

Anthony Devassya and anr. Vs. State of Kerla

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Court : Kerala

Decided On : Dec-08-1961

Reported in : 1963CriLJ536

Judge : Anna Chandy and P. Govinda Menon, JJ.

Appellant : Anthony Devassya and anr.

Respondent : State of Kerla

Advocate for Pet/Ap. : Sri. K.T. Thomas

Judgement :

Anna Chandy, J.

1. Accused 1 and 2 who are brothers are the appellants. The fourth accused is the sister of accused 1 and 2 and the third accused is their father. The first accused is convicted under Section 302 and sentenced to death and the second accused under Section 324 I.P.C. and sentenced to rigorous imprisonment for one year and to pay a fine of Rs. 300/-.

2. The charge against them was that they along with accused 3 and 4 in pursuance of their common intention caused the death of one Mathai by stabbing him with a malappuram knife. The first accused is said to have inflicted four incised injuries including the fatal one and the second accused of having caused a

minor injury on the scapula. Accused 3 and 4 who are acquitted are said to have held Mathai in their grips while the first accused stabbed him. The incident took place at 7.30 P.M. on 2-7-1961 on the Ettumanoor Athirampuzha road at a place near the shop of P.W. 3.

The prosecution case is that the first accused at about 7-30 P.M. abused the deceased Mathai who was then proceeding from the Sports Club closeby to the shop of P.W. 3 and aimed a stab which was warded off by Mathai. Mathai in turn slapped on the cheek of the first accused when the second accused who was nearby took a knife from the shop of P.W. 3 and inflicted a stab on the right shoulder blade. Though the second accused aimed further stabs they were all warded off. Then accused 3 and 4 arrived from their house to the east of P.W. 3's shop and accused 3 is alleged to have caught hold of Mathai on his waist and accused 4 to have held his right hand and slapped him. The first accused then stabbed Mathai in the left armpit and below the left shoulder. Accused 3 and 4 left their hold and Mathai fell down on his face. All the accused then left the place. Mathai attempted to get up and succeeded in taking two or three steps when he fell down again. He was removed by P.W. 1 and others to the District Hospital, Kottayam. By the time the doctor saw him he was dead.

Pw. 1 then proceeded to the Ettumanoor Police Station and lodged the First Information. His statement was recorded at 11.15 the same night by Pw. 13 the Sub-Inspector of Police. As the allegation in that statement was that these four accused along with the wife of the third accused took part in the crime a case was registered against all the five. Since investigation revealed that the wife of accused 3 had not taken any part in the incident the case was charged against the rest of them. The accused surrendered at the police station at 3-30 P.M. on 16-7-1961 and on his information P.W. 13 the Sub Inspector recovered M.O. 1 knife under Ext. P-II seizure list at 6.30 P.M. the same day. The knife alleged to have been used by the second accused was produced by P.W. 3 before the Circle Inspector and was taken into custody under Ext. P-4 mahazar. After completing the investigation the charge was laid on 29-7-1961.

3. The plea of both the accused is one of complete denial. A suggestion was made that at about the time of the incident the electric lights had failed for a few minutes and thus nobody could have identified the actual assailant of Mathai. A witness was also examined to prove the failure of electric current. It may be mentioned even here that this suggestion was not pursued in this Court.

4. The motive alleged is that P.W. 12 a brother of the third accused had filed a complaint in the Ettumanoor Sub Magistrate's Court against Mathai, P.W. 1 and others for the offences of wrongful restraint, theft and hurt which ended in a discharge. The order of discharge is dated-19-1-1961. It is suggested that accused 1 and 3 felt aggrieved and the first accused was biding his time to wreak vengeance and on the date of incident accused 1 and 2 actually lay in wait and attacked Mathai.

5. The death of Mathai on account of the injuries sustained by him is not in dispute and is well proved. P.W. 5 the doctor who conducted the autopsy noted twelve injuries. Of these five are incised injuries, one lacerated and the rest abrasions. Of the incised injuries, injury No. 9, 11/2' x 1' one inch below the left axilla penetrated into the pleural cavity causing an incised wound 1' x 1/4' x 1/4' on the left lung. According to the doctor that injury was sufficient in the ordinary course of nature to cause death.

