

In Re: Athayee and ors.

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SooperKanoon Citation : sooperkanoon.com/781352

Court : Chennai

Decided On : Jul-02-1964

Reported in : 1965CriLJ566

Judge : Anantanarayanan and ;Natesan JJ.

Appellant : In Re: Athayee and ors.

Judgement :

Anantanarayanan, J.

1. These related appeals are by five accused, who were tried before the learned Sessions Judge, Salem, with regard to the alleged murder of a certain man named Oorkaran alias Subbu Goundan. Accused 1, who is a woman was convicted of this murder, and sentenced to imprisonment for life. The other accused were not charged with complicity in the murder itself. But all the five accused, including accused 1, were separately convicted of causing the disappearance of the evidence of murder, in order to screen the offender from legal punishment, in furtherance of a common intention shared by all, under Section 201 read with Section 34 I. P. C. On this conviction, each of the accused was sentenced to undergo rigorous imprisonment for two years.

2. At the outset itself, we may observe that the joint trial of these persons does appear to have worked a certain hardship, as stressed by the learned Counsel for the accused, Sri V. T, Rangaswami Aiyangar. The hardship is not a legal infirmity,

since it could be urged, with some plausibility, that the joint trial was not vitiated by any error of law; the charge under Section 201 read with Section 34, I. P. C. applies to all the accused, including accused 1. But, in fact, it has occasioned a real disadvantage or injustice, As we shall show a little later, the convictions rest, substantially, upon the evidence of the approver, P. W. 1, which is sought to be corroborated by a judicial confession of accused 2 (Ex, P. 18). and by discoveries made in consequence of information given by accused 2, proved under Section 27 of the Indian Evidence Act. But the point which the learned Sessions Judge seems to have missed is that this corroboration applies to accused 2 and that, with regard to the other accused, it is corroboration of the weakest kind, since it is really the statement of a co-accused, admissible under Section 30 of the Indian Evidence Act. Further, the learned Sessions Judge has also overlooked the vital circumstance that the evidence of the approver consists of two parts, or almost independent incidents of a narrative. The first part is the murder itself, concerning which the approver, P, W. 1, does not speak; he did not witness it, and he merely speaks to an extra-judicial confession made in his presence by accused 1. That is not corroborated as far as we are able to see, by any other piece of evidence. For instance, it is equally conceivable that accused 2, or even accused 3, or accused 4 or accused 5, might have committed the murder instead. The other part consists of the narrative about the disposal of the body, and it is this alone which may derive some corroboration from the evidence and that too only with reference to accused 2, The failure to distinguish the necessity for independent corroboration in material particulars, as far as the actual murder is concerned, apart from the need for corroboration of the other part of the narrative about the disposal of the body, has, in actuality, led the learned Sessions Judge to a very imperfect appreciation of the true issues presented by this case, That, in its turn, has arisen largely from the joint trial of these accused.

3. This apart, the vital question for our consideration can be presented within a very brief compass. It must immediately be conceded that the deceased Oorkaran alias Subbu Goundan seems to have been a very unlovely character, to say the least. He was a drunkard and profligate, and many of the witnesses deposed that they went about it in mortal fear of this man. This man was not merely keeping accused 1, after the mental illness of his first wife, but was also attempting to

tamper with the chastity of the newly married wife of accused 2, who is the son of accused 1 by her former husband. Concerning this, we have the very definite evidence of witnesses, like P. W. 7, and it is clear that the deceased was molesting accused 2's wife, and making life unpleasant for every one connected with him. Since the murder is supposed to have occurred at the field shed ' of accused 1, where the deceased was merely frequently visiting her, it cannot even be said that the circumstances relating to the murder of the deceased must necessarily have been known to accused 1, her son (accused 2) or to any of the other accused. The deceased was not a permanent resident of this shed along with accused 1 and 2, and, conceivably, he might have been murdered elsewhere. As far as motive is concerned, accused 2 has the strongest motive, and not accused 1 or the other accused. It is true that P. W. 1 deposes that, when he came to the field shed at 9 p. m. that day, he saw Subbu Goundan (deceased) lying dead on the cot M. O. 1, and that accused 1 then confessed that she had hit him with the piece of timber (M. O. 2) and caused his death. But there were no blood-stains on this weapon. This evidence of P. W. 1, concerning the confession of accused 1 to him, stands totally uncorroborated by any other testimony on the record.

