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Court : Chennai

Decided On : Apr-23-1947

Reported in : (1947)2MLJ128

Appellant : The Crown Prosecutor

Respondent : Krishnan Alias Karikara Krishnan and ors.

Judgement :

Yahya Ali, J.

1. This is an appeal under Section 411-A(2), Criminal Procedure Code, from the acquittal of the three respondents of the murder of Nammalwar and of other offences comprised in the charge. The three respondents were tried in Sessions Case No. 6 of 1946 of the First Criminal Sessions of this Court and six charges were framed against them. The first charge was one of murder against all the accused read with Section 34, Indian Penal Code. The second charge was under Section 326, Indian Penal Code, against the first accused. The third and fourth charges were under Section 326 read with Section 114, Indian Penal Code, against the second and third accused. The fifth charge related to the simple hurt committed by the second accused, and the sixth charge was under Section 323 read with Section 114, Indian Penal Code, against the third accused. The jury by a majority of 7 to 2 found the first and second accused not guilty in respect of all the charges against- them, and by a verdict which was unanimous found the third

accused not guilty and of any of the charges. The learned Judge who presided had directed the jury to return a verdict of not guilty so far as the third accused was concerned in relation to the first charge. The learned Judge ' accepted ' (presumably agreed .with) the verdict of the jury in- respect of the charges, and he acquitted the three accused of all the charges against them and directed them to be set at liberty.

2. An application was made by the Crown Prosecutor for a certificate under Section 411-A, Clause (b) that this is a fit case for appeal against the acquittal on the ground that the verdict of the jury was perverse. The learned Judge granted leave considering that there was evidence let in by the prosecution on which the jury might well have returned a verdict of gailty, except as to the third accused in regard to the charge against him under Section 302, read with Section 34,-Indian Penal Code. Upon this certificate the appeal has come before us, and in deciding such an appeal the principle will have to be applied, which was recently enunciated in the judgment of the Judicial Committee- delivered on 27th March, 1947, in *Thiagaraja Bhagavathar v. The King-Emperor* (1947) 1 M.L.J. 404 . Their Lordships have, after discussing the decisions of this Court and of the Bombay High Court bearing upon this question, pointed out that

a Judge hearing an application for leave to appeal on the facts has an absolute discretion to grant or withhold such leave, but it is a discretion to be exercised judicially

Their Lordships observed. that a Judge

is bound to consider any special features in the particular case, but he cannot ignore the effect which the granting of leave to appeal without due discrimination 'may have upon the whole system of trial by jury in the High Court.

Then the following principle was laid down, which is of direct application in this case:

Leave once having been granted, however, the matter is at large, and the Court of Appeal must dispose of the appeal upon the merits paying due regard however to

the principles on which Courts of Appeal always act in such cases.

After enunciating this criterion their Lordships referred to the decision of the Board in *Sheo Swarup v. The King-Emperor* where the Privy Council had laid down the matters to which proper weight and-consideration should be given in exercising the power conferred by the Code on a Court of Appeal. As modified in the judgment in *Thiagaraja Bhagavathar v. The King-Emperor* (1947) 1 M.L.J. 404 referred to above, the considerations applicable to appeals under Section 411-A, Criminal Procedure Code, are the following : (1) the views of the jury implicit in their verdict as to the credibility of the witnesses ; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial ; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. It is manifest from this pronouncement of the Judicial Committee that subject to the considerations which a Court of Appeal bears in mind in dealing with such matters the whole matter is at large before us except in respect of the charge against the third accused under Section 302 read with Section 34, Indian Penal Code.

3. We may also point out that the test which was hitherto applied, namely, whether the verdict of the jury is perverse or unreasonable in order to entitle the Court to interfere with it has now been definitely discarded, and the test to be applied is whether the verdict is, upon the evidence, right or wrong.

