

In Re: Arusami Goundan

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Court : Chennai

Decided On : Nov-12-1958

Reported in : AIR1959Mad274; 1959CriLJ852

Judge : Rajagopalan and ;Balakrishna Ayyar, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 337(2) and 339(1);
[Indian Penal Code \(IPC\), 1860](#) - Sections 362 and 363

Appeal No. : Criminal Appeal No. 504 of 1957

Appellant : In Re: Arusami Goundan

Advocate for Def. : Public Prosecutor

Advocate for Pet/Ap. : G. Gopalaswami and ;V. Gopinathan, Advs.

Disposition : Appeal allowed

Judgement :

1. The Additional Sessions Judge, Coimbatore, has convicted the appellant under Section 363. I. P. C., read with Section 109 I. P. C., and sentenced him to undergo rigorous imprisonment for three years.

2. The case for the prosecution, so far as it is now material may be summarised extremely briefly. One Kolandaiappa Goundar of Narasapuram village had incurred the enmity of a number of his castemen in his village. So he left

Narasapuram and took up residence in the house of his sister, Devakkal, P. W. 23, in Gandhipuram. But his enemies were resolved to take his life. So they arranged that he should be persuaded to attend a late cinema show so that on his way back he could be murdered at some suitable spot. For some reason or other two such schemes miscarried.

3. Sometime in the evening of 26-8-1956, the deceased went to inspect a plot of land which he intended to purchase. One Nanjappa accompanied the deceased. Immediately before he set out in company with the deceased, Nanjappa asked P. W. 2 to go and inform the appellant that he was taking the deceased to a place that he had already shown to the Goundars. Accordingly P. W. 2 met the appellant and told him that the deceased had already been taken to the spot shown to the Goundars and asked him to inform the Goundars accordingly. The evidence in the case does not show what happened immediately thereafter.

4. About 9 a. m. on 27-8-1956, P. W. 4, the Talayari of Sanganoor village saw the headless body of a man lying on the cart truck between Sanganoor and Nallampalayam villages, He reported this to P. W. 5 the village Munsif who in his turn sent the usual reports to the Magistrate and the police. The body was subsequently identified as that of the deceased Kolandaiappan by its finger prints which tallied with those on a sale deed which the deceased had executed sometime before.

5. On 3-9-1956, P. W. 24, the Circle Inspector, Crime Branch, Coimbatore arrested P. W. 2. At 6 p. m. on 4-9-1956, the Circle Inspector arrested the appellant and questioned him. On 7-9-1956, P. W. 9, who was then the Sub Magistrate of Palladam, recorded a confessional statement, Ex. P. 2. from the appellant. Sometime thereafter a pardon was tendered to the appellant on the usual terms which he accepted. In due course a charge sheet under Sections 302, 364, 201 and 120B I. P. C., was laid against Nanjappa Mudali, Kaliappa Nadar and six others.

The learned Sessions Judge acquitted accused 6, 7 and 8 before him and convicted the remaining five. On appeal to this court these five persons were also acquitted. At the preliminary enquiry before the committing Magistrate in the case

against these eight persons the appellant was examined as a witness. He" then went back completely on the earlier confessional statement which he had made to the Sub Magistrate of Palladam, P. W. 9 vide Ex. P. 25. In view of that fact the appellant was not examined in the Session court at the trial of Nanjappa Mudali and others.

6. On 10-3-1957, the Public Prosecutor, Coimbatore. filed a certificate under Section 339 CrI. P. C. to the effect that the appellant had not complied with the conditions on which a pardon had been tendered to him. Thereupon the appellant was placed on his trial for his part in the murder of Kolandiappa Goundar. The learned Additional Sessions Judge framed two charges against him. The first was that on or about 26-8-1956, the appellant had

"abetted the commission of the offence of abducting Kolandippa Goundan by Nanjappa Mudali and Kaliappa Nadar alias Periathambi in order to murder him. which act was committed in consequence of"

his abetment -- an offence punishable under Sections 364 and 109 I. P. C. The second charge was under Section 302, I. P. C. and Section 109, I. P. C. The learned Additional Sessions Judge acquitted the appellant on the second charge and convicted and sentenced him on the first charge but under Section 363 I. P. C. as has already been mentioned.