4. The manner in which this murder, and the subsequent burial of the body of Subbu Goundan in a locality, in two different spots, the trunk having been buried in one part and the head in another, came to light, is again not satisfactory. It is true that the deceased was not seen alive after the alleged time of this murder, and, presumably, his younger sister and brother (P. Ws. 2 and 3) as well as his son, (P. W. 4), would have been concerned about him. But curiously enough, the first report to the authorities about the missing man (Ex. P. 5) is made by Ramaswami, P. W. 5, to the Circle Inspector of Police, P. W. 17. Again, very significantly, Ex. P. 5 is in extremely vague and general terms. It merely states that accused 1, 2 and 4 had conjointly murdered Oorkaran (deceased) and buried the body in the burial ground. There is another complaint made by the younger brother, P. W. 3, to the village munsif, P. W. 9, which is Ex. P. 4 following some alleged attempt by accused 1 and 2 to induce P. W. 4 to state before the authorities that the deceased had gone away to purchase bulls, and had not returned. But, when we look at his report, Ex. P. 4, we again see that it is merely information based upon

suspicion, and on the fact that the deceased had not been subsequently seen by any one. It is no definite report of any murder.

5. On the evidence, the questions that arise for our determination in this case may be briefly expressed in the following form. Firstly, concerning the transaction of murder itself, have we any evidence corroborating the testimony of the approver (P. W, 1) that accused 1 told him that she (accused 1), had killed the deceased with the piece of timber, M. O. 2. In the absence of blood-stains connecting this weapon with the offence, and the absence of any other corroboration, how can we believe this extra-judicial confession How can we exclude the possibility that, instead, accused 2, either by himself or in conjunction with accused 3, accused 4 or accused 5, or even any of these accused separately, may not have committed the murder That is one aspect of the problem.

6. The next aspect is even more crucial. Upon the charge of disposal of the body and causing disappearance of the evidence of the murder, the following questions arise. Firstly, can we be certain that the trunk and the head exhumed from the burial ground, relate to one single body, and that they are the remains of a man who met with his death by homicidal violence Secondly, even assuming this, can we be certain that that man was the deceased Oorkatan alias Subba Goundan Thirdly, can we accept the judicial confession of accused 2 as both voluntarily made and true Fourthly, since it has been retracted from a very early stage of the case, can we conclude that there is in the case some independent corroboration of this confession, at least, in its broad trend, if not in minute particulars Fifthly, can the confession of accused 2 be taken into account at all against any of the other accused, including accused 1 ?

7. The learned Sessions Judge has stated the law correctly, both on the need for caution in accepting the evidence of an approver like P. W. 1, as natural and true, and the equal necessity for corroboration of that evidence in material particulars, connecting the concerned accused with the crime. We do not think it is necessary to refer to the authorities here, and these principles are well known, and have been laid down in a catena of decisions extending over a long period. The learned Sessions Judge is also right in pointing out that corroboration need not be by

direct evidence; it could be of the character of circumstantial evidence, provided it is clear and strong enough. But what the learned Sessions Judge has failed to do is to keep in mind the distinction that we have pointed out earlier. Corroboration regarding the subsequent taking of the body to the burial ground, the severance of the head from the trunk and the burial of the body in the pits, is one thing; corroboration of the extra-judicial confession of accused 1, upon which alone she has been convicted on the charge of murder, is quite another. Regarding the latter category, there is no corroboration whatever. We are quite unable to see why the son, accused 2, should not have perpetrated the murderous assault, or any of the other accused besides accused 1. On this charge, accused 1 is entitled to acquittal, for utter lack of evidence corroborating the approver, P. W. 1 who himself was not an eye witness. The learned Public Prosecutor does not contend that such corroboration in material particulars on the charge of murder is forthcoming in this case. Accused 1 there-fore is clearly entitled to acquittal upon the charge of murder.

8. With regard to the charge under Section 201 read with Section 34, I. P. C., there is considerable difficulty in this case. The strongest case upon this charge is that against accused 2, and even this beset with infirmities and difficulties, as we shall presently show. There are difficulties in accepting the identification of the remains exhumed, as those of the deceased Oorkaran alias Subba Goundan. That seems to depend, mainly, on the testimony of immediate relatives like P. W. 3 and P. W. 2, with regard to an excessive growth of hair upon the thighs, and the fact that the big toes of both feet were bent. The first feature may apply to many persons and concerning the second feature, the evidence of the doctor is that not merely the big toe, but all the toes of one foot, were bent. For the moment, we shall assume that this body was that of the deceased Oorkaran alias Subba Goundan.

