In Re: Pakira Pujari

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SooperKanoon Citation : sooperkanoon.com/791489

Court : Chennai

Decided On : Apr-29-1943

Reported in : AIR1944Mad78; (1943)2MLJ524

Appellant : In Re: Pakira Pujari

Judgement :

Happell, J.

1. The appellant has been convicted by the learned Sessions Judge of South Kanara for the murder of a certain Poovu Hengsu on the 17th of July last, and has been sentenced to death.

2. Poovu Hengsu was the elder sister of the accused's mother, and so his aunt. She was undoubtedly murdered in the middle of the day on the verandah of her house. The medical evidence is that she had been strangled to death and had received other injuries--a contusion on the left side of the chin and a contusion covering the whole of the left cheek, under which the left superior maxilla and the lower jaw were fractured. Poovu Hengsu had been in the habit of going to Bombay to visit relatives and five or six years ago she had gone there for two years, leaving the accused's mother in charge of her house in Haleyangadi. During her absence the accused's mother failed to pay the rent to the landlord, and on her return she removed the accused and his mother from the house. After this episode they were on bad terms, and on the occasion of a marriage in Poovu Hengsu's house a few

months before her death the accused and his mother were not invited. There is no reason to distrust the evidence on these points, but it cannot be regarded as evidence which proves as motive. If however, it was the accused who killed Poovu Hengsu, his attack on her is not entirely unexplained.

3. The evidence from which the learned Sessions Judge has drawn the inference that it was the accused who murdered the deceased woman is that of three witnesses who gave evidence as P. Ws. 2, 3 and 4. P.W. 2 is a fisherwoman by caste and calling and she lives in a house about forty yards from the house in which the deceased was residing. Her evidence is that sometime before noon on the 17th of July Poovu Hengsu had come to her house to get some feeding stuff for her buffalo. Soon afterwards, a little after noon, the witness herself set out to go to a tank beyond Poovu's house by way of Poovu's yard. Before she got to the yard she heard what she calls ' a sound of beating from her chavadi,' and through the open door in the fence she saw 'someone like a man' and cried out ' thief, thief.' Her cries brought P.W. 3 and his sister, Dugge, and the witness, P.W. 4 to the spot. The houses of P. Ws. 3 and 4 are respectively about forty and seventy yards distance from the house of the deceased. P.W. 3 and his sister first reached P.W. 2, and all three then went up to the railings of the deceased's chavadi, and looked in. They saw Poovu Hengsu lying motionless on the ground and the accused standing beside her. P.W. 4 came up a little later and saw what the other witnesses had seen. None of the witnesses spoke to the accused. P.W. 2 withdrew to her house and P.W. 4 and Dugge to P.W. 3's house. P.W. 3 went for the Village Munsiff who lived not far away but found that he was out. He returned and immediately after his return all the witnesses saw the accused leave the deceased's chavadi. P.W. 3 ultimately found the Village Munsiff at the Panchayat Court at 3 p. M. and made the statement--Ex. C--to him. The Police arrived that evening and the accused was arrested on the 19th of July. When arrested he was wearing a shirt which was proved to be stained with human blood.

4. P.W. 3's statement to the Village Munsiff is less detailed than the evidence. He stated merely that hearing cries of 'thief, thief' he ran up and that 'just then Pakira (the accused). ,. came out from inside the house of the said Poovu Hengsu and went away. The said Poovu Hengsu is fallen on the ground.' The witnesses,

however, are disinterested witnesses, and they gave their stories to the police early the next day. There is no reason to doubt that they did see the accused standing by the body of the deceased. The learned Sessions Judge was of opinion that the only inference which could be drawn from the evidence of P. Ws. 2 to 4 was that the accused was responsible for her death. He has not, it should be mentioned, taken into account the evidence of P. W,3' s sister, Dugge, given at the preliminary enquiry and received as evidence in the Sessions Court under Section 33 of the Evidence Act. Her evidence does not differ in any material particulars from that of P. Ws. 2 to 4. Earned Counsel for the accused has raised a question of law which will be considered in a moment. As far as the facts are concerned, the sole question is whether the only reasonable inference that can be drawn from the circumstances established by the evidence is that the accused was responsible for the death of Poovu Hengsu. In considering this question it is important to note that P.W. 2, ' heard a sound of beating,' that she and the Sub-Inspector of Police are clear that no one could hide in the chavadi or get out of it and the yard without being seen, and that the accused made no report of the death of his aunt and has never given any explanation of his presence beside the body immediately after P.W. 2 had heard the sound of beating. In his statements both at the preliminary enquiry and at the trial he said that he knew nothing and denied that he was present. The evidence that he was seen standing by the body is plainly true, and we must agree with the learned Sessions Judge that the only inference which can be drawn is that the accused was responsible for the death of Poovu Hengsu.