7. Before the Additional Sessions Judge the appellant pleaded that he had complied with the conditions on which a pardon had been tendered to him. He also took the point that he had not been examined as a witness in the sessions court. The Additional Sessions Judge found that the appellant had not complied with the terms on which a pardon had been tendered to him. He also held that the omission to examine him in the Sessions Court did not bar his trial.

8. The appeal which the prisoner filed came on for hearing before Somasundaram J. Before him the point was taken that Sub-section (2) of Section 337 CrI. P. C. directs that every person who has accepted a pardon shall be examined as a witness both in the court of the committing Magistrate and at the subsequent trial, if any, and that as the appellant had not been examined at the "subsequent trial",

his conviction was bad. It was urged before him that the language of Sub-section (2) of Section 337, Cri. P. C., had been amended in 1923 and that therefore the earlier decisions under that section required re-examination. In view of the importance of the point raised Somasundaram J., has referred the entire case to a Bench. That is how the comes before us,

9. Before its amendment in 1923 Section 337(2) ran as follows:

"Every person accepting a tender under this section shall be examined as a witness in the case." The Amending Act of 1923 deleted the words "the case" occurring in the sub-section and substituted the following words:

"the court of the magistrate taking cognisance of the offence and in the subsequent trial, it any." We have now to consider whether the change thus introduced in any way alters the principles that underlay the earlier decisions given by this court on this Sub-section.

10. The earliest of these is reported in *Queen Empress v. Ramasami* ILR 24 Mad 321. The facts of that case were as follows: One Ramasami was originally charged by the police with being one of a band of dacoits who had committed a crime on 3-2-1900. On 15-2-1900 he made a confessional statement to the stationary Sub Magistrate of Trivellore.

A pardon was tendered to him which he accepted. On 7-3-1900 he was examined as P. W. 5 at the preliminary enquiry before the Magistrate. Ramasami then retracted his former statement and protested that he knew nothing of the crime. In consequence of this he was not put into the witness box in the Sessions Court. Thereafter the pardon that had been tendered to Ramaswami was revoked, and, after that Ramasami was charged with the original offence of having been one of the dacoits. The Sub Magistrate committed him to the court of session.

(II) The Sessions Judge, however, considered the commitment illegal on two grounds. One was that Ramaswami had not been examined in the court of Session. A Bench of this court held that this view was not correct. Benson J., who delivered the judgment of the court observed,

"I think the words 'in the case' are purposely used so as to include the preliminary enquiry and do not refer to the trial only.....could it be held that if the approver in these cases, when examined at the preliminary enquiry, kept back material evidence within his knowledge, the pardon could not be withdrawn, and that the witness must go scot-free though guilty of the offence of which he had been pardoned on condition of making a full disclosure? I can see no reason for such a conclusion..... Moreover, in the present case the man was sent up as a witness to the Sessions Court and was available as a witness though not, in fact, examined by either side. On the other hand in *Queen Empress v. Brij Narainman*, ILR 20 All 529, the Court clearly was of opinion that failure on the part of the approver to fulfil the conditions of the pardon when examined at the preliminary enquiry before the Magistrate was a sufficient reason for at once revoking the sanction and committing the witness to stand his trial for the offence Originally charged against him... The Sessions Judge is of opinion that the man should have been given an opportunity of earning his pardon in the sessions court, and says that, if he had. he might, in that court, have complied with the conditions on which pardon was granted. I do not think that this view is correct..... Even if he were examined in the sessions court and gave the evidence originally expected from him when pardoned, his evidence would be of little or no value in consequence of his previous contradictory evidence before the Magistrate. In fact, if the prosecution was bounded to follow the course proposed by the Sessions Judge, the provisions of the law which aim at securing convictions by the grant of pardons would become nugatory for the approver could always save him self without materially assisting the prosecution.... When a pardon has been tendered and has been accepted, the utmost good faith must be kept on both sides. Good faith is broken if the witness does not: disclose the truth to the Magistrate, and, in my opinion, the conditional pardon may be at once withdrawn as soon as good faith has been broken."