6. The prosecution relies on the evidence of P.Ws. 1 to 3 and the recovery of the weapons alleged to have been used by accused 1 and 2 to establish the charge against the accused. The evidence of motive afforded by Exts. p-1 and P-2 the complaint and the order of discharge are also relied upon. P.W. 2 swears that on the date of the incident he along with the first accused and three others visited the toddy shop in the market by about 6 P.M. and as toddy was not available they had to return. When they reached a place near one Devasia's shop P.W. 2 stopped there to purchase beedi and the others walked on. As he found! Devasia's shop closed he had to cross over to the other side of the road to P.W. 3's shop from where he purchased beedies. While proceeding along the road he heard some one spitting on the road. He looked back and saw accused 1 and 2 in front of P.W. 3's shop and Mathai coming out of the Sports Club. There was an exchange of

abusive words between the first accused and Mathai, Then the first accused advanced towards Mathai and aimed a stab at him, which was warded off. Mathai in turn slapped the first accused on his face. Then he saw the second accused picking up a knife from P.W. 3's shop and rushing up to the scene and stabbing Mathai on his back on the right side. Though further stabs were attempted by the second accused they were warded off by Mathai.

By that time accused 3 and 4 came to the place. They caught hold of Mathai and accused 4 beat him with the hand three or four times. When Mathai was in their grips the first accused stabbed Mathai on the left arm pit and on the back. When accused 3 and 4 released their hold Mathai fell down and all the accused left the place. Mathai got up and tried to walk but fell down again. P.W. 1 the younger brother of Mathai was returning from Mathai's house when he found the third accused holding Mathai by the waist and the first accused stabbing him twice on the leftside. P.W. 3 the owner of the shop in front of which the incident took place witnessed the incident from his shop. He heard the first accused spitting out in a contemptuous manner and Mathai abusing the first accused in indecent language. The first accused also did likewise and he neared Mathai and attempted to stab him. Warding off the stab Mathai slapped accused 1 on the cheek. The second accused then took a knife from his shop and stabbed Mathai from behind. When Mathai turned against the second accused the second accused attempted two or three stabs more which were warded off by Mathai. At this juncture accused 3 and 4 came up and caught hold of Mathai when the first accused stabbed Mathai twice and Mathai fell down and all the accused escaped. Mathai took, a few-steps and fell down again.;

A petromax light was burning in his shop and there were also street lights and they could get a clear view of the incident. P.W. is evidence is attacked as being interested. It is also urged that the version given by him in the First Information Statement has been given the go-by when he gave evidence before court. According to the first statement the wife of accused 3 had also taken part in the attack on Mathai and there is no allegation that accused 2 had stabbed Mathai and on the other hand it was alleged that he was catching hold of Mathai along with accused 3 and 4 at the time accused 1 stabbed him. The witness tried to explain

these discrepancies by saying that he was in disturbed state of mind which led to defective observation. In spite of these explanations it must be said that the witness was working upon his imagination too much and there was an attempt to rope in the entire family. His evidence has therefore to be scanned with great caution. We have taken care to do so and we are accepting his evidence only to the extent that it is corroborated by the evidence of the other two witnesses.

The main ground of attack against the evidence of P.W. 2 is that his name was not mentioned among those who were questioned in Ext. IV remand application filed on 17-7-1961 and even when copies of the case diary statements of witnesses were forwarded to the Court as directed by the Magistrate the case diary statement of P.W. 2 was not included. The Circle Inspector who questioned the witness is definite that he was questioned on the fourth itself and that the failure to include his name among the witnesses mentioned in the remand application is only an omission. The failure to forward his case diary statements in Ext. D-6 along with the rest also seems to be an omission as the case diary statements of witnesses who were questioned on the third alone appear to have been forwarded. It was argued by Sri K.T. Thomas the learned Counsel for the appellant that the witnesses were not questioned then and his case diary statement was not available at the time. No such inference is possible and the explanation appears to be satisfactory. The witness has satisfactorily explained his presence at the scene of incident and had no axe to grind by giving false evidence. P.W. 3 was attacked as being related to the deceased. The relationship as admitted by the witness is a very remote one, and is no reason for discarding his evidence. He is a natural witness to the incident which took place in front of his shop and his evidence could be safely accepted.

