

Murali Vs. State of Kerala

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Court : Kerala

Decided On : May-28-2003

Reported in : 2003(3)KLT226

Judge : K.A. Abdul Gafoor and; N. Krishnan Nair, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) 1973](#) - Sections 161, 171, 173 and 175

Appeal No. : Crl. A. Nos. 210 and 220 of 2001

Appellant : Murali

Respondent : State of Kerala

Advocate for Def. : P.V. Madhavan Nambiar, Public Prosecutor

Advocate for Pet/Ap. : P. Vijaya Bhanu,; P. Maya and; S. Vijayakumar, Advs.

Disposition : Appeal allowed

Judgement :

K.A. Abdul Gafoor, J.

1. First of these two appeals is by accused 1 to 4 and the other is by accused 5 to 8 in S.C. No. 193/98 on the file of the First Additional Sessions Judge, Thrissur in which, apart from them, two other persons were also involved. Those two persons (accused 9 and 10) had been acquitted. The appellants were charge sheeted for

offences punishable under Sections 143, 147, 148, 120B and 302 read with Section 149 of the Indian Penal Code for having committed murder of one Vidyasagar. Accused 1 to 8 were found guilty of the offences punishable under Sections 143, 147, 148 and 302 read with Section 149 of the Indian Penal Code. They have been sentenced to undergo rigorous improvement for life and to pay a compensation of Rs. 20,000/- each and in default to undergo rigorous imprisonment for a period of five years each. Though separate punishments have been awarded for the offences punishable under Sections 143, 147 and 148 I.P.C., the sentences were directed to run concurrently. It is against this conviction and sentences, the appellants have filed these appeals.

2. The prosecution case was as follows: There was an attempt against the life of the 9th accused on an earlier occasion. It was supposed to be at the instance of the deceased - Vidyasagar, who belonged to a rival political faction. To wreak revenge on him, all the accused assembled in the house of the 9th accused, hatched up a conspiracy to do away with the deceased. For that the 9th accused hired a taxi with the help of the 10th accused, which was being driven by the 6th accused. All the accused persons were transported in that taxi car to the place of occurrence which is stated to be close to an engine shed in Mathilakam Village. At about 8.30 P.M. on the date of occurrence (12.7.1996), all the accused assembled at the alleged scene of occurrence. Then there was load shedding. The deceased had been in intimacy with PW.7, residing in the nearby locality. He used to visit her. On that day, just after the load shedding was over at 9 P.M., he crossed over to his residence in the very same locality through a short cut which passes near the engine shed. At that time, all the accused persons are alleged to have assaulted the deceased with dangerous weapons like sword, knife, daggers and hitting block and the deceased fell down with multiple injuries. He was taken to the hospital, but he succumbed to the injuries. The prosecution case was that about 15 minutes before the alleged incident at about 9 to 9.10 P.M., PW.4 had been passing through that by lane and he saw four among the accused persons standing on one side of the by lane and the remaining standing on the other side with dangerous weapons. When PW.4 lighted his torch, he was threatened and thereupon he flew to his residence. It was thereafter that the deceased came from the house of PW.7. PWs.2 and 4 came to the scene hearing the hue and cry of the

deceased. PW.2 had seen the accused persons assaulting the deceased. PW.4 also had seen them running away with weapons. It was in the above circumstances, they have been charge sheeted for the offences punishable under Sections 143, 147, 148, 120B and 302 read with Section 149 of the Indian Penal Code.

3. The prosecution examined PWs.1 to 23 and marked Exts.P1 to P51 documents and identified material objects M.Os. 1 to 37. Exts.D1 to D4 documents were marked on the defence side. No witness was examined on the defence side.

