

State of Kerala Vs. Joseph and Another

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Court : Kerala

Decided On : Mar-05-1953

Reported in : 1963CriLJ454

Judge : Anna Chandy, J.

Appellant : State of Kerala

Respondent : Joseph and Another

Judgement :

Anna Chandy, J.

1. This appeal is by the State against the order passed by the First Class Magistrate, Cranganore acquitting the two respondents of charges arising out of an alleged theft of explosives from a Government store.

2. Large stocks of explosives for use in connection with the construction of the Sholayar Hydro-Electric Project were stored by the Government in two magazines situated 3 little off the Chalakkudy-Malikkippara Road at mile stone 41/4, These magazines were under the direct control of P. W. 2, a Junior Engineer attached to the project, the prosecution alleges that some time after 10.30 P.M. on 20-54960 and before the next morning accused 1 Joseph, who is now no more, broke open the locks of these magazines and committed theft of 21 boxes of gelatine and. 7400 detonators. The stolen goods were removed from the place by accused 1,

accused 2 and P, Ws. 8 and 9 in a lorry belonging to accused 3 a contractor. The lorry was first driven to Thumpurmuzhi where four packets of gelatine were removed by accused 1 for his own use and the rest were then taken to Ezhattumugham where accused 3 was doing some construction work. A part of the explosives was used at the work site and the rest taken to the house of accused 3 from where they were later removed to a quarry at Panthakkal. The theft was detected, on the morning of 21-5-1960 when P. W. 6 a lascar employed by P. W. 2 visited the magazines for routine inspection. The matter was reported to P. W. 2 who in turn informed his superiors. Ext. P-3 report was filed before the Chalakkudy Police Station on 21-5-1960 and investigation was started. On 29-5-1960 the first accused surrendered himself before P. W. 39 the Deputy Superintendent of Police to whom he made a confession. On information given by him, four packets of Gelatine were recovered from the compound of his house. On 2-6-1960 accused 2 surrendered himself and acting on his information the police recovered the explosives kept hidden in the quarry at Panthakkal. Accused 3 surrendered himself on 8-7-1960 and, the final charge was laid on 22-7-1960 charging the first accused under Secs. 454 and 380 I.P.C. and the other two accused under the same sections read with Sec. 109 I.P.C. All the accused were charged with offences punishable under Sec. 5(3)(b) of the Indian Explosives Act while accused 3 was also charged under Sec. 12 of the Act read with Rules 31 and 81.

3. As noted earlier the first accused died before the trial. The other two, completely denied the charges against them. The important items of evidence brought against them were the recoveries of the stolen properties on the basis of the information given by accused 1. and 2 and the testimony of P. Ws. 8 and 9. The learned Magistrate found that no definite conclusion can be drawn from the recovery as against accused 1, in view of the fact that accused 1 was dead and could offer no explanation for the alleged possession of the stolen articles. The learned Magistrate further found that the explosives could have been lost from the stores not only by theft by accused 1 but in a number of other ways as well. As regards the recovery in the case of accused 2, he was of the view that since the police had already got information from other sources that a part of the stolen properties was secreted in the quarry no adverse inference could be drawn from the recovery

which is alleged to be made on the basis of the information supplied by accused 2. The learned Magistrate also concluded that P. Ws, 8 and 9 the main prosecution witnesses were in fact accomplices of the accused and as such their evidence is of little value in the absence or corroboration on material points which is lacking in the case.

4. The learned State Prosecutor argues that the conclusions arrived at by the learned Magistrate are unsustainable because they are not based on proper appreciation of the evidence, that the recovery of the stolen articles from the quarry on the information of accused 2 is well proved, that the evidence of P. Ws. 8 and 9 could not be treated as that of accomplices and their evidence corroborated as it is by the recovery and the other evidence has brought home the guilt to the accused.

5. I shall first deal with the recovery of the part of the stolen articles from the quarry at Panthakkal. According to the prosecution accused 2 surrendered himself to P. W. 39, the Deputy Superintendent of Police at the Chalakudy T. B. on 2-6-1980. The accused then confessed his part in the offence and informed the police of the location of the hidden explosives. The accused accompanied the police to the quarry and himself unearthed the explosives from where they were buried. The recovery mahazar was attested by P. Ws. 4 and 5 one Varkey. The accused denies the whole incident. He maintains that he did not surrender himself to the police but was trapped by the father of accused 3 who in the guise of taking him to the District Forest Office, Chalakudy took him to the T. B. which is situated in the same building. The accused denies having confessed or having pointed out the hidden explosives. The learned Magistrate found that a part of the explosives stolen from the Government stores was recovered from the quarry at Panthakkal, but held that their hiding place was known to the police even before accused 2 was arrested. The learned Magistrate also disbelieved the prosecution story that accused 2 confessed to the police. The testimony of P. Ws. 4 and 5 was also discarded.

