Surendran Vs. State

Surendran Vs. State

SooperKanoon Citation : sooperkanoon.com/721396

Court : Kerala

Decided On : Oct-05-1976

Reported in : 1977CriLJ1197

Judge : S.K. Kader and; Kochuthommen, JJ.

Appellant : Surendran

Respondent : State

Judgement :

S.K. Kader, J.

1. Surendran, 29, who was tried along with his father, Madhavan, the second accused in the case, on a charge of committing murder of Thompi and Thankan,. two Harijan youths, was convicted twice by the Additional Sessions Judge, Mavelikara, Under Section '304' I. P. C. and sentenced to suffer imprisonment for life on both counts, with the direction that the sentences shall run concurrently. The second accused who was tried on a charge of abetment of this murder was acquitted. The convictions and sentences are challenged in the appeal filed by the appellant ; whereas the Revision Case comes up before us in pursuance of an order passed by a learned Judge of this Court on the Calendar as to why the appellant should not be convicted and sentenced Under Section 302, I. P. C.

2. The occurrence in this case was at about 6 p. m. on July 15, 1974, and was from a bathing ghat on the southern side of a canal known as Market Canal, which runs east to west at the place. There is a bridge over this canal and the bathing ghat is almost below this bridge a little to the east. There are pathways on the bunds on either side of the canal. There is a small platform near the bathing ghat shown as No. 3 in the Plan Ex. P5 prepared by the Village Officer. The shop cum residence of is a toddy shop about 50 metres to the south of the place of occurrence. The appellant and his father are residing in a property a few yards away from the place of incident, Sreedharan (P. W. 1), the first informant in this case, and Kunjumon (P. W. 17) are brothers of Thampi (deceased), while Vasukuttan (P. W. 16) is his uncle. Milan Madhavan (P. W. 8) is the father of Thampi. Raju, son of Joseph (P. W. 3), is the nephew of Antrayos (P. W. 4), Thampi and his relatives are agricultural labourers. They used to purchase articles from the shop of Govindan and also often take their bath in the evening at the bathing ghat near the shop. Than-4an (deceased) was the brother-in-law of the elder brother of P. W. 1. On the date of occurrence at about 5.30p.m., P. Ws. 1, 3 and 4 and the deceased were standing in front of the shop of P. W. 5 talking with each other. A little later Thampi, Thankan and Raju went to the bathing ghat for bathing. Raju got into the canal, while Thampi was sitting at the bathing ghat and was engaged in applying soap on his kaili placing the same On the washing stone. Thankan was seated on the nearby platform. The appellant also came there and took his seat on the platform. The appellant was then having a knife (M. O. I.) with which he was cutting a piece of tapioca. While so the appellant got down from the platform and suddenly approaching Thampi, from behind, inflicted two stabs on him with M. O. I. knife causing injuries on his left shoulder and on the back and pushed him into the canal. On seeing this Thankan got up from the platform and was approaching the bathing ghat, when he was also stabbed on his chest by the appellant with the same weapon causing an incised gaping wound and pushed into the canal. The appellant then wanted to attack Raju and approached him, when "Raju waded into the water and somehow escaped. Thampi who received the injuries somehow got up and taking a few steps from there fell down at the foot of a coconut tree. Both the injured died on the spot. The appellant also attempted to stab P. Ws. 1 and 16, who ran away and escaped, P. W. 1, P. W. 2 who was

passing along the pathway on the northern bund of the canal, and P. Ws. 3 and 4 who were there near the bathing ghat, saw the occurrence. P. W. 5 also saw part of the incident ; but, at the trial he resiled from his previous statement to the police and was cross-examined on behalf of the prosecution. P. W. 1 went and informed his relatives and thereafter went to the Thiruvella Police Station and laid Ex. P1, first information statement, before the Sub-Inspector of Police, P. W. 15, at 10 p. m. on the same day, A case was registered on this basis and later investigation was taken up by the Crime Branch. The Detective Inspector of Police, Crime Branch, (P. W. 18), reached the scene of offence, held inquest over the dead bodies, prepared inquest reports Exs. P6 and P7, inspected the scene of offence and questioned witnesses. P. W. 9, the Medical Officer, held autopsy over the dead bodies on the next day of the occurrence. The appellant was arrested on August 1, 1974 and in pursuance of a statement given by him, M, O. I. knife was recovered under mahazar Ex. P2 attested by P. W. 7.

