

In Re: Moorthy and anr.

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Court : Chennai

Decided On : Mar-07-1956

Reported in : AIR1956Mad536; 1956CriLJ1202

Judge : Govinda Menon and ;Ramaswami, JJ.

Appellant : In Re: Moorthy and anr.

Judgement :

Govinda Menon, J.

1. I agree. As leave to appeal had also been granted under Section 411A (1)(b), it is open to this Court to assess the evidence for itself and having done so, I am of the view that the convictions are justified. Having perused the testimony of P. Ws. 2, 3 and 4 in the light of the strong criticism levelled against their veracity, I feel that all the three of them are witnesses of truth. P. Ws. 5 and 6 corroborate the eye-witnesses' testimony to a large extent. In these circumstances on an analysis of the evidence there is no ground whatever for holding that the convictions are wrong. I agree to the confirmation of the convictions as well as the modification of the sentences,

Ramaswami, J.

2. These are appeals preferred by Moorthy and Mani, accused 2 and 1 respectively in Sessions Case No. 10 of die Fourth Criminal Sessions of 1955 of'

the Madras High Court, against their convictions, under Section 302 read with Section 34, I.P.C. in the case of accused 1 and under Section 302, I.P.C. in the case of accused 2, and the sentences of death.

3. The facts are: The deceased in this case one Krishnaswami Naidu, was employed as a Alaistry in the Zoological Gardens of the Corporation of Madras. It is in evidence that this deceased was a hard taskmaster and naturally the servants of the zoo bore him illwill. One of the persons who is said to have borne him a grudge, in particular, was one Bhima Pillai, accused 3 in the Sessions case charged under Section 302 read with Section 109, I.P.C. and got acquitted.

It would appear that on 23-7-1955, the deceased asked this Bhima Pillai to do some work. This Bhima Pillai wanted to avoid doing the work and asked for permission to go for tea. The deceased refused permission. In spite of it, Bhima Pillai went away. On that account there was an altercation between the deceased and this Bhima Pillai. The deceased reported the matter to the Superintendent of the Madras Zoo P. W. 10 Sri B. V. Ramanujulu. P. W. 10 sent for the deceased and Bhima Pillai. Bhima Pillai gave a written undertaking, Ex. P. 1, apologising for his conduct and stating that he would thereafter obey the orders of the Maistry.

The Superintendent thereupon passed orders warning him for the last time and informing him that if there was any further complaint against him he would be reported for dismissal. This Bhima Pillai was suspended for half a day. This was greatly rankled in the mind of this Bhima Pillai who seems to have looked upon what happened as an abject humiliation of himself by the deceased and appears to have informed Krishnaswami Naidu of this the next day. This constitutes, according to the prosecution, the motive for this occurrence.

4. Then the prosecution examined in the committing Court three employees of the Zoological Gardens, Gunalan, Chittarai and Marimuthu and of whom only Marimuthu was examined as P. W. 11 in the Sessions Court and we are not in a position to know from the charge to the Jury or the records why the other two were not examined and it is only mentioned in the arguments at the Bar, where a point has been made of it, that Gunalan and Chittarai were tendered for cross-examination. We shall deal with this point later.

The evidence given by this P. W. 11 is to the effect that when himself, Chittarai and Gunalan were working in the garden, Bhima Pillai came and told Gunalan that the nuisance of the Maistry Krishnaswami Naidu was increasing day by day and that he should be got rid of, that prior to 26-8-1955 this Bhima Pillai was found by him talking with Moorthy and Mani, accused 2 and 1, on some occasions, that on 26-8-1955 which was a Friday at about 10 a.m. this P. W. 11 saw accused 1 and 2 and Bhima Pillai talking together, that he overheard Bhima Pillai telling accused 2 that Krishnaswami Naidu should be done away with either when he left the Zoo or when he got down at Chetput railway station and went towards his house and that saying so Bhima Pillai gave accused 2 Rs. 4 and pointed out to accused 1 Krishnaswami Naidu as the person to be removed and that at that time Gunalan and Chittarai were also present at the place. This evidence, according to the prosecution, constitutes the preparation for the commission of the offence.

5. It may be mentioned here that accused 1 is a Harijan aged about 21 who was unemployed at the time of the commission of this offence and is the son of the uncle of Gunalan. Accused 2 is also a young man aged 20, who, though he gave out his calling as a milkman, appears to have been unemployed at the time of the commission of this offence.

