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Court : Kerala

Decided On : Mar-20-1952

Reported in : 1952CriLJ1290

Judge : Koshi, C.J. and; Gangadhara Menon, J.

Appellant : Kuruvila Joseph

Respondent : State

Judgement :

Koshi, C.J.

1. The appellant has been convicted by the learned Sessions Judge of Parur of two offences of murder and four offences of attempt to murder. For each offence of murder he has been sentenced to undergo rigorous imprisonment for life. With respect to the attempts to commit murder, as regards the attempts made on the lives of Pws. 1 and 7 he has been sentenced to undergo rigorous imprisonment for five years in each case. As for the remaining two attempts, namely those on the lives of P.W. 3 and Ulahannan, a brother of the appellant, the sentence awarded is two months' rigorous imprisonment for each offence. The appellant has hence been awarded two sentences of life imprisonment (rigorous) and fourteen years' rigorous imprisonment in addition. These sentences are directed to run concurrently. The appeal is against the above convictions and sentences.

2. In the view we take that the interests of justice demand the convictions and sentences passed upon the appellant by the lower court should be set aside and a retrial ordered we do not propose to set out the facts of the case in any detail or submit the evidence to any great scrutiny. We shall content ourselves by setting out the reasons which induce us to quash the convictions and sentences and direct a retrial. It may however be stated that the prosecution case is that the accused poisoned the toddy which he knew his father (one of the deceased persons) would be consuming. He is said to have adulterated it with a decoction made out of the tubers of Gloriosa Superba. The toddy so adulterated was consumed by Kuruvilla, the father of the accused, Pylee, a confidant of Kuruvilla, who also died and the four prosecution witnesses referred to in the preceding paragraph of this judgment whom the accused is alleged to nave attempted to murder.

There is no direct evidence in the case that the accused poisoned the toddy which the six victims mentioned above consumed. To bring home the guilt to the accused the prosecution relied upon (i) an alleged confession of the accused to the Police which is said to have led to the discovery of incriminating materials such as the remnants of the poisonous decoction said to have been used to adulterate the toddy and a hammer used to crush the roots of Gloriosa Superba, (ii) certain circumstances which the learned Judge refers to as 'attendant circumstances', (iii) subsequent conduct of the accused and (iv) motive. Of these items of evidence the learned Judge brushed aside the attendant circumstances, some as inconclusive and others as unworthy of credit. The item of evidence of which most use has been made is the alleged confession and it is the illegal and improper use of that confession which mainly induces us to quash the convictions and sentences the learned Judge passed in the case.

3. We regret to notice the learned Judge has ignored the limitations imposed by rules of evidence as to the extent of information received from a person accused of any offence in the custody of a Police Officer which leads to the discovery of incriminating materials can be admitted in evidence or made use of at the trial. The prosecution case is that pursuant to a confessional statement the Accused made to P.W. 23, the investigating Police Officer M.Os. 3 to 5 were recovered. M.O. 3 is

an old cigarette tin with remnants of the poisonous decoction in it, M.O. 4 a hammer said to have been used to crush the poisonous tubers and M.O. 5 a wooden toy gun. If so much of the statement which lead to the discovery of these articles alone was made use of no exception could have been raised. That however is not what the learned trial Judge did. The following extracts from his judgment would show how far he has transgressed the provisions of Sections 25 - 27, Evidence Act and Section 162, Criminal Procedure Code, In paragraph 2 of the judgment it is seen stated:

Immediately they (the police) contacted and questioned him. He made a clean breast of the whole affair and admitted that he poisoned the toddy by adding a decoction of Gloriosa Superba. He also pointed out the hammer with which he crushed the tubers and the cigarette tin in which the decoction was prepared.