4. The incident which is the subject-matter of this case arose out of what appears to be a gambling brawl. Gambling on an extensive scale more or less in an open manner seems to have been carried on in the open spaces near the Radio Park and My Lady's Garden in People's Park, Madras, in spite of the fact that there is a police station in close vicinity. It is also in evidence that some military personnel had not only been taking part in the gambling . but were supplying cards on hire or for price. The gambling in cards goes on under the trees. The gamblers assemble in separate groups which are distinguished by the amount of stakes for which they play. People who come join one group or the other according to their capacity- On

the day of occurrence, 7th November, 1945, in the morning, gambling as usual was in progress. The first accused, third accused and Natarajan were playing in one group at about 11 a.m. Nammalwar, the deceased, was also playing in that group, and it would appear that except Nammalwar all the rest were losing and the first accused among them was losing particularly heavily, while the whole time the deceased was winning. The first accused having lost his money asked the deceased for money. It is immaterial whether it was by way of loan or on any other footing. The request was refused by Nammalwar who continued to play. Thereupon the first accused and Natarajan rose and went a short distance to the place where two boys were sitting and from those boys, they brought two knives. The deceased observed them coming with knives and hastily collected all his money and ran away. A little while afterwards the first accused and Natarajan went away from the place, but the third accused continued the gambling. This marked the first episode. The deceased appears to have gone home and had a hurried meal. He returned soon afterwards to the same place at about 1-30 p.m. and joined the group in which the third accused was playing. Four persons, namely, the first accused, the second accused, one Charlie and Karuvatu Krishnan turned up at about 2 p.m. Among them the first accused and Charlie were armed with knives. In the crowd there was Perumal (P.W4) and Nondi Kuppan alias Kuppuswami (P.W 5). They had evidently come for gambling and had lost and were watching. Seeing the four persons coming P.Ws. 4 and 5 warned the deceased saying that his enemies were coming, but curiously the deceased paid no heed whatever to the warning in spite of his experience in the forenoon, but continued playing. P.Ws. 4 and 5 however could not bear the sight of these four persons coming in the direction of the group in that manner, and they left the scene. They saw nothing more. The four assailants approached the deceased and among them, Charlie alone stayed behind the deceased and stabbed him with the knife (called patta knife) on the back. This blow caused the injury which is described as the first wound in the post mortem certificate. It is, penetrating stab wound with clean cut edges on the left side of the back measuring 7/8 inch by 1/4 inch and had cut the muscles and gone through the gap between the left 6th, and 7th ribs slicing the upper margin of 7th rib and then penetrated through the left lung completely through the pericardium and ended on the left ventricle of the

heart. According to the opinion of the doctor who held the autopsy this was definitely the fatal injury.

5. At the time when Charlie attacked the deceased, none of the other assailants appear to have done anything.' The deceased after receiving this blow had sufficient presence of mind and strength to collect all his monies and things and to get up and walk a few paces and he was allowed to do so. After he had walked a few paces it is said that the first accused inflicted a cut on him with the knife on the face. The deceased moved forward unmolested about 100 to 150 paces and reached a tree which is marked in the plan. There, according to the prosecution, the third accused, who had been playing the whole time and who had to leave the place because the whole crowd dispersed after this disturbance, went and caught hold of the deceased from behind and as he did that, the first accused and Charlie cut the deceased with knives on the face and on other parts of the body and the second accused and Karuvatu Krishnan fisted him. The deceased fell down, and the assailants ran in different directions. The third accused ran in the direction of the Moore Market while the four others ran in the direction of the wicket gate leading up Sydenham's Road.

6. At that juncture Sanjimuthu who was coming in the opposite direction found the third accused running and caught him, and just at the moment, an employee in the P.W.D. office who was also passing along the road helped Sanjimuthu in apprehending the third accused. Sanjimuthu was in a position before he chased and caught the third accused to see the last phase of the attack 5 namely, the deceased being caught by the third accused and his being beaten and cut by others. After the third accused was caught, Sanjimuthu went to the place where the deceased was lying and tried to administer some tea to him which was brought from a tea-vendor, but since the fluid did not go down the throat of the deceased he sent the deceased in a rickshaw to the hospital along with Manavalan and Thanapal who were there and to whose presence we shall advert presently. They Took the deceased to the hospital but there he was pronounced to be dead and the body was taken to the police station. In the meantime Sanjimuthu and Kannan had taken the third accused to the police station and had mentioned to the police officer there all that they knew. Before the complaint Ex. P-2 was recorded,

Manavalan and Thanapal also arrived with the body of the deceased. The complaint which was given by Sanjimuthu was attested by Kannan and Thanapal, and although Manavalan was present, his signature was not taken because he was illiterate. This is, in brief, the prosecution case.