3. Some time prior to the occurrence the local farmers wanted to construct a bund for the second crop. But the second accused, the father of the appellant, objected to this. Disregarding his objection, the local farmers, with the help of the agricultural labourers including Thampi (deceased), P. W. 1 and their relatives constructed a bund taking mud from the paddy field belonging to the second accused. Under the belief that it was Thampi and his relatives who took a leading role in putting up the bund, the appellant and his father, ever since that incident, were on inimical terms with them. The prosecution also has a case that some four days prior to the date of occurrence, the father of Thampi lost his knife on the way in front of the toddy shop. In the morning of the date of incident, P. W. 17 found a similar knife in the hands of the appellant and when P. W. 17 wanted to have a look at it, he refused to show the same and there was some altercation between them on this account. It is alleged that the appellant then issued a threat that he would do away with all of them. This is said to be the apparent motive for the occurrence.

4. When examined On the prosecution evidence, in denying his guilt, the appellant gave a somewhat detailed statement setting up a plea of self defence of person, He stated that on the date of occurrence he was putting up a fence in his property

and at about 6 p. m. after finishing that work he came to the bathing ghat in question for taking bath. Muthu Pillai, the manager of the subtoddy shop nearby also had come there for taking his bath, When the appellant got into the canal Thankan who was standing on the bank of the canal approached him abusing in provocative language and beat him. Thampi who was then standing there after finishing his bath came running and he also started beating the appellant. Both Thampi and Thankan heat and fisted him, when the appellant somehow managed to take the knife used for making the fence from the foot of a plantain. Thampi then took out a dagger, There was a scuffle in the course of which Thampi stabbed the appellant. But that stab fell on the chest of Thankan who then went out of the bathing ghat. There was a grappling between the appellant and Thampi and both of them fell down. The appellant somehow got himself released from the hold and stood up. Thampi also stood up. The appellant then, in order to save his life, inflicted a stab and ran eastwards. The appellant further stated that Muthu Pillai alone had seen the occurrence and there were none else there except himself and the deceased.

5. The trial court on a due consideration of the entire evidence, found the evidence of P. Ws. 1 to 4 reliable and convicted and sentenced the appellant as aforesaid.

6. While the prosecution relied on the direct testimony of P. Ws. 1 to 4, the medical evidence, the discovery of M. O. I. and the other circumstances in the case in support of the convictions of the appellant, the learned advocate appearing for the appellant very strongly attacked these items of evidence. He mainly contended that it is not at all safe to rely on the evidence of P. Ws. 1 to 4 who are highly interested and who are also on inimical terms with the accused, that the name of P. W. 2 is not mentioned in the first information Statement, that the motive alleged is flimsy and the prosecution has also miserably failed to prove the same, that the medical evidence is inconsistent with the prosecution case and that in any view, it does not render any corroboration.

7. Although the case of the appellant is that Thankan sustained the fatal injury accidentally at the hands of Thampi, his definite ease in regard to the injuries sustained by Thampi is that he inflicted these injuries in exercise of his right of self

defence of person. In spite of this plea, it is for the prosecution to prove that the appellant inflicted the injuries on the deceased in the manner and under the circumstances alleged by the prosecution. The admission of the appellant that he inflicted the injuries will not in any way lessen the burden heavily cast on the prosecution. The appellant has not adduced any evidence in support of his plea. It is not necessary that, in every case where an accused pleads an exception to Section 300, I. P. C., he should call evidence in support of that plea ; for, he is entitled to rely on 1977 Cri LJ.76 VII the circumstances transpiring in the prosecution evidence to prove or to probabilise his plea. It is also not necessary that he should prove his case beyond any reasonable doubt. The law treats the burden of proving an exception pleaded by an accused as dis charged, if he or she succeeds in proving a preponderance of probability.