4. The trial court did not find the allegation of conspiracy in the house of the 9th accused as true. Hence the 9th accused was acquitted. But the trial court found that there was a conspiracy in and around the locality where the incident had taken place. For that purpose, the trial court mainly relied on the evidence of PWs.2 and 4 and PW.23, the Investigating Officer. According to the prosecution, PW.2 was an eye witness and he had seen the incident and had seen each of the convicted accused assaulting the deceased with the weapons that he had identified. So also, PW.4 had identified the appellants as the persons running just after the incident, when he was coming to the spot, with the weapons seized which had also been identified by him. The evidence of PW.4 that he had seen the accused roaming near the engine shed just few minutes before the incident was also taken note of by the trial court to fasten guilt on the appellants. Added to this is the circumstances as spoken to by PW.7, with whom the deceased had been in intimacy and whose house the accused had visited on the particular day. He had been there with PW.7 until 9'0 clock in the night when the load shedding had been lifted. That house was only just 200 meters away from the scene of occurrence. Therefore, the occurrence around 9 to 9.10 P.M. is also stated to be proved as the deceased had passed through that area while returning from the house of PW.7. It was in the above circumstances, the trial court found the accused/ appellants guilty of the offences with which they were charged.

5. The conviction and sentence of the appellant based on the evidence of PWs.2 and 4 are vehemently challenged by the appellants contending that both these witnesses did not divulge the correctness of the incident before the Court below. In

order to substantiate this contention, learned counsel for the appellants have placed much reliance on Exts.D1(a) to (d), portions of the case diary statement stated to have obtained by PW.23, Investigating Officer from PW.2 under Section 161 of the Code of Criminal Procedure during the course of investigation, on the next day of occurrence viz., 13.7.1996. That statement did not form part of the original records of the investigation nor the records sent to the Court under Section 173 of the Code of Criminal Procedure. But in the copy of the records given to the accused, there contained a carbon copy of the statement seems to have obtained from PW.2 by PW.23. According to the instructions to the Police, the statements so obtained by the Investigating Officer were to be sent to the immediate superior officer of the Investigating Officer. The accused attempted to get that copy from the Deputy Superintendent of Police produced before the Court. Even before production of that document, the copy received by the accused had been marked, subject to proof, as Exts.D1(a) to (d), wherein it is seen that PW.2 had stated that he did not see the real incident except that the deceased was lying on the spot with profuse bleeding. The records did contain another statement stated to be obtained from PW.2 under Section 161 Cr.P.C. which contained a version that he had really seen the incident of the accused persons assaulting the deceased with deadly weapons and their running away from the scene. It is that version that PW.2 had spoken to before the Court below. It is pointed out by the counsel for the appellants that PW.2 had denied any statement given like Ext.D1(a). But that fact has been confronted with PW.23, the Investigating Officer. He had admitted in his cross-examination that ExtD1 had been written in his handwriting though he attempted to correct it by volunteering that it looks like as if it had been in his handwriting. But at the same time, he had admitted that it is the true copy of the document that has been produced from the Office of the Deputy Superintendent of Police as summoned by the Court below and that it is the statement that he had obtained from PW.2 on 13.7.1996 itself; just before the one that he had made part of the records to be forwarded to the Court. He had also made it clear that the original of Ext.D1 had been torn off by him. He has got an explanation that he noticed that while giving Ext.D1 statement, PW.2 was concealing something and that he could successfully counsel upon PW.2 about the consequences of the concealment of an offence and that it was thereupon that the fresh statement has

been obtained from PW.2 on the same day itself. It was with the concurrence of PW.2 that he had torn off the original of Ext.D 1. The counsel, relying on the version so given by PW.23 and the statement under Section 161 Cr.P.C. obtained from PW.2, contends that denial of the original statement or the first statement, has prejudiced the accused as they were not given the copy of the entire statement obtained from PW.2. Thus gross unfairness had been shown by the prosecution to the accused depriving them of an opportunity to defend properly and effectively. It is very vehemently pointed out referring to the deposition of PW.23, that he had produced only those statements which were conducive to the nature of the prosecution case and that therefore he did not produce the original statement stated to have been given by PW.2. But it is pointed out by the counsel for the appellants that in the light of the evidence of PW.23, PW.2 cannot be believed to have stated the true facts as Ext.D1 admittedly taken from him by PW.23 is denied by PW.2. There is no reason to disbelieve PW.23 when he stated that he had obtained Ext.D1 wherein PW.2 had stated that he had not seen the real occurrence. That statement is denied by PW.2 from whom PW.23 is stated to have obtained it. Therefore PW.2 cannot be believed at all. It is a trick played by the prosecution to obtain a second statement from PW.2 to suit the prosecution case, the counsel submits.