Davies, J.

concurring.

12. In *Kullan v. Emperor*, ILR 52 Mad 173 the view expressed in the earlier case was affirmed. The court observed:

"In this connection, however, we desire to express our concurrence with the remarks of Benson J. in ILR 24 Mad 321, that the transaction is one of the utmost good faith, and that the approver commits a breach of the condition if he fails to make a full and true disclosure throughout. It is not enough for him to make such disclosure before the committing magistrate if he withdraws it in the Sessions court or to make it when examined in chief if he withdraws it in cross examination."

13. In *Alagirisami Naicken v. Emperor*, ILR 33 Mad 514, the earlier views of this court were reaffirmed in these terms;

"It has nowhere been laid down that if a witness first makes a full and true disclosure he is then at liberty to contradict his statement or deny its truth without any fear of forfeiting his pardon. Such an interpretation of Section 339 would, we think, be unreasonable, and would render nugatory the provisions of the law which aim at obtaining true evidence of offences by the grant of pardons to accomplices."

14. After Section 337(2), Cri. P. C., was amended in 1923, the same question, whether the omission to examine an approver before the Sessions Judge bars his subsequent trial in those cases where he had failed to comply with the terms of the pardon came up for consideration before the Lahore High Court in *Ramnath v. Crown*, ILR 9 Lah. 608: (AIR 1928 Lah 320 (2)). The court observed;

"So far as Mr. Pun's second argument is concerned, namely, that the conditional pardon granted to the approver is a bar to the present trial as he was not examined before the Sessions Judge, I am of opinion that that argument cannot be sustained..... The amendment in the Act appears to have been introduced for the purpose of making it clear that the approver must be examined both & the court of the committing magistrate and in the subsequent trial. Whether non-compliance with this statutory provision renders trials of the persons against whom the approver's evidence is to be tendered illegal, is a question which need not be decided here as those persons have been acquitted. But when it comes to the trial of the approver himself for the offence in respect of which the pardon was

tendered, I do not think that the fact that he has not been examined at the trial of the persons he has implicated is a breach on the part of the Crown of the conditions upon which the disclosure was made and the pardon granted. The approver has failed to comply with the condition on which a tender of pardon was made as soon as it is established that his disclosure is not a true and full one, and that it is not a true and full disclosure becomes apparent as soon as he is shown to have made a statement entirely inconsistent with the one upon the strength of which the pardon was granted."

15. The decision in *Mahla v. Crown*, ILR 1L Lah 230: (AIR 1930 Lah 95), to which we were referred during the course of the arguments throws no light on the present question. What was decided there was that the omission to examine the approver at the Sessions Court vitiated the trial of the persons who were being tried before the Sessions court. The decision was:

"The fact, however, that an approver appears to the court to be an untrustworthy witness does not absolve the court from complying with the statutory provisions."

What the position is of an approver who has failed to comply with the terms on which a pardon was granted to him was not considered there.

16. The case in *Emperor v. Shahdino Dhaniparto*, AIR 1940 Sind. 114 may be regarded as lending some support to the contentions of Mr. Gopalaswami, the learned advocate for the appellant. The facts in that case were as follows. On 19-7-1936 a number of persons formed an unlawful assembly, committed house trespass and abducted a woman. On 7-8-1936 the District Magistrate tendered a pardon to one of the accused named Shahdino. On 12-9-1936 this man was examined as a witness in the court of the Committing Magistrate.