7. The main story from the commencement until the production of the third accused at the police station is spoken to by Manavalan. It receives support in certain portions from other witnesses. P.Ws. 4 and 5 speak to that part of the incident which related to the coming of the four persons, namely, the first and second accused, Charlie and Karuvatu Krishnan to the scene, the warning given to the deceased, and Perumal and Nondi kuppan (P.Ws. 4 and 5) leaving the scene immediately. Thanapal and Sanjimuthu corroborate that portion of the story which relates to what happened near the tree where the third accused went and caught hold of the deceased and the deceased was cut and beaten by the other assailants. They also speak to the running of the assailants, the apprehension of the third accused, and the other events that followed ; Kannan speaks virtually to the very last phase of the incident. He only knew about Sanjimuthu catching hold of the third accused while he was running away, and he helped him in doing so. He saw the other four assailants running away. He also speaks to what transpired later.

8. The main criticism with regard to the evidence so far as Manavalan is concerned is that it is exceedingly improbable. It is said that he is a gambler and that his version that he was there from 11 o'clock in the morning till 8 in the evening is to a degree incredible. Reference is made to the circumstance that although he is said to have been present at the time of the making of the complaint his name does not appear even as an attester in the complaint. If his evidence stood by itself wholly uncorroborated by any other testimony or circumstance there might have been some force in this contention. It was apparently a notorious place of gambling and certain sets of persons used to frequent it during their leisure hours whenever they had little spare money, partly in the hope of winning more money and partly in view of their interest in the game. It is therefore difficult to reject the evidence of Manavalan on the ground that he is a gambler or that he happened to stay so long. He was at the scene only from 11 a.m. until the actual

incident was over before 3 p.m. Afterwards he was asked by Sanjimuthu to take the deceased in a rickshaw to the hospital. He brought back the body and he was required at the police station Until the proceedings there were over and he then went home.

9. Nothing has been shown by way of animosity against any of the other witnesses namely, Perumal, Nondi Kuppan, Thanapal, Sanjimuthu and Kannan. They (sic)

10. What each person did, that is to say, what Charlie did when the deceased was -sitting and playing cards, what the first and second accused did near the tree are clearly individual acts done of their own accord rather than acts done in furtherance of a pre-arranged or pre-conceived plan or arrangement between them. In this view it follows that the liability of each accused can be in respect of his own individual act and not the joint liability contemplated in Section 34, Indian Penal Code.

11. In this view it becomes necessary to examine the evidence with regard to the acts of each of the respondents.

12. The first respondent is said to have been armed with a knife and caused the injuries on the face of Nammalwar both when he was on his way to the tree and at the tree after he was held up by the third accused. The injury on the face is , mentioned as the second wound in the post mortem certificate, and is described as ' four cut wounds with clean cut edges on the left side of face and head measuring 7 inches by 1 inch, 3-3/8 inches by 3/4 inch, o, inches by 3/8 inch and 3^ inch by inch and making cuts on the left molar bone and left side of frontal bone.' It is evident that there is no fracture involved. Further it is not possible on the evidence to attribute all these injuries to the first accused alone, because the evidence consistently of the witnesses who speak to the incident is that both Charlie and the first accused cut the deceased on his face with knives. It is not possible therefore to attribute all the four, injuries on the face to the first accused. The other injuries in the post mortem certificate are relatively minor. The doctor who was examined in the case, P.W. 18, stated that the other injuries, besides the first one, were not necessarily fatal, and with regard to the second injury he said that it could be said to be grievous. He also stated that if the first injury was not

there and the rest were present there were chances of his living.