In paragraph 15 the learned Judge makes the following comments about the confession:

The accused must have been questioned before his statement was recorded in Ext. C. Even when he stated that Gloriosa Superba was used the Inspector could not straightaway accept it, without some corroboration. So the post-mortem examination was conducted in the house itself by getting down the Doctor there, with a view to get his opinion about the theory admitted by the accused. The dead bodies were entrusted at 2.30 p.m., for post-mortem examination, as can be seen from Exts. H and K. There does not appear to have been any necessity to get the Doctor in that place. The only object I repeat, was to got the opinion of the Doctor whether the accused's admission about Gloriosa Superba was probable. The post-mortem appearances noted by the Doctor must have convinced the Inspector that the accused's admission was probably acceptable. Otherwise a statement from the accused expressly mentioning the use of Gloriosa Superba would not have been embodied in Ext. C. The Inspector believed firmly that Gloriosa Superba was used. It is seen from the accused's statement in Ext. C that he mentioned that the cigarette tin was hidden at the foot of a Maruthu tree in Kuzhikattu Puraidom. The Inspector wanted to ascertain the truth of this statement. Ext. C. could not be completed before the return of P.W. 7 and Ulahannan. There was time after the

post-mortem examination of Kuruvilla to visit Kuzhikattu Puraidom to ascertain whether the tin was secreted as stated by the accused and the Inspector wanted, it to be done before a record of the admission of the accused was made.

The next paragraph (paragraph 16) also contains references to the confession and the relevant portion reads:

There was no possibility for the Inspector to know beforehand that the poison was of Gloriosa Superba, unless the accused told him so. Exts. H and K show that the Doctor was not positive about it and that he deferred his opinion pending the report of the chemical examiner. So without an assurance the Police Inspector would not have dared to foist M.O. 3 with remnants of Gloriosa Superba.

This is followed by the summing up in paragraph 17 and there we see the culmination of the misuse of the alleged confessional statement of the accused to the Police. We shall extract here the whole paragraph:

So much of the information supplied by the accused, as leading to the recovery of the incriminating material is admissible in evidence. His admission is that the tin which contained the remnants of the poison poured into the toddy, was secreted by him in his holding. That admission led to the discovery. The statement which is corroborated by the recovery establishes that it was the accused who poisoned the toddy and that the poison used was the root of Gloriosa Superba.

The second and the fourth sentences in that paragraph are in clear violation of the rules of evidence relating to the admissibility of confessional statements to the Police even when they lead to the discovery of incriminating materials. It is not only the information as related distinctly to the fact thereby discovered that has been made use of in the case but also the statement that he committed the crime. Ext. R, the Mahazar relating to the recovery of M.Os. 3 to 5 and the accused's statement embodied in Ext. C (inquest report) have not only been admitted in evidence but have been made free use of by the court in fastening criminal responsibility for the acts complained of on the accused. We are not sure whether but for this improper use of the accused's statement to the Police the learned Judge would have come to' the conclusion he arrived at.

4. It is not infrequently that in Criminal appeals coming from certain parts of the State we find such gross disregard of the provisions of Sections 23 - 27 of the Evidence Act and Section 162 of the Criminal Procedure Code. We take the liberty to tell sessions Judges and Public Prosecutors that the decision of the Privy Council in Pulukuri Kottaya v. Emperor AIR 1947 PC 67 will well repay perusal. In that case at page 70 of the report Their Lordships after setting out Sections 25 - 27 of the Evidence Act said as follows:

The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police Officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered, may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in Police custody produces from some places of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Magow, for the Crown, has argued that in such a case the 'fact discovered' is the Physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of Section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the Police, or by persons in police custody. That ban was presumably inspired by the fear of the Legislature that a person under Police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the Police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles

of construction their Lordships think that the proviso to Section 26, added by Section 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced, the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered, information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife, knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

High Courts in India have generally f taken the view as to the meaning of Section 27 which appeals to their Lordships, and reference may be made particularly to Subhan v. Emperor 10 Lah 283 and Ganuchandra v. Emperor 56 Bom 172 on which the appellants rely, and with which their Lordships are in agreement. A contrary view has, however, been taken by the Madras High Court, and the question was discussed at length in a Pull Bench decision of that Court, in Athappa Goundan v. Emperor ILR (1937) Mad 695 (FB) where the cases were referred to. The Court, whilst admitting that the weight of Indian authority was against them, nevertheless took the view that any information which served to connect the object discovered with the offence charged was admissible under Section 27. In that case the Court had to deal with a confession of murder made by a person in police custody, and the Court admitted the confession because in the last sentence (readily separable from the rest) there was an offer to produce two bottles, a rope, and a cloth gag, which, according to the confession had been used in, or were connected with, the commission of the murder, and the objects were in fact produced. The Court was impressed with the consideration that as the objects produced were not in themselves of a incriminating nature their production would be irrelevant unless they were shown to be connected with the murder, and

there was no evidence so to connect them apart from the confession. Their Lordships are unable to accept this reasoning. The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into Section 27 something which is not there, and admitting in evidence a confession barred by Section 26. Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by the law.