In his evidence he denied all knowledge of the offence. He was then sent back to the sub-jail in which the other accused were lodged. On 27-10-1936, Shahdino applied through his advocate asking that the magistrate should recall him and re-examine him explaining him that on 12-9-1936, he gave the evidence he did because of his fear of the other accused who were in the same sub-jail. He also prayed that he be kept in custody in some oilier place. On 23-12-1936 the

Magistrate discharged some of the accused and committed ten others to the sessions court.

Shahdino was examined as a witness in the Sessions Court and then he made a full and true disclosure of all the facts relating to the offence. The Sessions Judge, however, took the view that the evidence of Shahdino was practically worthless. Subsequently Shahdino was prosecuted for the part attributed to him in the original offence of unlawful assembly and abduction. Shahdino pleaded that the prosecution was barred under Section 339, Crl. P. C., since he had complied with the conditions upon which the pardon was tendered to him, The Additional Sessions Judge accepted the plea and acquitted him. The Government appealed. The court observed;

"But we think that when the evidence given by the approver in the Sessions Court was in accordance with the conditions of his pardon, and was evidence upon which, in the circumstances as now disclosed, reliance might very well have been placed, then the fact that in the committing magistrate's court the approver gave false evidence should not necessarily be taken to be non-compliance with the conditions of pardon."

It must be pointed out that the facts in that case were somewhat peculiar. Shahdino made a confession to the magistrate. When he was placed in the box before the committing magistrate he retracted his earlier statements. That was apparently because he had been frightened by the other accused who were detained in the same sub-jail. As soon as practicable thereafter he made a representation to that effect to the Magistrate who thereupon had him removed to another place.

In the Sessions Court he fully adhered to his original statement. Therefore, when he retracted his statement in the committing court he did so out of fear. The High court also took the view that it was in the Sessions Court that the approver had his main duty to perform and that, in the circumstances of the case, it considered that Shahdino had substantially complied with the terms of the pardon tendered to him.

That being so, it will not be right to treat this case as an authority for the proposition that an approver will have earned his pardon if he adheres to his story in the Sessions Court, and that if he is denied the opportunity of doing so by his not being examined in that court, it cannot be said that he has failed to comply with the terms on which the pardon was tendered to him we do not consider that the learned Judge in the case intended to rule that it is sufficient for an approver to adhere to his story at one stage of the proceedings.

17. Let us examine the reason of the matter. Occasionally when grave offences are committed the law finds it necessary to enlist the assistance of some of the offenders in order that the rest may be brought to justice. This happens when one of several persons who have committed a crime makes a confession which is believed to be true and which it is considered would help to secure a conviction of the rest.

The Procedure Code now insists that accomplices who have been tendered a pardon must be examined both in the committing court and in the court of Session. This provision is inserted in the interests of justice and is not intended for the benefit of the approver. Its purpose is to ensure that all the evidence obtained from the accomplice is placed before the court so that justice may be done as between the State and the persons placed in their trial. It is not an ordeal through which an approver has to pass before he can win to safety.

So far as the approver is concerned, he is given a pardon "on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof." The condition of the pardon is that he must make a full and true disclosure, and, if, he wilfully conceals anything essential or gives false evidence, he would have failed to comply with the conditions on which the pardon was granted to him.

The obligation to make a full and true disclosure would arise whenever the approver is lawfully called upon to give evidence touching the matter; it may be in the committing court, or, it may be in the sessions court. But, the obligation to make a full and true disclosure rests on the approver at every stage at which he

can be lawfully required to give evidence. If at any stage he either wilfully conceals material particulars or gives false evidence he would have failed to comply with the conditions' on which the pardon was tendered to him and thereby incurred its forfeiture.

Neither as a matter of reason or logic, nor as a matter of statutory interpretation can it be said that Section 339 (1) is dependent on or connected with Section 337(2) in the sense that the approver must be examined both in the committing court and the Sessions Court before it can be held that he has forfeited his pardon. It is sufficient if he fails to conform to the conditions on which the pardon has been granted to him at either stage. As explained in the earliest of the cases we have referred to where a pardon has been tendered and accepted, the utmost good faith must be kept on both sides.