13. The first respondent is charged under 'the first and second charges under Section 302 read with Section 34, Indian Penal Code and under Section 326, Indian Penal Code. For the reasons we have given, he must be acquitted of the charge of murder because he cannot be held responsible for the stab inflicted by Charlie. With regard to the second charge under Section 326, Indian Penal Code, it is clear from the foregoing discussion that no grievous hurt within the meaning of Section 322, Indian Penal Code, was caused by reason of the cuts that he is said to have inflicted with the knife. There was no fracture and there was no endangering of life. Life had been endangered and death had resulted wholly on account of the first injury inflicted by Charlie. In these circumstances the first accused can be held to be guilty only of an offence under Section 324, Indian Penal Code, of causing simple hurt with a deadly weapon.

14. The second accused has been charged under the first, third and fifth charge⁸ under Section 302, Indian Penal Code, under Section 326 read with Section 114⁵ Indian Penal Code and under Section 323, -Indian Penal Code. For the reasons we have mentioned with reference to the first accused, the second accused cannot also be held to be guilty under Section 302 or under Section 326 read with Section 114 Indian Penal Code. The only act attributed to him is that he fisted the deceased when he was held up by the third accused. He can be held guilty under Section 323, Indian Penal Code, under the fifth charge and he must be acquitted of the other charges.

15. The case of the third accused hinges upon the sole circumstances that he held the deceased near the tree 'when he was trying to get away and when he moved about 150 paces from the place where he was first attacked by Charlie, and this afforded the opportunity to the first accused and the second accused to again come and attack the deceased. He is charged for murder under the first charge, under Sections 326 and 114, Indian Penal Code, on the fourth charge and under Section 323 read with Section 114, Indian Penal Code, on the sixth charge. As we have indicated before the learned Sessions Judge directed the jury to return a verdict of not guilty against A-3 on the first charge, he did not grant leave to appeal

against his acquittal under Section 302 -read with Section 34, Indian Penal Code. For reasons already given the third accused cannot be held guilty under Section 326 read with Section 114,-Indian Penal Code. The only question that remains is whether he is guilty on the sixth charge of abetting the causing of simple hurt by the act of holding the deceased. There are in the evidence a host of circumstances which negative the existence of any criminal intention on his part. The third accused was interested in the gambling to such an extent that he was there throughout. Even when the first and second accused and the deceased went away before noon he continued to play. He was there until the second episode occurred. He left the place only when as a result of the disturbance the Whole crowd broke up. Then he was going away. He did not ask for money and he did not mix up with any of the other accused at any stage. He did not, even run with the other appellants but ran in a different direction. All that is said against him is that he went up to the deceased and held him up by putting his hands under the arm-pits round his body. Just when he did it, within a very short space of time, possibly in less than a minute or two, the others had come and inflicted injuries on the deceased. There is no other circumstance from which it could be inferred that this accused held the deceased in order to enable the other accused to come and attack the deceased. There was, no necessity for him to do so nor had he any interest in the matter. Presumably, he found the deceased tottering on the way as he had already received a fatal injury, and as he must have got completely exhausted on account of the distance of 100 to 150 paces he had walked and as he was not able to move on steadily the third accused wanted to enable him to stand up and walk. Taking advantage of this, however, the assailants attacked the deceased. In these circumstances we do not feel justified in holding that the or fly possible conclusion is that the third accused abetted the causing of the simple Jiurt by the other assailants by enabling the deceased to stand up and holding him up round his arms. The third accused is, in our opinion, entitled to acquittal on all the charges.

16. We would in the result allow the appeal only to the following extent. The first accused will be convicted under Section 324, Indian Penal Code and the second accused will be convicted under Section 323, Indian Penal Code and in other respects the appeal will be dismissed. The first accused is sentenced to rigorous

imprisonment for two years under Section 324, Indian Penal Code, and the second accused to rigorous imprisonment for six months under Section 323, Indian Penal Code.

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