6. Subsequently on 26-8-1955 at about 5-30 p.m. the deceased Krishnaswami Naidu telling the employees that he was going home a little earlier, apparently on account of indisposition, asked the employees to leave at 5-45. This witness Marimuthu P. W. 11 left the Zoo at 5-45 p.m. The deceased was living at Aminjikarai and used to travel from Park to Chetput Railway Station.

7. Then as regards the tragedy that happened, we have got a group of witnesses, Raman P. W. 3, Rangan, P. W. 4 and Gupta, P. W. 2. P. W. 3 Raman is a tea-vendor residing in No.4, Arunachala Pillai St., Periamet and he sells tea in the Moore market and he knew this Krishnaswami Naidu previously as he used to purchase tea from him but did not know the two appellants before us. P. W. 4 Rangan is a skin and hides merchant living at No. 13, V. V. Koil Street, Periamet, and who also did not know the appellants before. P. W. 2 Gupta is a resident of Amaravathi, Sattanpalle taluk in Guntur Dt. who carries on business in test stones

for testing gold.

These witnesses happened to be in the vicinity at the time of this occurrence, viz., by the side of My Lady's Gardens for the following reasons. P. W. 2 Gupta after visiting the Zoo was passing by My Lady's Gardens and proceeding to a distance of 50 yards when the deceased Krishnaswami Naidu was going ten yards before him when the occurrence took place. P. W. 3, Raman, had sold tea and was proceeding to the Park when Krishnaswami Naidu was coming in the opposite direction to him from My Lady's Gardens. P. W. 4, Rangan was at that time proceeding from the Moore Market to My Lady's Gardens, when the deceased Krishnaswami Naidu was coming from the side of the Stadium.

8. What these witnesses saw when there was plenty of light at about 5-45 p.m. at close quarters can be summarised as follows : The deceased was proceeding from the Zoo towards the Moore Market. On the road by the side of My Lady's Gardens, accused 1 suddenly overtook the deceased and stabbed him on his face and caught hold of him and asked accused 2 to stab and thereupon accused 2 stabbed him on his back with a bichuva like M. O. 2 and then these two accused persons ran away towards the Coovum river.

9. P. W. 5, Thiruvengada Naicker, the night watchman of My Lady's Gardens and P. W. 6 Thangavelu saw these two appellants running away, The injured after proceeding some distance fell on the pavement by the side of the Lily Pond opposite to the gate of Ashok Vihar. P. W. 8 Babu, who was going through My Lady's Park to purchase bamboos in Sydenham Road at that time, saw the deceased lying on the pavement with bleeding injuries. He went to him and made enquiries but the injured man was unable to reply.

Two minutes later, P. W. 2, Gupta and P. W. 5, Thiruvengada Naicker gave him the information that two persons had stabbed the deceased and run away. By that time the Sub-Inspector of Police of G.2 station, Sri Anai Gounder and P.C. 3142 of G.2 station, P. W. 15, who were on their rounds for spotting bad characters learnt of this stabbing and came to the spot. They found the deceased Krishna-swami Naidu alive but not in a position to speak. P. W. 8 was then found by them near the injured man. The injured man was sent in a rickshaw to the General Hospital.

P.C. 3142 accompanied the rickshaw.

10. The Sub-Inspector of Police, Sri Anai Gounder, recorded a statement from P. W. 8 Babu and while he was recording the information, received intimation that the deceased had died on the way.

The first information report states what P. W. 8 saw and in addition what he had learnt then there, viz., that two persons joined together and one person held the deceased tight and that the other man stabbed him with a bichuva and that both of them ran away and that this was known to the watchman Thiruvengada Naicker and Andhra gentleman, meaning P. W. 2, Gupta, and some others.

11. The Sub-Inspector proceeded to the scene of offence and scraped the bloodstained earth under the Mahazar Ex. P.6 and also seized from person of the deceased some of his belongings like a green kerchief, a season ticket, an empty money purse, snuff bottle and two invitations. Then he proceeded to the station and registered a case under Section 302, I.P.C. and sent intimation to his superior officers. The investigation was taken up by the Inspector of Police, Law and Order, who came to the scene at 7 p.m. and then went to the hospital and seized the blood-stained clothes of the deceased and examined witnesses.

12. The autopsy held over the deceased by Dr. C. B. Gopalakrishnan showed the following injuries : (1) A transverse stab wound on the right side of back communicating with right pleural cavity. On dissection it was found that the apex of the left lung was cut and the right pleural cavity contained 4 ounces of blood. (2) An incised wound involving the bridge of the nose. The left nasal bone was cut underneath. (3) An incised wound near the left eye-brow. (4) An incised wound involving the outer aspect of the left upper eyelid. (5) An oblique incised wound on the left side of the nose. In the Opinion of the doctor injury No. 1 could have been caused by a weapon like M. O. 2 and the others by a pen-knife and that death could have happened at about 6 p.m. on 26-8-1955.