8. There is no dispute that Thankan and Thampi died as a result of the injuries sustained by them on the date of occurrence and this is also amply proved 'by the evidence of P. W. 9 and Exs. P3 and P4, the postmortem certificates. Ex. P3 is the postmortem certificate relating to Thankan, while Ex. P4 details the injuries found on the dead body of Thampi. P. W. 9, the doctor, noticed on the dead body of Thankan, an incised gaping oblique wound, front of left side of chest over 3rd intercostal space. The wound was 3 cm. in length and 1 cm. gaping. There was an incised wound 2.5 cm. at the junction of the left atrium and left ventricle at its anterior margin. This injury, according to the doctor, could have been caused by stabbing with a weapon similar to M. O. 1. and was sufficient in the ordinary course of nature to cause death and the injured died as a result of sustaining this injury. On the dead body of Thampi there was an incised gaping transverse wound 4.5 cm. in length 2 cm. in width over the 7th left intercostal Space 10 cm. from midline just below the angle of scapula left. Another incised gaping oblique wound 1.75 cm. in length 1 cm. in width over left supra clavicular space and posterior triangle of neck going downwards about 5 cm. deep, and a transverse skin deep injury with tapering end posteromedially over the junction of upper and middle 1/3 of posterior side of left arm 3.5 cm. in length, were also noticed. There was an incised gaping wound, 2 cm. over the left lower lobe of lung posteriorly and an incised gaping wound 2 cm. over left upper lobe of lung 1.5 cm. below the apex of lung, and these injuries corresponded to external injuries 1 and 2 described in Ex.

P4. The evidence of the doctor is that these injuries could have been caused by a weapon similar to M. O. I., that injuries 1 and 2 and the corresponding internal injuries are sufficient in the ordinary course of nature to cause death and Thampi died as a result of sustaining these injuries.

9. The main attack on the evidence of the eyewitnesses was that they being interested and also on inimical terms with the accused, their evidence should not be relied on unless the same is corroborated by some independent evidence. It was also argued with equal vehemence that in view of the failure of the prosecution to prove the motive and also in view of the inadequacy or insufficiency of the motive alleged, it is not at all safe to accept the evidence of the eye-witnesses without being corroborated by other independent evidence.

10. In a case where there is satisfactory and convincing direct testimony, motive is of little importance or consequence. No doubt motive may lend additional support or assurance to the finding of the court that the accused is guilty but does not mean that the absence of motive or failure to prove motive leads to the contrary conclusion. In other words, absence of an impelling motive or the insufficiency or inadequacy of a motive, alleged or proved, is not a ground to discard or suspect the other material evidence in the case. It is often the offender alone who knows the real motive which impelled him to commit the crime. What appears to be a flimsy or a silly motive for one may be sufficient for another to commit even a most atrocious crime. Where there is reliable direct testimony, motive is only of academic interest and the reliable ocular testimony of eyewitnesses could not be discarded merely because the prosecution failed to prove motive. It is also not proper in a case where there is direct testimony, to start with the discussion of the evidence relating to motive before dealing with the direct testimony, because the motive alleged or proved may mislead the court in the matter of appreciation of evidence. It is difficult to weigh the reaction of persons in golden scales with absolute computerised accuracy. (See Nachhittar Singh v. State of Punjab, : 1975 CriLJ66 ; Podda Narayana v. State of A. P., : AIR 1975 SC1252 ; Bahal Singh v. State of Haryana, : 1976 CriLJ1568 . The inadequacy of the motive or the failure of the prosecution to prove the motive is therefore of no avail to the defence in this case.