5. In their Lordships' opinion Athappa Goundan v. Emperor ILR (1937) Mad 695 was wrongly decided, and it no doubt influenced the decision now under appeal.

6. The statements to which exception is taken in this case are first a statement by accused No. 6 which he made to the police sub-Inspector and which was reduced into writing, and is Ext. P. It is in these terms:

The mediatornama written at 9 A.M. on 12.1.1945, in front of Maddinani Verrayya's choultry and in the presence of the undersigned mediators. Statement made by the accused Inala, Sydayya on being arrested. About 14 days ago, I, Kotayya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We, all beat Beddupati China Sivayya and Subayyam to death. The remaining persons, Pullayya, Kotayya and Narayana ran away. Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of Pulikuri Kotayya.

Signed/- Potla China Mattayya,

Kotta Krishnayya,

G. Bapaiah, Sub-Inspector of Police.

12th January 1945.

7. The whole of the statement except the passage 'I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come' is inadmissible. In the evidence of the witness Potla China Mattayya proving the document the statement that accused 6 said 'I Mattayya and others went to the corner of the tank-land, we killed Sivayya and Subayya' must be omitted.

8. A confession of accused 3 was deposed to by the Police Sub-Inspector, who said that accused 3 said to him.

I stabbed Sivayya with a spear, I hid the spear in a yard in my village. I will show you the place.

The first sentence must be omitted. This was followed by a Mediatornama, Ext. Q. 1, which is unobjectionable except for a sentence in the middle, 'he said that it was with that spear that he had stabbed Booddapati Sivayya' which must be omitted.

Here it is interesting to mention that after this pronouncement of the Privy Council an expert Committee was appointed in Madras to examine the correctness of the convictions made in that jurisdiction following Athappa Goundan v. Emperor ILR (1937) Mad 695 (PB) and that on the recommendations made by that Committee the unexpired portion of the sentences passed on several prisoners were remitted by Government and the prisoners concerned released.

9. Sufficient mention has been made earlier that both Ext, B and the accused's statement in Ext. C, contain what the learned Judge has characterised in one of the quotations we have 'a clean breast of the whole affair' that is to say, they embody statements that he prepared the decoction out of tubers of Gloriosa Superba, that he climbed up the Palamyra tree and poured the decoction into the toddy which he knew would be consumed by his father. After the quotations we have made in extenso from Kottaya's case further words from us would be superfluous to show that inadmissible evidence has been allowed to go in. It is unfortunate that it should be so. We regret the learned Judge should have used it for the decision of the case.

10. Yet another criticism to be made of the trial held by the lower court and the judgment which it gave in the case is regarding the free use made of the statements made by the witnesses and the accused at the inquest. Paragraph 15 where-from we took one extract contains also the following:

Her (referring to P.W. 6, wife of the deceased Kuruvilla) statement (at the inquest) shows that the accused was not present when she was making the statement.

Further on comes the following sentence:

The statements of P.Ws. 5, 6 and 8 make it abundantly clear that the accused was suspected. The Inspector makes no secret of it and he admits that he questioned the accused. The statement of the accused embodied in Ext. C. is a clean cut confession.

Section 174, Criminal Procedure Code deals with Inquests. It states 'inter alia' that on receipt of information that a person has committed suicide or that a person has been killed by another or that somebody died under suspicious circumstances the officer in charge of a Police station shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbour hood, shall make an investigation and draw up a report of the apparent cause of death etc. This section comes under Chapter XIV of the Code commencing with section 145. Section 162 states:

No statement made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced to writing, be signed by the person making it, nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly

proved, may be used to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

The rest of the section is not material for our present purpose. Apart from the provisions of the Evidence Act as to how far previous statements of witnesses can be used at a trial those two sections of the Criminal Procedure Code make it abundantly clear there is no warrant for making use of the statements made at the inquest as substantive evidence in the case. Unfortunately that is what has happened in this trial. That a statement made by a person when there is no suspicion against him that he has participated in the commission of the crime under investigation also comes under this ban is clear from the decision of the Privy Council in Narayana Swami v. Emperor AIR 1939 PC 47. It is idle to speculate what decision the learned Judge would have come to in the case without putting the statements referred to above to the use he actually made of them.

