abdul Sameed, P. W. 17 Mohammed Hussain and P. W. 18 Ameer do not admit that either Abdul Sattar or any one of his friends inflicted the injuries found on the person of the appellant, we have no doubt in our minds that the injuries were received by the appellant during the quarrel and at the place of the incident in which Abdul Sattar died. Admittedly the appellant and the deceased were utter strangers to each other,

There was no motive for the appellant to commit the offence. There was no previous ill-will between the appellant and the deceased. It is during a sudden quarrel that ensued on account of the rude behaviour of the appellant to which deceased, Abdul Sattar took exception. A fight between them took place. There was absolutely no premeditation. In these circumstances, we are of the opinion that the offence committed by the appellant falls under exception (4) of Section 300 of the Indian Penal Code and can only be of culpable homicide not amounting to murder.

12. In Dharman v. State of Punjab : 1957 CriLJ420 the Supreme Court held that when during a sudden and free fight in the course of which one of the persons receives an injury which proves fatal even though it is proved that the accused Inflicted the injury and when the evidence further establishes that the accused also received some injuries, the case of the accused clearly falls within Exception (4) of Section 300 of the Indian Penal Code. In Jumman v. State of Punjab (S) : 1957 CriLJ586 their Lordships held that where a mutual conflict develops and there is no reliable and acceptable evidence as to how it started and as to who was the aggressor it will not be correct to assume private defence for both sides and such a case will be a case of sudden fight and conflict and has to be dealt with under Section 300 of the Indian Penal Code exception 4; and this is what their Lordships observed:

In such, a case where a mutual conflict develops and there is no reliable and acceptable evidence as to how it started and as to who was the aggressor would it be correct to assume private defence for both sides? We are of the view that such a situation does not permit of the plea of private defence on either side and would be a case of sudden fight and conflict and has to be dealt with under Section 300, I. P. C. Exception 4.

The facts and circumstances proved in the case, in our opinion, lead to the irresistible conclusion, that the act of the appellant falls under exception 4 of Section 300 of the Indian Penal Code and that he can only be held guilty of culpable homicide not amounting to murder punishable under Section 304 of the Indian Penal Code and not of murder punishable under Section 302 of the Indian

Penal Code.

13. We accordingly modify the conviction of the appellant and convict him under Section 304 of the Indian Penal Code instead of Section 302 of the Indian Penal Code. In the circumstances of the case we are of the opinion that the ends of Justice can be met by sentencing the appellant to suffer Rigorous Imprisonment for a period of Five (5) years for the offence punishable under Section 304 of the Indian Penal Code. We order accordingly.

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