11. We shall now examine the direct testimony adduced in this case. The first information statement (Ex. P1) has been laid without any unreasonable delay. The material facts of the case and the names of P. Ws. 3 and 4 find a place in Ex. P. 1. Omission to mention the name of P. W. 2 in Ex. P1, in the light of the evidence of P. W. 1 and the circumstances of the case, cannot be treated as a serious infirmity. P. W. 2 was passing along the pathway on the northern bund of the canal. P. W. 1 was standing near the shop of P. W. 5 which is a little to the south of the southern bund of the canal. He says that he did not see P. W. 2 at the time when he left the place of occurrence after the incident. This does not mean that P. W. 2 was not there. In all probability he might not have noticed P. W. 2 passing along the northern bund or he might not have cared to see who all were there in the surrounding area at the time of the occurrence, P. Ws 1 and 2 are cousins. In assessing and evaluating the evidence of] eyewitnesses, the two important considerations are : (1) whether in the circumstances of the case, it was possible for the eyewitnesses to be present at the scene or their explanation for their presence at the scene can be accepted ; and (2) whether there is anything inherently improbable or unreliable in their evidence. We do not think the law requires that the evidence of an interested or a partisan witness, or, for that matter, even a witness who is on inimical terms with the accused, should be corroborated by other independent evidence, before it can be accepted. It is only in the case of an approver or accomplice that the courts ordinarily insist on corroboration in material particulars. It is not the law that the evidence of an interested or partisan witness should be equated with tainted evidence or that of an accomplice so as to require corroboration as a matter of necessity. Of course, us a rule of prudence, depending upon the particular facts of each case, the court may insist on corroboration of the evidence of a partisan or interested witness. The corroboration required of a witness who is a telation of the deceased is not that kind of corroboration which would be necessary to support the evidence of an approver or accomplice. Ordinarily a close relation would be the last person to screen the real culprit and falsely implicate an innocent person Each case must be judged on its own facts The contention that the evidence of a wit ness who is related to the deceased am who shares the hostility of the victim towards the assailant should not be accepted unless it is corroborated by other indepen dent

evidence is difficult to be accepted. By no stretch of imagination, they can be characterised as accomplices. Even interested-ness coupled with hostility by itself is no ground to reject the evidence of a witness but, of course, such evidence should be subjected to very close and careful scrutiny (see Darya Singh v. State of Punjab : [1964]3SCR397 . The evidence shows, and it is also not disputed, that immediately after the incident in this case somebody set fire to the house of the appellant and a case was registered in that regard, P. W. 1 was said to be an accused in that ease. P. Ws. 2 and 17 were said to be accused in a case in respect of an incident which took place after the occurrence in the case on hand. The evidence also shows that after the murder case, there was tension in the locality between the party of the deceased and the party of the accused, and that proceedings Under Section 107 Cr. P. C. have been initiated by the police against both parties. P. Ws. 1 to 4 and 16 and 17 were said to be counter petitioners in one of those proceedings. It is on this basis that the counsel stressed that it is not at all safe to enter a conviction relying on the evidence of these witnesses. There is nothing before us to show what happened to these cases whether they were found guilty or they were bound over in these cases Cases might have been registered on the allegations made. But that does not mean that the allegations are necessarily true unless they are proved properly. In any view, all these incidents happened only after the murder case. Although an aggrieved party cannot be permitted to take law into their own hands to wreak vengeance, there is nothing unnatural or improbable, if on the spur of the moment, immediately after the incident, there was some spontaneous outburst of minor incidents. On a consideration of all relevant aspects, we are unable to agree with the contention put forward on behalf of the appellant that the evidence of the eyewitnesses should be rejected on these grounds or should not be accepted unless they are corroborated by other independent evidence. Another attack against the prosecution case is that the medical evidence destroys the prosecution version, that it really supports and probabilises the version put forward by the appellant that it was at the hands of Thampi that Thankan sustained the injuries with a dagger and that the prosecution has. no explanation how Thampi sustained three injuries on his person, while the witnesses are positive that the appellant inflicted only two stabs, The injury which is said to have been not explained by the prosecution is a

superficial injury described as No. 3 in Ex. P4. Considering the location and nature of the injury over the left supra clavicular space described as No. 2 in Ex. P. 4, it is quite possible that this skin deep injury could have been caused while withdrawing or drawing out the knife after the infliction of injury No. 2. It is true that no such suggestion has been put to the doctor. There is also the evidence of the eyewitnesses that after inflicting two stabs, the appellant pushed Thampi into the canal and the doctor has deposed that this superficial injury could have been caused in the course of the act of pushing him into the canal. Pointing out that the doctor has stated that the injury found on the chest of Thankan was having cut margins, it was argued that an injury of this nature could have been caused only by a double edged weapon and not a single edged weapon like M. O. I. Although at one stage the doctor gave a favourable answer to the suggestion put on behalf of the accused, he was definite at a later stage that the injuries of the nature described in Ex. P. 3 could have been caused by a weapon like M. O. I. which has got a lengthy sharp pointed edge. The medical evidence in this case cannot therefore be said to be inconsistent with or in any way sufficient to destroy or to create reasonable doubt regarding the prosecution case. On the other hand, it corroborates the evidence of the eyewitnesses. A Division Bench of this Court in a recent decision reported in Vasudevan v. State 1976 Ker LT 354 : 1977 Cri LJ 83 has dealt with this aspect in detail. In Bajwa v. State, : 1973 CriLJ769 the Supreme Court has observed that the mere fact that in a murder case the evidence of eye-witnesses is inconsistent with the medical evidence will not by itself render the former unreliable. The failure of the prosecution to explain a very minor or superficial injury found on the deceased or the accused by itself is no ground to discard the entire prosecution case. It may not always be possible for the prosecution and the law also does not insist, that in every case the prosecution is bound to explain each and every minor or superficial injuries found on the deceased and accused.