6. The most important piece of evidence regarding this aspect of the case is the testimony of P. W. 3 Shri C. G. Janardhanan. He is a sitting member of the

Legislative Assembly representing the Chalakudy Constituency. His evidence is that towards the end of May 1950 when this case was under investigation, Thomas the father of accused 3 approached him to seek his assistance in surrendering accused 3 to the police and to make sure that he was not man-handled by them. Thomas also informed the witness that the whole trouble being due to their possession of the stolen articles, accused 3 wanted to help the police to recover them from where they were concealed in a quarry near Karukutty. The Sub-Inspector was a personal friend of the witness and he undertook to do what he could. Accordingly he first approached the Sub-Inspector and then as suggested by him the Deputy Superintendent of Police. He passed on to them the information he received regarding concealment of the explosives. Now, if the evidence of this witness is accepted the significance of the recoveries of the stolen articles from the quarry is minimised and there appears to be no justification to discard his evidence. He is the M. L. A. from the locality and it is but natural that such a person would be approached for help in such matters. His lack of any special interest either in accused 3 or his father is not even questioned by the prosecution. Nor is there any suggestion that he had any reason to be ill-disposed towards the police officers.

The learned State Prosecutor attacks his evidence as inconsistent and inconclusive. It is argued that according to one of his statements in cross-examination it is seen that he must have informed the police of his talk with accused 3's father only after the recovery was actually effected and that he did not even specify the locality of the quarry. The witness stated in cross-examination that he had a general talk with the Sub-Inspector regarding this case when he was informed by the Sub-Inspector that one Bobby was arrested and that it was two or three weeks after this talk that accused 3's father approached him. It is pointed out that the arrest of accused 2 and the recoveries were over within a week after the arrest of Bobby. In view of the fact that the witness had specifically stated on more occasions than one that he was approached by accused 3's father by the end of May and also his statement that week after he talked to the Sub-Inspector on behalf of accused 3 he heard of the recovery of the explosives from the quarry, the discrepancy pointed out by the learned Prosecutor appears to be only a mistake of little significance. Again though the witness did not give the name of the quarry,

but merely stated that it was near KaruKutti, he explains that he had given its name to the police and could not recollect it at the time he gave evidence. 1 do not see why this explanation should not be accepted.

Another objection urged by the State is that no questions regarding the witness's talk to them were put to the police officers when they were examined, in the circumstances of this case, I think this objection also need not be given much weight. As suggested by the learned defence (counsel) failure to put questions might have been due to the lack of confidence in whether the witness would testify at all and if so what his attitude would be, D. W. 3 does not appear to be a very willing witness. He did not respond to the summons and coercive steps had to be taken to procure his attendance. In fact the trial of the case was delayed considerably for no reason other than the witness's reluctance to appear in Court. Though some part of the testimony has to be discarded as hearsay his statement that he informed the police about the place of concealment of the stolen property has to be accepted.

The learned Counsel for the respondents had pointed out certain other objections against accepting the prosecution case regarding the recovery as true. Of the three independent attestors to the mahazar only one was a local man and he has not been -examined. The other two attesters p. Ws 4 and 5 belong to Chalakudy. P. W. 4 is in the words of the learned Magistrate

a stray driver who has no fixed employment who changed his masters every now and then and was a witness for the police in many cases.

He admits that he has been on former occasions employed by the Chalakudy police in connection with the investigation of cases and that he was not paid for the day's work. He does not say who asked him to stop the lorry at the place nor does he say that accused 2 pointed out the quarry to the police. P. W. 5 is a tea shop keeper who has his shop just in front of the Chalakody Police Station and one who has been usually supplying tea to the police men. He was picked up from the road in the lorry on the way to the place even without being informed of the place where he was going or the purpose. He admits he had given evidence in other cases charged by the Chalakudy Police. He too did not say on whose

instruction the lorry came to be Stopped at the place or that it was the accused who pointed out the quarry. These witnesses are neither respectable nor are they neighbours and it is very suspicious why they were chosen to attest such an all important record as the recovery mahazar, when admittedly it is an inhabited locality and several persons had gathered at the time of recovery. When respectable persons can be found in the neighborhood and the police officer making a search takes with him persons whose respectability is questionable or who came from a distant locality it may not be unjustifiable to presume that he was prompted by desire to have such witnesses as would be easily persuaded to support and story he might put forward, It is rather strange that in search conducted by experienced and responsible officer like the Deputy Superintendent of the Crime Branch and the Circle Inspector of Police the salutary provisions of the Code regarding attestation of the mahazar by independent and respectable neighbours were overlooked. In the words of Chagla, C. J. in *S. K. Fernandez v. State*, : AIR1951 Bom468 :