5. It is argued by earned Counsel for the accused that the proceedings are vitiated by reason of the fact that the learned Sessions Judge refused an adjournment, in spite of an intimation by the accused that he intended to apply to the High Court for a transfer of the case, in contravention of the mandatory provisions of Section 526, clause 8, Criminal Procedure Code. The Public Prosecutor in his opening address intimated that he proposed to ask the Court to admit the evidence given at the preliminary enquiry of P.W. 3--a woman named Dugge, the sister of a witness--under Section 33 of the Evidence Act on the ground that she was in an advanced stage of pregnancy. Counsel for the accused objected to the proposal and when the Court overruled the objection and directed that the evidence should

be received under Section 33 intimated that he intended to apply to the High Court for a transfer of the case and asked for an adjournment. The learned Sessions Judge refused to adjourn the trial under clause 9 of Section 526, Criminal Procedure Code,on the ground that the accused had already had a reasonable opportunity of making the application and had failed without sufficient cause to take advantage of it. The order of the Sessions Judge was clearly wrong and appears to have been made under a misapprehension of the ground on which it was sought to make the application. It was the admission of the evidence of Dugge under Section 33 of the Evidence Act that gave rise to the intimation of the intention to make an application for transfer, and the intimation was given as soon as the objection to the reception of the evidence was overruled. The question whether a person notifying his intention of making an application under Section 526 had had a reasonable opportunity of making such an application must have reference to the ground on which it is sought to make the application, and in the present case, the accused could not have made an earlier application for a transfer on the ground that the. evidence should not have been admitted under Section 33 of the Evidence Act.

6. If the accused had suffered any prejudice by reason of the admission of the evidence under Section 33 of the Evidence Act or if there was any reasonable possibility that he might have suffered prejudice we should feel no difficulty regarding the course which must be pursued. The conviction would have to be set aside and a retrial ordered. We have, however, no doubt that the accused suffered no prejudice and that the Sessions Judge, in the circumstances, properly admitted the evidence under Section 33 of the Evidence Act. Dugge was one of four witnesses who ran up and saw the accused standing by the body of his aunt. She was fully cross-examined at the preliminary enquiry and is the sister of P.W. 3. Neither P.W. 3 nor P. Ws. 2 and 4 were shaken in cross-examination at the trial, nor did their evidence at the trial differ from their evidence at the preliminary enquiry. There is no reason, therefore, to believe that the examination of Dugge in person in the Sessions Court would have been of any advantage to the accused. Moreover, the learned Sessions Judge did not rely on her evidence for the conviction of the accused, and it has not been suggested in the appeal petition or in argument that the accused was prejudiced by the fact that the witness was not

again examined. The contention is simply that the trial is vitiated by the failure of the Sessions Judge to comply with a mandatory provision of law. The fact that the Sessions Judge treated the evidence as relevant under Section 33 of the Evidence Act has not therefore occasioned a failure of justice; and the question we have to determine accordingly, is whether the refusal of the Judge to grant an adjournment is something more than a mere irregularity so that it cannot be cured by the provisions of Section 537, Criminal Procedure Code.

7. Earned Counsel for accused argues that the question whether a refusal to adjourn a case in contravention of the provisions of sub-section 8 of Section 526, Criminal Procedure Code, is an irregularity which can be cured by applying the provisions of Section 537 is concluded by the decision of a Bench of this Court in Nathan, In re : (1929)57MLJ763 . The petitioners in that case had been convicted by a Bench of Magistrates and it was argued that the conviction was bad, first because the judgment had not been signed by all the Magistrates, and secondly, because an adjournment had not been granted when application was made for one in order to enable the petitioners to apply for a transfer of the case to this Court. Waller and Cornish, JJ., who decided the case held that the omission on the part of some of the Magistrates, to sign the judgment was only an irregularity curable under Section 537 of the Code, but that sub-section 8 of Section 526 was absolutely imperative in its terms and to deny the applicant an absolute right conferred on him by the statute vitiated the whole proceedings. The conviction was, therefore, set aside. We see no reason to doubt the correctness of this decision, but the case before us is clearly distinguishable. In Nathan, In re : (1929)57MLJ763 , it was a Bench of Magistrates that refused to grant an adjournment, and under the provisions of Section 526 a Magistrate on intimation being given of an intention to apply for a transfer, if it is the first intimation and is made in a case to which the section applies, must grant an adjournment. He has no discretion in the matter; no jurisdiction to refuse an adjournment. The intimation operates, as it were, as a statutory stay. A Judge, presiding in a Court of Session, however, has been in a different position from a Magistrate with reference to the provisions of Section 526, Criminal Procedure Code, ever since sub-section 9 of Section 526 was enacted by the Criminal Procedure Code (Amendment) Act of 1923. Sub-section 9 provides that:

Notwithstanding anything hereinbefore contained, a Judge presiding in a Court of Session shall not be required to adjourn a trial under sub-section 8 if he is of opinion that the person notifying his intention of making an application under this section has had a reasonable opportunity of making such an application and has failed without sufficient cause to take advantage of it.

8. A Judge presiding in a Court of Session, therefore, has a discretion in the matter. He is empowered to refuse an adjournment, if, in his opinion, the application could and should have been made at an earlier stage. That being so, it is manifestly impossible to contend that by forming a wrong opinion he has infringed a mandatory provision of the Code and committed an error which cannot be cured by the provisions of Section 537. The only question can be whether the wrong opinion and the consequent refusal to grant an adjournment has occasioned a failure of justice. We have already given our reasons for holding that no failure of justice has been occasioned. The contention of earned Counsel for the accused that the trial is vitiated by the error of the learned Sessions Judge cannot, therefore, be accepted.

9. We must, therefore, sustain the conviction of the accused for murder, by the learned Sessions Judge. The accused is a youth of 18. But he has given no explanation of the offence, a most brutal murder, and we see no justification for interfering with the sentence, which the Sessions Judge has thought it his duty to impose.

10. The conviction of the accused for murder, and the sentence of death passed on him, are confirmed. His appeal is dismissed.