12. Another argument advanced on behalf of the appellant was that there is positive support to the defence plea available in the evidence of P. W. 5 and there is no reason to reject his evidence and that the prosecution failed to examine another witness to whom the appellant is said to have made an extrajudicial confession. It has come out in evidence that except the house-cum-shop of P. W.

5, there is no other house in the close neighbourhood of the scene of offence. Even P. W. 5 has stated in his evidence that Thankan, Thampi and their relatives used to purchase articles from his shop in the morning and evening and that they also used to come there and take their bath. The eyewitnesses have given satisfactory explanation for their presence at the place of occurrence. P. W. 2 was returning home after purchasing articles from a shop a little away from the scene of offence along the pathway on the northern bund of the canal. P. W. 5 and the appellant are close neighbours and they belong to the same S. N. D. P. Sagha Union. Apart from contradicting his previous statement to the police, some of the answers given by him during cross-examination have contradicted his previous statements given at the trial which indicate that he is not inclined to speak the entire truth. In the circumstances, the trial court was right in rejecting his evidence as a whole. The non-examination of the other witness is of no serious consequence in the case, as he was only expected to speak to a cryptic extra judicial confession made by the appellant.

13. Recovery of M. O. I. has been spoken to by the Investigating Officer. But the Chemical Examiner did not detect any human blood on the weapon. The evidence of P. W. 18 and the inquest report show that at the time of the inquest, the Investigating Officer noticed a wet kaili placed On the washing stone at the bathing ghat. This is a circumstance which lends support to the evidence of the eye witnesses that it was while Thampi was sitting and was about to wash his kaili placing it on the washing stone that the appellant came and inflicted the stabs, In this respect relying on certain admissions made by the doctor, it was argued that the injury on the shoulder of Thampi could not have been caused from behind. Having regard to the location, nature and direction of the injuries, we do not find any improbability or impossibility in this regard. What the doctor has stated is that if Thampi was sitting in a crouching position it was probable that the injury could have been caused from his front. The doctor has stated that this injury could have been caused from behind if the victim was sitting straight. One injury is definitely on the back. It is not clear from the evidence whether it was from his side or from behind that this particular injury was inflicted. Anyhow this aspect cannot in any way belie or create reasonable doubt in the evidence of the eye witnesses.

14. It cannot be said that the prosecution has failed to prove the motive alleged in this case. There is the evidence of P. Ws. 1, 16 and 17 in this respect. It is also seen from the suggestions, put to the witnesses and also from the statement of the accused that the accused were not on good terms with Thampi and his relatives. The subsequent events also indicate that there was ill-feeling and tension between the two sections.

15. We have been taken through the entire evidence in this case and after a very careful scrutiny and on an anxious consideration, we do not find any inherent improbability or unreliability or any other material defect or circumstance sufficient to reject or suspect the evidence of the eyewitnesses. As stated earlier, their evidence also has been corroborated by the medical evidence and the other circumstances in the case. We therefore confirm the finding of the trial Court that it was the appellant who inflicted the fatal injuries on the deceased in the manner alleged by the prosecution.

16. There is absolutely no evidence either let in by the appellant or transpiring in the prosecution evidence in support of the plea put forward by the appellant. It is his case that there was scuffle and grappling in the course of which he fell down and that he was beaten by both the deceased and that he was also attacked by one of them with a dagger although it accidentally fell on the other deceased. Ordinarily in such circumstances, one expects at least some injuries on the person of the appellant. He has no case that he has sustained any injuries, nor is there any proof in support of that. It sounds highly improbable that although there were two young mazdoors determined to attack and one armed with dagger pounced upon him and that there was a scuffle for some time, the appellant escaped without even a scratch.