6. This aspect is attempted to be fortified by the accused/appellants pointing out similar deceptive tactics again on the part of PW.23, referring to PW.4. It is an admitted case by PW.23 in his deposition before the Court below that he had questioned PW.4 on 13.7.1996. In his own words before the Court below:

'PW.4 has not stated to me on 17.7.96 the facts that he had told me on 13.7.1996'.

He further admits in answer to a question that the statement of PW.4 in terms of Section 161 Cr.P.C. recorded on 13.7.1996 has not been produced in Court and that he produced only the statement given by PW.4 on 17.7.1996, as that alone suits the charge.

Therefore, the prosecution was attempting to conceal several facts before the Court in order to find the accused guilty and thus the accused had been denied of a fair opportunity to rebut the accusations against them. It is incumbent in terms of

Sections 171, 173 and 175 of the Code of Criminal Procedure that the entire records including what the charge witnesses have stated be sent to the Court and copy be given to the accused even though the prosecution may not be entitled to rely upon such statements to substantiate the accusations. Necessarily, the intention behind providing copies of such statements is to enable the accused to confront the witnesses about the contradictions so that they can effectively defend themselves. Counsel has pointed out a decision of this reported in *State of Kerala v. Raghavan* (1974 CrLJ 1373). Rejecting the argument of the State Prosecutor, that the prosecution need produce only that much statements which shall be in conformity with the prosecution case, it was held:

'The argument of the learned State Prosecutor cannot be accepted for more reasons than one. The reasoning that the prosecution does not propose to rely on the statement of the CW.2 recorded on 14.2.1973 as mentioned in the remand report dated 16.2.1973 appears to proceed from a basically wrong presumption. For one thing, there is no question of the prosecution relying on statements recorded under Sub-section (3) to Section 161 Cr.P.C. The limited uses of the statement recorded under Section 161 are indicated in Section 162 of the Code. The prosecution is entitled to make use of such statements only for the purpose of contradicting the witnesses who made the statements, and that too with the permission of the Court, there is therefore, no question of the prosecution exercising a sort of discretion as to rely or not to rely on a particular statement recorded under Section 161(3), as the prosecution is not entitled to rely on such statements at all as substantive evidence. Moreover, if this argument of the State Prosecutor is to be accepted, it would imply that the prosecution can, at its sweet will and pleasure pick and choose the statements of witnesses in respect of which the copies are to be, or are not to be, furnished to the accused to suit its convenience, thus eliminating all chances of the witnesses being confronted with their previous statements inconsistent with or contradictory to the case which the prosecution seeks to establish, which could never be the intention of the Legislature. If there are embellishments or contradictions in the statements given by the very same witness on different occasions, the veracity and trustworthiness of the evidence of the witness have to be tested in cross-examination with the aid of such materials. To deny that would be to deny a just and fair trial to the

accused.'

7. It is thus contended that by suppressing the original statement of PW.2 obtained under Section 161 Cr.P.C. and not producing at all the original statement obtained from PW.4 under the same provision, a fair trial has been denied to the accused.

8. The original of Ext.D1 had not been produced before the Court below and it has not been taken note of while framing the charges. The original Section 161 statement stated to be made by PW.4 had not been admittedly produced before the Court below. Necessarily, relying on the aforesaid decision, we hold that non-production of those statements has really prejudiced the accused insofar as they have been denied a fair trial.