It was argued that it is not safe to rely on the evidence of these witnesses which has been rejected in part by the learned Sessions Judge himself. It is not a case in which the learned Sessions Judge has come to the conclusion that they were giving a false version of the Incident when they implicated accused 3 and 4 and the learned Judge was only giving the benefit of doubt to those accused on a consideration of the entire circumstances and probabilities. Though we are of the view that in the light of certain circumstances and probabilities which the learned

Judge failed to appreciate in their proper perspective, the second accused is also entitled to the same benefit as accused 3 and 4, we have no hesitation in accepting the evidence of these witnesses regarding the part played by the first accused.

7. Coming to' the motive for the Incident though the order of discharge was pronounced six months, back and' there is no indication that anything happened thereafter ifford an immediate provocation for the incident it still appears that the feelings between the parties were strained enough for the deceased to take the noisy spitting by the first accused as an insulting gesture. As against the first accused there is also the evidence afforded by the recovery of M.O. 1 the malappuram knife which is identified by the witness as the weapon used by him.

8. The case of the second accused stands on a different footing. In the early statement given by P.W. 1 the case that the second accused stabbed Mathai doss not find a place and on the other hand it was alleged that he was also catching hold of Mathai along with accused 3 and 4 when the first accused stabbed him. It may be argued that there is no significance in this omission because P.W. 1 had not actually witnessed the earlier part of the incident, but the stabbing by accused; 2 according to the prosecution was an integral part of the incident and took place immediately before the stab by the first accused and as such it is not likely that P.W. 1 who remained at the place for some time before he proceeded to the hospital would not have become aware of it. Admittedly accused 2 was not armed and had to pick up a knife from the shop of P.W. 3. Only one stab is said to have been inflicted by him. Admittedly the first accused had a weapon with him with which he inflicted as many as four incised injuries and the possibility of his being responsible for injury No. 10 is there. Injury No. 10 is the one attributed to the second accused and considering the dimansions of the weapon which is alleged to have been used and the superficial nature of the injury Ho. 10 it is doubtful whether that injury could have been caused by that weapon as the result of an aimed stab from behind.

The learned Sessions Judge himself has not accepted the prosecution case that it was a case of a premeditated and concerted attack on the deceased by accused 1

and 2 and there is nothing suspicious about the presence of accused 2 at the place. The second accused's house is not more than 20 or 25 feet from the place. He was in the shop sometime before the incident when the deceased had been to the shop and not even a conversation is reported to have taken place between them. When the quarrel started, he was in F.W. 3's shop and he ran up only after the deceased slapped accused 1 on the face. It may even be that his attempt was only to see that no harm befell his brother as he did nothing more than inflicting a superficial injury. The version about the recovery of M.O. 7 knifa is also not quite convincing. It was produced before the police by P.W. 3 and his case is that he picked it up the next morning from below the desk kept in the verandah of his shop when he opened the shop. The shop was closed by him immediately after the incident and there was no occasion for the accused to place it inside the shop. When chemically analysed the knife was found rusty and no blood was detected. Taking all these circumstances into consideration we feel that it was a case in which the benefit of doubt given by the learned Sessions Judge to accused 3 and 4 can well be extended to the second accused also.

9. The nature of the weapon used by the first accused, the vital parts of the body which were attacked and the number and nature of the injuries all indicate that the intention of the first accused when he stabbed Mathai was to cause his death. His conviction for murder has therefore only to be confirmed.

10. Regarding the sentence, we feel that this is not the type of case where the infliction of the extreme penalty is justified. The case that it was a premeditated and preconcerted act has not been accepted by the learned Sessions Judge. The discharge order was passed six months back and it is in evidence that Mathai used to pass by that way at least twice a day. There is nothing in the evidence to indicate why the accused should have waited there to murder him on that particular day. It is clear that it was a casual meeting when the act of the 'noisy spitting' by the accused was taken by Mathai rightly or wrongly as an insult. He was the first to start the quarrel by abusing the accused in vulgar language and by slapping him on his cheek. These circumstances justify only the passing of the lesser sentence provided for by law.

11. As this is one of many cases brought to our notice where death penalty was imposed when the circumstances did not warrant it, we may take this opportunity to express our views on the matter. Though we do not approve of the attempt of some Courts to wriggle out of the infliction of the extreme penalty in deserving cases by resorting to untenable and strained arguments, we equally disapprove of the practice of giving the death penalty in all cases of murder thereby casting the responsibility on this Court to commute the sentence if necessary. The discretion is that of the Trial Court and that Court has to exercise it judicially.