11. We would also avail of this occasion to point out that the prevailing practice of getting eyewitnesses or accused persons to sign inquest reports is not only unwholesome but also unwarranted. Section 174 when read with Section 162 makes it plain that inquest reports are not to be signed by witnesses. The provision in Sub-section (2) of Section 174 that besides the Police Officer, other persons, or so many of them as concur therein, shall sign the report, when it refers to other persons etc., refers to 'two or more respectable inhabitants of the neighbourhood' mentioned in Clause (c) of Sub-section (1) of the section. Reference may in this connection be made to a decision of a Full Bench of the Cochin Chief Court reported in Cochin Sirkar v. Kadir Kunhi 27 Coch LR 103, where this point is dealt with.

12. Apart from the legal bar now pointed out the pernicious result of the practice would be that witnesses will not feel as free agents when they afterwards give evidence at the enquiry or the trial, subsequently held. The decision now referred to, as also an earlier decision of the Cochin Chief Court reported as Ouseph

Elyikutty v. Cochin Sirkar 25 Coch LR 571, deals with this aspect of the matter. Recently in Zahiruddin v. Emperor AIR 1947 PC 75, the Judicial Committee pointed out that the value of evidence of a witness who had given a signed statement previously to the Police may be seriously impaired as a consequence of the contravention of the statutory safeguard (Section 162 Cri.P.C.) against improper practices. The arguments in that case as reported in 74 Ind App 80 (PC) contain exhaustive references to the case law bearing on the subject and show that the tendency of the Courts is on the side of caution, if not of over-caution, to place reliance on the testimony of witnesses who happen to give signed statements to the Police during the course of the investigation. The principle and purpose behind the statutory bar against the Police obtaining signed statements during investigation are thoroughly thrashed out in the arguments as reported in 74 Ind App. 80 (P C). We have purposely adverted to this irregular practice of witnesses who give their statements at the inquest being made to sign the report with a view to see that that practice is ended. Equally improper it is for the police to get signed statements from witnesses interviewed during the course off-the investigation whether they be in the form of statements as such or in the guise of mahazars, yadastha, recovery lists etc.

13. This irregularity on the part of the Police apart, to repeat what we have said already we are not sure what the learned Judge's view of the accused's guilt would have been had he not made use of the items of inadmissible evidence pointed out earlier to make his decision of the case. Notwithstanding the provision in Section 167, Evidence Act and that in Section 537, Criminal Procedure Code, we think that regard being had to the grave charges levelled against the accused we shall not, ourselves embark upon an investigation as to whether independently of the inadmissible evidence admitted there is sufficient evidence to justify the conviction. Though under the present order of things our decision may not be the last word on the case we do not feel justified to seek here to exercise the jurisdiction vested in us under the two sections now referred to and virtually function as a trial court. If eventually we were to uphold the conviction that would be really depriving the accused the benefit of one appeal. The accused stands charged with two murders and four attempts to murder. We would therefore set aside the convictions and sentences passed upon the accused and direct the case to be retried. Sense of

justice and fair play demand that another Judge should conduct the retrial. The case will-hence on remand go before the Additional Sessions Judge, Parur.

14. A word more may be added. The learned Judge conducting the retrial will try to obtain more definite evidence as to whether the poison detected under Exts. J and 1 on the one hand was or was not identical With that detected under Ext. W on the other. If so advised the Chemical Examiner himself may be examined either at the Parur Court itself or on commission through the Trivandrum Sessions Court. Section 510, Criminal Procedure Code which enables the Court to use a Chemical Examiner's report as evidence without examining him is but an enabling provision.

15. The appeal is therefore allowed and the convictions and sentences passed by the trial Court are set aside. The appellant is directed to be retried for the offences with which he was charged.

16. It would appear that since his arrest the day following the occurrence he has been in custody. If and when an application for bail is made on his behalf the Sessions Judge is at liberty to release him on such bail as he thinks reasonable.

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