The Courts are bound to attach the greatest importance to the evidence of panch witnesses, and in order that the Court should attach such importance to panch witnesses it is essential that panch witnesses should be independent witnesses, unbiased and without being in any way under the control of the police. It is only when Panch witnesses, are independent that the liberty of the subject can be safeguarded as far as searches are concerned. If it is established that a panch witness is likely to be a pliable agent in the hands of the police or is likely to be amenable to the influence of the police or he may be looked upon as a police agent, the evidence of such a witness cannot be relied upon.

The suspicion is reinforced by the circumstance that Varkey the man of the locality who has attested is not cited as a witness. As observed by the Supreme Court in *Habeeb Mohammad v. State of Hyderabad*, : [1954]1SCR475 :--

It is the bounden duty of the prosecution to examine a material witness, particularly when no allegation has been made that, if produced, he would not speak the truth. Not only does an adverse inference arise against the prosecution case from his non-production as a witness in view of illustration (g) to Section 114

of the Evidence Act, but the circumstances of his being withheld from the Court casts a serious reflection on the fairness of the trial.' It may also be noted that accused 2's categories refusal to confess before the Magistrate to whom he was sent to confess makes it appear doubtful whether he did admit anything to the police much less point out the stolen property. The circumstance that the quarry is an open place accessible to all and sundry also minimises the evidentiary value of the recovery. In *Public Prosecutor v. Pakkiriswami*, AIR 1929 Mad 846 where vessels were recovered from a tank on the information given by the accused Curgenven, J. remarked that:--where the tank is not the particular property or within the sole control of the accused, but accessible to the public in general and it is doubtful whether the accused or some other person concealed the stolen articles, such evidence of itself is not sufficient for a conviction.

So also, in the case reported in *Amrik Singh v, Emperor*, AIR 1931 Lah 50 where the accused person pointed out explosive substances from a place not in his exclusive possession it was held that he was only mere tool for disclosing the existence of the explosives in the absence of proof of facts from which it could be inferred that the articles were in the control and possession of the accused. Nor is this a case in which the articles could be said to have been concealed. P. W. 8 says, that they had not taken any spade or other implement with them and only hands and legs were used to spread some sand over the articles and the mahazar notes that the sand was just 2' thick, thus the recovery in this case cannot be acted upon as incriminating evidence against accused 2 for more reasons than one.

7. The most important item of oral evidence relied on by the prosecution in this case, is the testimony of P. Ws. 8 and 9. Both, of them were workers engaged by accused 3 in connection with his contract work at Ezhattumughom. They were that at about noon on 19-5-1960 when they were returning to work after their meals they were called into the office of accused 3 where they saw accused 1 and 2 also. Accused 3 asked them to go with accused 2 the next day to fetch some explosives from Shoiayar, Accordingly the next day P. Ws. 8 and 9 set out from Ezhattumughom in a lorry with accused 2 and some others. They first went to the petrol bunk at Chalakudy where accused 1 joined them. From there they started

for Shoiayar by about 9 P.M. The lorry was stopped on the main road at the place where the 'pocket road' to the magazine branched off. They were taken by accused 1 a little distance along the pocket road and were given some twenty packets of explosives from the jungle which lined the road. These were then loaded in the lorry and taken first to Thumpurmuzhi where accused 1 removed four packets for his own use. The rest were taken to accused 3's shed at Ezhattumughom. On the next day as instructed by accused 3 they removed the packets to accused 3's out-house and late at night two days later, from there to the quarry at Panthakkal where they buried the articles in the ground while accused 3 assisted them by showing a torch light.

Now, if the testimony of these witnesses is accepted it goes a long way in proving the prosecution case, how ever I am inclined to agree with the learned Magistrate 'that it cannot be acted upon. In the first place their own evidence makes them out to be virtual accomplices in the offence. They knew that they were handling explosives and the stealth which surrounded their movements from the first removal from the magazine to the concealment at the quarry must have made them realise that they were engaged in dishonest activities. In Ext. D-6 remand report in respect of accused 1 and 2 it is stated that

the other accused in the case viz., contractor George of Karukutty and the drivers of the lorry (Ayyappan and Thomas) and the coolies who loaded the explosives in the lorry are absconding. Efforts continue to apprehend them.