12. For the guidance of Judges, though not exhaustive or inviolable some general indications of the type of cases where death sentence alone would be the appropriate one may be indicated. In the Division Bench decision of this Court in Criminal Appeals Nos. 299, 314 and 340 of 1960 and Criminal R.P. No. 482 of 1960 and Calendar Revision, one of us had occasion to observe as follows:

Choice as to which of the two punishments prescribed by the Section for murder is the proper one to be awarded, will depend upon the particular circumstance of each case, but broadly speaking murder for gain and other sordid motives, murder committed in connection with sexual offences or with dacoity, pre-planned, cold-blooded murder committed with unusual brutality and such murders that appear to be particularly heinous as to arouse judicial indignation may be considered as some of the cases deserving the extreme penalty. Of course these cases are not exhaustive, but merely illustrative.

13. In *Narayanan v. Travancore-Cochin State* : 1956 CriLJ278 , His Lordship Justice Bose gives an indication of the type of cases where death sentence is not called for. In that case:

A slap by V. on the face of the accused resulted in a minor scuffle between the two. The deceased, an innocent by-stander, intervened with a mild admonition to the accused's adversary to stop fighting. The accused thereupon took a pen-knife from his waist and hit on the chest of the deceased and caused the injury which eventually killed the man.

His Lordship observed that:.....the lesser sentence was called for because the slap on the face evidently made the accused, who appeared to be a hot-blooded man, lose control of himself. That would not afford justification for killing an innocent by-stander. But this was not the type of case in which the death sentence was called for. There was no premeditation and the knife was not ready in the hand but was drawn from the waist after the accused had been slapped and the quarrel between V and him had started.

14. Going a step further a Division Bench of the Madhya Pradesh High Court in *Mojiya Ratna v. State* : AIR 1961 MP10 laid down some general principles about the sentence in a murder case after the amendment of Section 367(5), Criminal Procedure Code. The learned Judge observed that:

Though after the amendment of Section 367(5), Cr.P.C. in 1955, there is no statutory direction that a Court should in such cases record its reasons why the lesser penalty is being awarded, still, the Courts are not absolved of their duty of exercising their judicial conscience as to whether the extreme penalty should be awarded or only the life sentence. Various considerations enter and there is always what can be called the personal equation. A murder on the spur of the moment and actuated by anger, jealousy, pride or sense of honour and the like may call for the lesser penalty. On the contrary, any murder that has been planned before-hand, and has been committed with cruelty or for a sordid purpose, and without the least trace of any spirit of fair-play or sportsmanship, without giving a chance to the victim should necessarily be punished with the extreme sentence.

15. The following observations made by Agarwala, J. in *Moolchand v. State* : AIR1953 All220 are also helpful.

Under Section 302, I.P.C. a discretion is vested in Courts either to impose a sentence of death or of transportation for life. Discretion must always be exercised according to principles and not according to the humour of the Judge, arbitrary or fanciful. The principle upon which discretion is to be exercised not being fixed by any statute, may be interpreted progressively in accordance with the spirit of times, so that real and not technical justice may be secured. To my mind the true principle of exercising the discretion of imposing either the penalty of death or of

transportation for life should be that the sentence of death is awarded in cases in which the act is very brutal and highly repugnant to morals and the sentence of transportation for life is imposed in all other cases.

16. With these observations we acquit the second accused and set him at liberty and confirm the conviction of the First accused while altering the sentence of death to rigorous imprisonment for life,.

Govinda Menon, J.

17. I am in full agreement with the order proposed in this case that the conviction of the first accused for murder has to be confirmed and the sentence has to be reduced to rigorous imprisonment for life. I also agree that the conviction of the second accused should be set aside and that he should be acquitted. But I would like to add a few words regarding the question of sentence to be passed in cases of murder. It is not possible to lay down any hard and fast rule of universal application. Each case must be decided on its own merits and punishment should be awarded suitably to each case. There can be no general rule defining the classes of cases in which lesser sentence can be imposed, though from time to time certain circumstances have been recognised by the Judges as valid grounds for imposing such sentence. I would say that in the absence of any extenuating circumstances whatsoever, the sentence of death would be the appropriate sentence. The Court whose duty it is to award punishment must exercise its own discretion, but the discretion must be exercised judicially and not arbitrarily. This, I consider, is the effect of the various rulings.

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