13. The Police in the meanwhile were searching for the accused and Bhima Pillai was arrested on 28-8-1955 at 11-15 p.m. at Vasudeva Pillai Street. Accused 2 was arrested in the house of one Sadayan in Kalyana Maistry Gardens at about 11-40

p.m. where he was sleeping and the bichuva M. O. 2 was recovered from near his pillow. Later the Chemical Examiner found no stains of blood on it which is not surprising when the weapon had been recovered some days after the commission of the offence and there was opportunity to remove the traces of blood stains from it. Accused 1 was arrested on that day at 11-55 p.m. in his house.

14. On a requisition by the police the Honorary Presidency Magistrate Mr. Bonnell held an identification parade at G.2 police station from 10-25 a.m. to 11-20 a.m. on 29-8-1955. At that parade P. W. 3 Raman, P. W. 4 Rangan, P. W. 5 Thiruvengada Naicker, P. W. 6 Thangavelu and P. W. 2 Gupta are said to have identified these appellants as the culprits. The charge-sheet was laid on 12-9-1955.

15. In the Committing Court Gunalan examined as P. W. 11 and Chittarai examined as P. W. 18 are stated to have been treated as hostile witnesses and cross-examined by the prosecution. A note to that effect has been made by the learned committing Magistrate in para 5 of his order.

16. The case for these appellants was only a denial of any knowledge of the occurrence and a suggestion that they were arrested on 27-8-1955 and that they were pointed out beforehand to the identifying witnesses.

17. In these appeals the learned advocates for the appellants press three points, viz., that the majority verdict of the jury is opposed to the weight of evidence and the probabilities of the case; secondly, that the learned trial Judge's charge to the jury suffers from serious misdirections and non-directions amounting to misdirections resulting in miscarriage of justice; and thirdly, that the trial has been vitiated by material irregularities. We shall now consider them one by one.

18. Point No. 1 : On the evidence on record, we cannot agree that the majority verdict of the jury which the learned trial Judge has accepted was against the weight of evidence and probabilities of the case. The prosecution has shown that there was discontent amongst the gardeners and especially Bhima Pillai nurtured a grievance against the deceased as a hard task-master who publicly humiliated him and that this grievance constituted the motive for the commission of this offence.

It is quite true that Bhima Pillai has been acquitted of the charge under Section 302 read with Section 109, I.P.C. on a divided but majority verdict of the jury and which the learned trial Judge has accepted. But this does not mean that the evidence regarding motive has been found to be false. It is quite possible that the Jury came to the conclusion that the evidence on record was not sufficient to bring home the charge of abetment against Bhima Pillai especially when that part of the case spoken to by Marimuthu has not been corroborated by Gunalan and Chittrai who were examined in the committing Court but were given up in the Sessions Court.

It is also quite possible that the learned trial Judge thought that though he was not bound to accept the divided verdict, still in the circumstances he need not order a fresh trial at the next sessions, as he might have considered the evidence on record such as might not justify such a course and that a different jury might not come to a different conclusion. This evidence of motive is corroborated by the evidence of preparation on the morning of the date of offence when these appellants had come to the garden and a sum of Rs. 4 had changed hands.

19. Then we have the evidence of the three eye-witnesses who have seen the deceased being followed by these appellants and stopped and stabbed repeatedly till he collapsed. These three witnesses have identified throughout these two accused persons as the assailants of the deceased Krishna-swami Naidu and there is nothing to distrust this identification. The occurrence took place before sunset and at close quarters to these witnesses and occupied sometime to enable these witnesses to have a good look at the assailants and their features getting memorised.

These three witnesses are strangers to these appellants and have no motive to falsely implicate them. One of them is a resident of Sattanapalle in Guntur Dt. These witnesses have also been in the vicinity on legitimate businesses of their own. Immediately after the occurrence the names of Thiru-vengada Naicker and of the Andhra gentleman have been given in the first information report as the persons who gave the information about what they saw.

Consequently, the Jury had good reasons to accept the testimony of these eye-witnesses and their identification of the assailants. Then, these accused persons have been seen by Tliiruvengada Naicker, P. W. 5, the gate keeper of My Lady's Gardens and Thangavelu P. W. 6, when running together away from the scene of occurrence. Once again, there is no reason to distrust the testimony of these two witnesses. The evidence of P. W. 6 Thangavelu that accused 2 ran away with a knife like M. O. 2 is corroborated by the subsequent recovery of M. O. 2 when he was arrested on 28-8-1955 at 11-40 p.m. in the house of Sadayan in Kalyan Maistry gardens.