This clear statement taken along with the witness's own testimony that they were hiding from the police for more than 40 days quite strongly indicate that whatever they may say now, both the police and the witnesses themselves were in no doubt whatsoever as to the nature of the latter's activities. I therefore think the learned Magistrate is right in considering their testimony as accomplice evidence requiring independent corroboration. It is well recognised that though

it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction ...The independent evidence must not only make it safe to

believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming In some material particular the testimony of the accomplice ... that the accused committed the crime.' (vide Rameshwar kalyan Singh v. State of Rajasthan, : 1952 CriLJ547 .) Such evidence is lacking in this case. No witness speaks to have seen P. Ws. 8 and 9 being called by accused 3 on 19-5-1960 or seen going with them in the lorry to Sholayar or engaged in transporting the explosives and all the witnesses who had been cited to prove the contracts between the various accused have been declared hostile. In fact the only corroboration on any material particular is that provided by the recoveries. Even here since the recovery regarding accused 2 cannot be acted upon, it cannot be considered as in any way corroborating the evidence of P. Ws. 8 and 9.

8. Even apart from the question of corroboration, it is doubtful whether P. Ws. 8 and 9 can be considered as, witnesses of truth. The entries in Ext. P-45 register seized from accused 3 show that P. W. 8 did not work for the. accused from 16-5-1960 and P. W, 9 from 20-5-1960. this, register is admittedly genuine and there is no allegation that any of the relevant entries were cooked up. In fact the evidence of P. W. 9 seems to indicate the correctness of the entries. He says he did not attend work from the day following the trip to Sholayar, i.e. 20-5-1960 and I find in Ext, P46 his attendance is not marked from 21st onwards. It may also be noted that neither of these witnesses speak to any special relationship with their employer and as such it seems unlikely that they would have been called by him to help him in this dangerous task and thereby hold a whip hand over him, when the transport could have been easily managed by the accused themselves and the driver and cleaner of the lorry, who must needs be aware of the implications of the venture. Nor do the witnesses any (sic) that they were offered any remuneration at all for this risky work. On the other hand they seem to have lost even the daily wages on account of having been engaged in such 'extra curricular' activities. In these circumstances I am unable to find any reason to disagree with the learned Magistrate when he finds that no reliance can be placed on the evidence of P. Ws. 8 and 9.

9. If the evidence of the recovery and the testimony of P. Ws. 8 and 9 are discarded then there is little or nothing to connect the respondents with the offence. All but one of the witnesses (other than P. Ws. 8 and 9) cited to prove that there were contracts between the three accused both before and after the theft have turned hostile to the prosecution. P. Ws. 10, 11, 22, 24, 25 and 27 are the witnesses who failed to support the prosecution case and were declared hostile. P. W. 21, the Forest Guard of the Thana at Pariyaram is the only witness apart from P. Ws. 8 and 9 who speaks to have seen two of the accused together and he has for good and sufficient reasons been disbelieved by the learned Magistrate. He swears that on 20-5-1960 at 8 P.M. he checked lorry K.L.R. 2701 driven by Ayyappan. Accused 1 and 2 were in the cabin besides 3 or four others whom he could not identify. The lorry returned that way the same night at about 4 P.M. when he found two persons whom he did not recognise. He did not find any goods in the jorry. He had no previous acquaintance at all with accused 2 and he says he had known accused 1 for the past one year. Admittedly he had no contact with either of them. There was neither the occasion nor the necessity for the witness to note or identify the occupants of a vehicle when it did not contain any forest produce, He admits that he is unable to remember the number of any of the lorries that passed that way on any other day or who were all traveling in the vehicles. He was questioned by the police only after 20 days when it is highly improbable that he could have remembered either the number of the lorry or the persons who travelled in it. It may also be noted here that no identification parade was conducted.

10. Since there is such complete dearth of evidence regarding the abetment of accused 1 by the appellants the evidence against accused 1 is of little significance in this case. Moreover even apart from the question of the admissibility of the confession of an accused who has never been brought to trial against the co-accused the finding that the first accused is proved to have been in possession of four boxes of gelatine which forms part of the explosives missing from the magazine, is of no consequence in view of the further finding arrived at by the Magistrate after an elaborate analysis of the evidence, circumstances and probabilities that the stock in the magazine was not being properly verified and checked and that there was the possibility of the explosives going out of the

magazine by means other than breaking open the locks, a finding which cannot be said to be altogether without basis.

11. Having bestowed my earnest consideration to an the aspects of the case, I feel that the learned Magistrate was justified in reaching the conclusion that there is no conclusive proof to bring home the charges against the appellants. The order of acquittal is therefore confirmed and this appeal by the Stab is dismissed.

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