9. It is in this context the contention of the appellants that PW.2, the only eye witness in this case, is not a witness to be relied upon, has to be considered. According to the counsel, that witness is unreliable and his evidence is unworthy to be acted upon. As already mentioned above, PW.2 has very categorically stated in his deposition that he had not given the statement like Ext.D 1. At the same time, PW.23, the Investigating Officer, had very categorically stated that he had obtained a statement like Ext.D1 from PW.2 and that he had torn off it after counselling PW.2 about the consequences of anything concealing to the police and that on being successful in that counselling, he could obtain a further statement, as if PW.2 had seen the occurrence. Thus, it is evident that the first statement given by PW.2 and second one under Section 161 Cr.P.C. speaks two divergent aspects. There is no reason to disbelieve, with respect to this, the Investigating Officer PW.23 who had obtained two statement from PW.2. Necessarily, the only possible conclusion, with respect to Exts.D1 (a) to (d), is that PW.2 was simply lying. As pointed out by the appellants, it was with an ulterior intention because the victim in this case is none other than the step father of PW.2. PW.7 is his mother. It was with her the deceased had been living in intimacy. PW.2 has something to revenge against the accused for the alleged murder of his own step father. Therefore, it is not safe to convict more than half a dozen accused under Section 302 relying on such a witness, the sole alleged witness to the occurrence.

10. It is true that PW.4 had stated that he had seen the accused waiting at about 8.45 P.M. near the engine shed and that just between 9 and 9.10 P.M. on the date of occurrence, he had heard the cry and had rushed to the scene of occurrence to see the deceased lying injured and the accused running back with weapons. But in the light of the fact that a statement obtained from him under Section 161 on 13.7.1996 had not been produced before the Court below, it cannot now be guessed what really he had told the police on 13.7.1996. PW.23 Investigating Officer had very categorically stated in cross-examination that he had questioned PW.4 on 13.7.1996 and on 17.7.1996. He has further deposed that, what PW.4 had told him on 17.7.1996 had not been told to him on 13.7.1996. Therefore, the evidence of PW.4, in the absence of furnishing a copy of the 161 statement obtained from him to the accused, cannot be relied upon as it will be prejudicial to the accused.

11. There are also contentions with regard to the absence of sufficient light to identify the assailants on that night during monsoon season and about the hasty recovery of about more than half a dozen weapons within two hours on the same day and about the absence of authorship of concealment of the weapons recovered. These are also facts in favour of the accused, it is submitted.

12. The Public Prosecutor, relying on the decision reported in *Bodhraj v. State of J. & K.* (2002 (8) SCC 45), submits that there is no impropriety in the recovery based on the statement obtained from the accused under Section 27 of the Evidence Act. But the proposition in the said decision does not in any way help the prosecution. Even in that decision, it has been made clear that:

'Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given.'

Anyhow, we are not, for the purpose of this judgment, placing much reliance upon the legality or otherwise of the recovery of the weapons.

13. It is further submitted by the Public Prosecutor that nonproduction of the earlier original statement under Section 161 Cr.P.C. obtained from PW.2 and PW.4 did not in any way prejudice the accused. Therefore, on that ground, the finding

entered into by the trial court need not be unsettled.

14. As held by this Court in the decision (cited supra) reported in (1974 CrL LJ 1373), the prosecution is bound to produce the entire statements obtained from the witnesses under Section 161 Cr.P.C. whether the statement is in favour of the accused or in favour of the prosecution because the role of the police is to bring the real truth before the Court. Necessarily, as held in that decision, non-furnishing of some of the statements or some part of the statements of the same witnesses will vitiate the trial and the accused will be denied of a fair trial. Denial of fair trial would necessarily prejudice the accused to have a proper defence. Therefore, it cannot be accepted that nonproduction of the original of Ext.D1 or the statement under Section 161 Cr.P.C. obtained from PW.4 on 13.7.1996 do not prejudice the accused/appellants. Therefore, on that reason itself, because of the denial of a fair opportunity, the appeals have to be allowed reversing the judgment of the trial court, finding the appellants/accused not guilty of the offences with which they are charged, and acquitting them of all the charges levelled against them.

In the result, the appeals are allowed. The order of conviction and sentence passed on the accused/appellants in S.C. No. 193/98 on the file of the First Additional Sessions Judge, Thrissur is set aside and the accused are found not guilty of any of the offences charged against them. They are acquitted. They shall be set at liberty forthwith, if they are not required in connection with any other case.