We have already pointed out that the fact there were no blood-stains on the knife is consistent with the fact that there was sufficient time for cleaning up the bichuva. Therefore, the verdict of the jury is certainly based on the weight of evidence and probabilities of the case.

20. Point 2 : The misdirection on which reliance is placed is that in various places of his charge the learned trial Judge has used strong expressions about the truthful character of the prosecution witnesses, practically making up the minds for the jury. It is quite true that the trial Judge in a sessions case under Section 298 (2), Cr. P.C. may, if he thinks proper, in the course of his summing up, express to the Jury his opinion upon any question of fact. But still it is well settled that the Judge ought not to express any decided opinion because the decision on the questions of fact is left entirely to the Jury.

The Judge in his charge to the Jury ought not to express his own opinion in terms too dogmatic even though he informs them that they are not bound by any opinion of his. The warning, even of repeated, that the members of the Jury are not bound by the opinion of the Judge cannot be considered to be magic formula to cover up dogmatic assertions and tendentious suggestions. The object is that the Judge should not impress his own opinion indelibly on the minds of the Jury and thus give them no option but to arrive at a decision which he himself has arrived at. But at the same time in a protracted narrative of facts, the determination of which is ultimately left to the Jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black

type.

It would, however, be not proper to treat such cases as cases of misdirection if upon the general view taken the case has been fairly left to the jury's province. This has been the case here notwithstanding the dogmatic and repeated expressions of opinion regarding the credibility of the witnesses to be found in the charge to the Jury here and there. We are not prepared therefore to hold them to be misdirections bringing about miscarriage of justice.

21. In regard to the non-direction, it is settled law that mere non-direction is not necessarily mis-direction. But in order to justify the appellate Court to set aside the verdict of the Jury the finding that there are certain omissions or non-directions is not enough. The Court of appeal must be satisfied on a perusal of the charge and the material evidence in the case, that the omissions are so important that it may reasonably be stated that they have led to an erroneous verdict.

In this case the learned trial Judge, it is pointed out, did not draw the attention of the Jury that the first information report in this case mentioned that only one of the assailants stabbed the deceased. It was not necessary for the learned Judge to do so because the first information report itself has been read out to the Jury; and secondly, the first information report in this case was given not by an eyewitness but by one who had learnt that two persons had set upon the deceased and that the deceased had collapsed on the pavement with injuries and was unable to give any coherent information.

Then it is said that the learned trial Judge has failed to point out that since the bichuva M. O. 2 is traced to accused 2, even if accused 1, Mani, was the person who held the deceased, he did not stab the deceased according to the first information report. This does not follow, because accused 1 might have made away with the weapon which he is stated to have used like a pen-knife, before he was arrested. Thirdly, it is pointed out that the learned trial Judge has failed to place before the jury the fact that the eye-witnesses P. Ws. 2, 3 and 4 who alleged that they saw the occurrence at close quarters, within a distance of 15 feet, and P. Ws. 3 and 4 practically from the same place, failed to notice one another as between themselves.

The learned trial Judge might have placed this before the Jury and also mentioned that when an occurrence of this nature takes place suddenly, the attention of each one of the eye-witnesses is riveted upon the ghastly tragedy and they would not be looking about to see who else was there. In fact if they are not witnesses of truth they would easily have said that they noticed one another. Therefore, these alleged non-directions and others of similar nature pointed out to us neither singly nor cumulatively make out that they could reasonably be said to have led to an erroneous verdict.

22. Point 3 : There is no doubt that the learned advocates for the appellants are on a very strong ground when they argued that the learned trial judge has admitted inadmissible evidence in the shape of statements of identifiers at the identification proceedings. There is also no doubt that though the identification proceedings in this case were held by a Honorary Magistrate with all legitimate precautions to ensure a fair identification still, it was arranged at the G.2 police station by the investigating police officers and that throughout the police officers have been present and in fact the entire show has been under the police auspices and could hardly be described as anything else than a police identification parade.

Quite different would have been the case if after arranging the identification parade the police had completely obliterated themselves and the Honorary Magistrate was left solely in charge of the parade and in which case the statements made by the identifiers would be outside the purview of Section 162, Cr. P.C. In this case not only was evidence let in of the statements given by the witnesses that particular persons were identified then, but the learned Judge to discredit a defence argument impeaching the value of Mr. Bonnells' evidence had the deposition of the Honorary Magistrate read over once again during the delivery of the charge, apparently to refresh the memory of the jurors.