We have the evidence of the Forensic Expert Doctor (P. W. 16) that the head and trunk belong to one individual, a male aged between 50 and 60. This male, probably, met with his death by homicidal violence, though we cannot be quite certain about this, because of the fractures spoken to by Dr. Guruswami (P. W. 13) which might have been ante mortem in character. But assuming that this was the body of Subba Goundan, and that he met with his death by homicidal violence,

and further that the head had been severed from the trunk at the level of the third cervical vertebra, as pointed out by P. W. 13, that is not the end of the difficulties on this aspect of the case. For curiously enough, when the trunk was exhumed, almost all the internal organs of the thoracic and abdominal cavities were found missing. They were not decomposed or liquified, as we would ordinarily expect. They were altogether missing and the grave also showed signs of having been tampered with subsequently. That raises a formidable and mysterious problem, that we have been unable to solve. The learned Sessions Judge has solved it, merely by coming to the conclusion that some one else must, subsequently, have tampered with this grave and removed the internal organ from the trunk. We are bound to ask why did this happen, for what purpose and by whom was it effected? There are no answers to these questions. This feature does suggest that, conceivably, the trunk might be of some other individual altogether, who had been buried long previously. However we shall assume that this difficulty has been somehow overcome.

9. Even so, it is difficult to see how there is legal evidence on this charge against accused 1, 3, 4 and 5. In a word, that evidence consists only of the judicial confession of accused 2, admissible under Section 30 of the Indian Evidence Act, to the extent to which it implicates the other accused as well, and liable to be regarded as evidence against them. But, as recently pointed out by their Lordships of the Supreme Court in Cr. A. 208 and 209 of 1963 : (reported in : 1964 CriLJ344 Haricharan Kurmi v. State of Bihar) though such a confession, as against the other accused is evidence in the generic sense because of the provisions of Section 30 of the Indian Evidence Act, it is not evidence as defined by Section 3 of that Act. The Court cannot therefore commence with the confession of co-accused person, as evidence against any one arrayed at a trial. Needless to say, it is even less permissible to conclude that that confession is adequate evidence. The Court must commence with the other evidence adduced by the prosecution, and it is only after an opinion has been formed regarding the quality and effect of that evidence, that we can turn to the confession of a co-accused for assurance and support. The learned Public Prosecutor concedes that this is the true principle, and, in this sense, that there is no evidence upon the charge under Section 201 read with Section 34, Indian Penal Code, against accused 1, 3, 4 and 5, They are all of

them, entitled to an acquittal.

10. The separate case against accused 2 under Section 201 of the Indian Penal Code remains for consideration and it has given us some degree of anxiety, because it is prima facie a good case. There is the judicial confession of accused 2, in which he has described the disposal of the body by himself; of course, in conjunction with the co-accused and P. W. 1. He had a powerful motive to hate the deceased and naturally, he would have wished to screen the offender or offenders from legal punishment. It is difficult to see why he should admit that he severed the head from the trunk, unless he had actually helped in that act. His confession is retracted, but it might be said to be corroborated both by part of the evidence of the approver, P. W. 1, and by the conduct of accused 2 in making a statement under Section 27 of (he Indian Evidence Act and pointing out the spots of burial. But, when we scrutinise this aspect more narrowly, we see that the confession is unworthy of acceptance. We do not think that any weight can be attached to the testimony of the approver P. W. 1. It does not appear to be very natural or credible evidence, and, actually, he was more or less an accidental intruder into this transaction of offence.

Further, we are not satisfied that the confession was voluntarily, given; indeed, there are several symptoms indicating that it must have been obtained by coercion or inducement. The record shows that, at the stage of the investigation itself, and after this confession was recorded by the Magistrate, the police authorities wanted accused 2 to be taken as an approver, and that they moved in that direction. Even when accused 2 was tendered a pardon by the Magistrate on those terms, he declined to accept the tender of pardon, and retracted his earlier confessional statement as made under coercion. We are necessarily impressed by the fact that, when it could have been to the great advantage of the second accused to have escaped the risk of being tried for murder, and could have, instead, become a witness for the prosecution, he declined that offer and retracted that confession. Indeed, it is very difficult to see how the police authorities could claim, in one breath, that the confession was voluntarily made, and attempt at the same time to have the confessor taken as an approver in the case; that action of the Police authorities is sufficient to condemn the confession as most probably made under

coercion, inducement or pressure. Since his mother (accused 1) was a co-accused accused 2 could easily have been induced to speak to a confessional narrative of this kind, and it was probably the apprehension that he would figure as a witness against his mother (accused 1) that prompted him to decline the offer of pardon and to retract the confession. We are, therefore, of the view that the confession was not voluntarily made, and we can place no reliance whatever on it as a narrative of truth. Excluding the confession, as also the evidence of P. W. 1, we have merely the fact that accused 2 possessed knowledge of the spots of burial. That might be compatible with several hypothesis, and it may even be true that the police had knowledge of the facts, before the exhumation, from other sources. Therefore, we do not think that the charge has been brought home beyond reasonable doubt even against accused 2.

11. All the accused, in our view, are entitled to acquittals upon the several charges. We allow the appeals and acquit them accordingly and direct that they be set at liberty forthwith.

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