18. The amendment made in the section in 1923 does not affect the correctness of the reasoning of the earlier decisions of this court. In our opinion they still continue to be good law.

19. The preliminary objections being out of the way, it is now possible to go into the merits of the case. We have already stated that the learned Additional Sessions 'Judge has acquitted the appellant on the charge of abetment of murder under Sections 302 and 109 I. P. C. It is therefore sufficient to examine the evidence bearing on the first charge, viz., the abetment of the offence of abduction in order to murder. We would recall that the abetment is supposed to have taken place in the afternoon or evening of 26-8-1956.

To show that the appellant abetted this abduction there is practically no evidence. P. W. 2 does not say that the appellant induced the deceased person to go anywhere or to do anything. According to P. W. 2 all that the appellant did at that stage was to take a message from P. W. 2 to the Gounders to the effect that the deceased was at the spot that had been agreed on. To take a message from one confederate to another may amount to conspiracy. It may also amount to abetment of murder. But, how it can amount to abetment of the offence of abduction it is hard to see.

So far as the confession which the appellant himself made, there is nothing in it to show that he abetted the offence of abduction of Kolandaiappa Goundar. All that he confessed to having done at that stage of the case was to have taken the message from P. W. 2 to the Gounders. The evidence of P. W. 16 only shows that on 26-8-1956 the appellant visited his tea shop once in the morning and again in the afternoon, and, spent some considerable time there. In the afternoon when the appellant was waiting in the tea shop P. W. 2 met him there. Thereafter the appellant went away.

20. P. W. 23 a son of the deceased merely stated that he saw the appellant sitting in the tea shop of P. W. 16 about the time his father went away in the company of Nanjappa Mudali and another person. Some time later he noticed the appellant was talking to P. W. 2. Thereafter the appellant went away in a bus. That is all the evidence we have been shown relating to the abduction.

21. The learned Additional Sessions Judge recorded his conclusion on the evidence as follows: "Therefore if that version is accepted, the confessional statement only goes to show that the accused abetted the decoying of the deceased in the evening of Sunday but there is nothing in Ex. P-2 to show that he abetted the decoying with the intention of causing the murder of the deceased. Thus on a careful and anxious consideration of the whole evidence and the confessional statement of the accused, I come to the conclusion that the accused abetted the decoying of the deceased at about 4 p.m. on Sunday the day of occurrence and that there is practically no evidence to show that it was with the intention of murdering the deceased that the accused so abetted the decoying."

It was in this view that he convicted the appellant under Sections 363 and 109 I. P. C. Now, S. 363 can have no application whatever to a case of this kind. That section deals with kidnapping any person from India or from lawful guardianship. Kolandaiappa Gounder the deceased, was certainly not a minor to be kidnapped from lawful guardianship; nor was it anybody's case that he was kidnapped from India. Apart from the elements of force or fraud that may be involved in abduction and which elements may attract punishment under other sections of the Code abduction per se of an adult person is not punishable under the Code.

Section 364, I. P. C., deals with cases of kidnapping or abduction in order that the person may be murdered or may be so disposed of as to be put in danger of being murdered. Section 365, I. P.C.deals with kidnapping or abduction with intent to cause that person to be secretly and wrongfully continued. Section 366, I. P. C., deals with the kidnapping or abduction of a woman, in order that one or other of the various offences enumerated in that section may be committed against her. Section 367 deals with the kidnapping or abduction of a person that he may be subjected to grievous hurt, slavery, etc. Section 369, I. P. C. deals with the kidnapping or abduction of children under ten years of age.

22. The position, therefore, conies to this:

the evidence does not support the findings of the learned Additional Sessions Judge; and his findings cannot support the conviction.

23. In the result, the appeal is allowed and the appellant is acquitted and ordered to be set at liberty forthwith unless he be otherwise law fully detained.

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