In doing so the learned Judge overlooked that excepting as pointed out by Bhagwati and Venkatarama Ayyar JJ. in - 'Ramkishan Mitanal v. State of Bombay' 1955 SC 104 ((S) AIR 5 42) (A), the identifier would be entitled to give evidence in regard to his mental act of identification by way of corroboration of his identification of the accused at the trial, the other evidence regarding the process of

identification by identifying witnesses at test identification parades, directed and supervised by police officers involving statements by witnesses, express or implied, including signs and gestures, that particular persons were identified, would attract the operation of Section 162, Cr. P.C. and would make that evidence inadmissible as laid down by their Lordships of the Supreme Court in the aforesaid decision. There can be no doubt that in this case inadmissible evidence hit by Section 162, Cr. P.C. has been allowed to be let in and it is to be hoped that in future identification parades, though they may be arranged by the Police, would not be directed and supervised by them and that after arranging test identification parades the police would completely obliterate themselves and leave the Honorary Magistrate and the Panch witnesses solely in charge of the parade so that the statements made by the identifiers would be outside the purview of Section 162, Cr, P.C.

But the mere fact, however, that inadmissible evidence has been admitted, should not be made a pretext for either ordering a retrial or for acquitting the appellants because as laid down in the very Supreme Court decision just now referred to, that though the admission of inadmissible evidence would amount to a misdirection, what has to be done, in cases where inadmissible evidence has been admitted and incorporated in the charge to the Jury, is to exclude the inadmissible evidence from the record and consider whether the balance of evidence remaining thereafter is sufficient to maintain the conviction and it is for the Court of appeal to take the whole case into consideration and to decide for itself whether the conviction could be maintained, and not act upon vague suppositions as to the extent to which the minds of the jury might have been affected by the adduction of inadmissible evidence or in other words instead of seeking shelter in an idle skepticism as was said by Lord Cockburn C.J. in the Tichborne case in another connection which weakness readily adopts, analyse the evidence and find out whether the other evidence in the case established the guilt of the accused beyond reasonable doubt.

23. Therefore, we have examined the evidence in this case from the standpoint laid down by the Supreme Court and have come to the conclusion that even if this evidence of statements of identification at the identification parade is excluded,

there were sufficient materials for the Jury, as narrated above and which need not be repeated, to come to the conclusion that these two appellants were the assailants of the deceased Krishnaswami Naidu.

Therefore, beyond expressing our regret that the learned State Prosecutor did not bring to the notice of the learned trial Judge this ruling of the Supreme Court, which we are bound to follow and especially so when their Lordships have specifically mentioned that the Madras decisions to the contrary have been overruled - and since such disregard of these rulings, as has been repeatedly pointed out by our High Court and other High Courts would amount even to dereliction of duty See - 'Raghava Mannadiar v. Theyunni Mannadiar' 1947 Mad 106 (AIR 5 34) (B) - 'Rex v. Ram Dayal' 1950 All 134 (AIR 5 37) (C) - 'Beevathamma v. Lakshmi Ammal' 1952 Trav-Co 92 (AIR 5 39)(D)-'Karam Husain v. Md, Khalil', 1946 All 509 (AIR 5 33)(E) and-'Didda Subbareddi v, Gunturu Govindareddi, 1955 Andhra 49 ((S) 9AIR 5 42) (F), we find that, on the balance of evidence remaining thereafter, there is sufficient and satisfactory evidence to maintain the convictions of these appellants,

24. The convictions are therefore correct. In regard to the sentences of death, the learned trial Judge himself has stated whether it was not for the Government to consider, in view of the fact that accused 3 Bhima Pillai, the principal instigator has been acquitted, this is a proper case to act under Section 402, Cr. P.C. We do not agree that this would be an extenuating circumstance. But in view of the fact that these appellants who are young men have come under the influence of the older man, viz., Bhima Pillai, and would not have committed this offence but for that baneful influence upon them, we consider that the ends of justice do not require that we must confirm the extreme penalty of law awarded to them. The sentences are reduced to imprisonment for life,

25. We suggest that the attention of all Judges and Magistrates in this State might be suitably drawn to this Supreme Court decision and the Executive Authorities may also do the same in regard to Police Officers so that by a careless disregard of the implications of this ruling valuable evidence might not be lost and opportunities given for soliciting for wholly unmerited re-trials or acquittals.