17. The next question is, on the facts and the circumstances proved in the case, what is the offence committed by the appellant. After having found that the appellant voluntarily caused the fatal injuries on Thampi and Thankan, that the appellant used a deadly weapon (M. O. I) for inflicting these injuries and that the appellant caused these injuries intentionally, the learned Additional Sessions Judge curiously and surprisingly chose to convict the appellant Under Section

'304' I. P. C. stating that though it was not established that the appellant had the deliberate intent to take the lives of the deceased persons, it was clear that the appellant inflicted these injuries intentionally and that these injuries were likely to cause death. We are constrained to state that the learned Additional Sessions Judge has gone wrong in this respect and that he has lost sight of the fact that Section 304 I. P. C. has two parts. It is not clear from his judgment whether the conviction of the appellant is under Part I or Part II of Section 304 I. P. C., even though from the sentence imposed in the case it can be presumed that the conviction was under Part I. Section 299 I. P. C. defines what is culpable homicide and this consists of three clauses. The first clause speaks of doing an act with the intention of causing death, and the second, with the intention of causing such bodily injury as is likely to cause death ; while the third applies to an act done with the knowledge that the act is likely to cause death. Murder is defined in Section 300 of the Indian Penal Code ; and this section comprises of four clauses and has five exceptions. Homicide may be culpable and culpable homicide may amount to murder. Murder under this section can be said to be an aggravated form of culpable homicide Under Section 299. All murders are culpable homicides, but all culpable homicides are not murders. What distinguishes these two offences is the presence of a special mens rea which consists of four mental attitudes. Intention or knowledge is an essential ingredient of the four clauses to Section 300 I. P. C. and these four mental attitudes stated in the foul clauses distinguish murder from culpable homicide. In other words, if the killing comes within any one of the four clauses to Section 300 I. P. C., exceptions apart, it is murder. Clause 3 has been interpreted by the Supreme Court as early as in 1958 in Virsa Singh v. State of Punjab : 1958 CriLJ818 and the principles laid down therein have been followed in a number of subsequent decisions of the Supreme Court, the latest being Jayaraj v. State of Tamil Nadu 1976 Cri LJ 1186(SC). Therein the Supreme Court has clearly laid down the four necessary elements that have to be proved by the prosecution to bring a case Under Section 300 'thirdly'. In the first place, the prosecution has to establish that a bodily injury is present. Secondly, the nature of the injury must be proved. Thirdly, it must be proved that there was an in tention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended, and fourthly, it must

be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. Once these four elements are established by the prosecution, the offence committed is murder coming Under Section 300, 'thirdly'. It does not matter that there was no intention to cause death.

It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature. It does not even matter that there is no knowledge that an act of that kind will be likely to cause death, It has been further stated that once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death.

18. The medical evidence in the case is clear and positive that the injuries found on the deceased were sufficient in the ordinary course of nature to cause death and this evidence is also not being challenged during cross examination. The trial Court has already found that the accused inflicted these injuries intentionally. The weapon used was a deadly one and the part chosen for the attack was a vital part of the body. It is therefore clear that the offence committed is nothing short of murder. In any view, the case squarely falls Under Section 300 'thirdly'. But, we are helpless in this matter. The State has not chosen to file an appeal against the judgment of the trial court acquitting the appellant of the charge Under Section 302 I. P. C. It is well settled that, in revision, a finding of acquittal cannot be altered into one of conviction. Such an alteration or conversion is clearly barred under Sub-Section (3) of Section 401 of the Code of Criminal Procedure, 1973. Of course we can order retrial in revision. But the powers to order retrial in revision have to be exercised only in exceptional cases, i. e., where there is miscarriage of justice, glaring defect in procedure, manifest error of law, etc. In the case on hand, although the trial court wrongly convicted, the appellant Under Section 304 I. P. C., he has been sentenced to imprisonment for life, Even if the appellant was to be convicted for murder, considering the circumstances of this case, we do not think, that this was a case for extreme penalty. It cannot therefore be said that there has been any miscarriage of justice or failure of justice so as to call for a retrial.

We therefore dismiss this appeal confirming the conviction and sentence passed against the appellant. The Calendar Revision also is dismissed.