

The Public Prosecutor Vs. Chitikina Subbanna and ors.

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Court : Chennai

Decided On : Mar-01-1946

Reported in : AIR1947Mad239; (1946)1MLJ444

Appellant : The Public Prosecutor

Respondent : Chitikina Subbanna and ors.

Judgement :

Sahahab-ud-din, J.

1. The respondents who were accused 1, 3 and 4 in Sessions case No. 9 of 1945 in the Court of Session, West Godavari, were tried with the second accused on a charge under Section 302, Indian Penal Code read with Section 34, Indian Penal Code in respect of the murder of one Arupalli Nara-simhulu. The learned Sessions Judge convicted the second accused of murder and sentenced him to death; and that conviction and sentence were confirmed and his appeal was dismissed by this Court (Referred Trial No. 156 and Cr. App. No. 552 of 1945). The learned Judge held that the respondents were not guilty of murder. He convicted the first accused of causing grievous hurt and sentenced him to five yars' rigorous imprisonment and the other two accused of ' wrongful confinement'; sentence being one year's rigorous imprisonment each. They have not appealed but the Public Prosecutor, Madras, has filed this appeal against their acquittal on the charge of murder.

2. The case for the prosecution was that early in the morning of the 26th December, 1944 while the deceased was taking fodder for his cattle to his field, accused 3 and 4 caught hold of him and accused 2 aimed a blow with a tree-tapper's knife at his throat. The deceased put up his left arm to ward off the blow and received on it three cuts. Accused 1 who also had a tapper's knife cut him on the left arm. The deceased raised an alarm as soon as he was attacked and P.W. 2, his-brother, who was coming behind him as well as P.W. 3 of the neighbouring field who had joined P.W. 2 on the way came running and tried to intervene, but ran away as the first and second accused threatened to cut them. P.Ws. 4 and 5, who were-in the neighbouring fields, also came running and meeting P.W. 2 on the way learnt from him that the four accused were cutting the deceased. When they arrived on the scene, they saw the accused running away. They then chased the accused for some distance and then returned to the deceased. P.Ws. 6, 7, 9 and 10 also came to the scene of occurrence and to them the deceased Narasimhulu stated that the accused had cut him. The deceased was then taken to the hospital at Achanta, three miles from the scene, which he reached at 9 A.M. There were three injuries on the left arm and one on the right. All of them were incised wounds and ' one of the injuries on the left arm had cut the brachial artery and vein. Apprehending that this injury might prove fatal, P.W. 1, the doctor, sent for P.W. 12, the village headman, who had the dying declaration Ex. C recorded in his presence by the karnam P.W. 13. In that statement which is attested by the doctor, Narasimhulu implicated the four accused and described the parts played by them in the attack. He said that the third accused caught hold of him, that the second accused came with a tapper's knife, that then the fourth accused also came and caught hold of him, that on the second accused attempting to cut his throat with the knife he raised his hands to ward off the blow and received the cuts on his left hand. Then the first accused came and cut him on his right hand and on his raising an alarm P.W. 3 and others came and the accused ran away. Narasimhulu died the same day at 6-30 P.M. As already stated one of the injuries on the left arm had cut the brachial artery and vein. The injury inflicted by the first accused on the right arm had resulted in the fracture of the external condyle of the humerus. The postmortem examination disclosed that death was due to shock and haemorrhage resulting from the injuries.

3. An hour prior to the occurrence, P.W. 6, while going to his field that morning saw the four accused together at about 50 yards from the spot where the deceased was attacked; and an hour later he heard the deceased's cry. The accused were not available to the police that day but were arrested in their houses the next day. At about 10 a.m. on the day of occurrence accused 1 and 2 came to P.W. 14 the monigar of Achanta (it appears that there are three village officers besides the karnam for this village) and presented a complaint Ex. K, alleging that that morning while the four accused were in the tope of the first accused (the first accused is a renter of a toddy shop) the deceased, P.W. 2 and the others named in that complaint came in a body, that the deceased cui the second accused between the left thumb and forefinger and that P.W. 2 hit the fourth accused with a stick on his back and the third accused on his leg. The others who had come with the deceased and 9.W. 2 attempted to attack the accused with knives and sticks and so the accused ran away. There was a minor injury between the left thumb and forefinger of the second accused, which P.W. 14 noticed. P.W. 17, the investigating officer, also saw it, but it does not appear that the second accused was sent to the doctor. The injury was a trivial one. There were no injuries on the other accused.

4. The rest of the evidence relates to the motive for the offence. There was enmity between the first accused on the one hand and the deceased and his brothers on the other due to rivalry in bidding at the toddy sales of 1944. Owing to the competition by the deceased, the first accused had to take the lease of the shops for a far higher amount than usual. P.W. 15, the President of the Panchayat Board of Achanta, deposed that there were criminal cases in his court between the deceased and some others on the one hand and the first accused on the other. It is alleged in Ex. K that the deceased, P.W. 2 and others were breaking the pots tied to the trees of the first accused. The third and fourth accused are brothers. The first accused is the son of the third accused and the second accused in the son of the fourth accused.

5. All the accused denied the charge. The first accused stated that he had the lease of the toddy shop against the wishes of the kamrnas of the village and did not give the usual contribution to the temple. The kammass, therefore, falsely

implicated him. He denied having presented Ex. K to P.W. 14. The other accused stated that they had been falsely implicated by the kammass.

6. On this evidence, the Public Prosecutor of West Godavari conceded that in view of the decision of their Lordships of the Privy Council in *Mahbub Shah 'v. The King Emperor*¹, he could not contend that the common intention necessary for the application of Section 34, Indian Penal Code could be inferred. The learned Sessions Judge who believed the evidence referred to above, agreeing with the Public Prosecutor, took the view that the respondents could be held responsible only for their individual acts and convicted and sentenced them as stated already. He observed,

There is no proof in this case that the criminal act was done in concert by all the accused pursuant to any pre-arranged plan. It follows therefore that each of the accused can be responsible-only for the offence committed by him.

The learned Public Prosecutor, Madras, contends that it is a necessary inference from the facts proved in this case that all the accused acted in concert in pursuance of a pre-arranged plan to kill the deceased and that the fact that the Public Prosecutor in the trial Court made a concession on this point wrongly cannot stand in the way of our considering the question in this appeal. The learned Counsel for the respondents relying on the judgment of Reilly, J. in *The Public Prosecutor v. Allada Satjam* (1931) M.W.N. 873, argues that in view of the concession made in the trial court, this Court should not interfere even if it considers that the concession was wrongly made. He contends that the concession made by the Public Prosecutor in the lower Court was not wrong, that even if the evidence for the prosecution is accepted as true, it cannot be said that the first accused, though armed with a tapper's knife, had the intention to kill and that in any event such an intention cannot be imputed to the third and fourth accused. Finally, referring to the evidence of P.W. 13 that the Kammass were on bad terms with the first accused, he argues that it is not safe to rely on the evidence adduced by the prosecution as all the occurrence witnesses except P.W. 2 are kammass. With regard to P.W. 2, the argument is that he should not be believed as his name does not find a place in the dying declaration. It is said that

Ex. K relates to a different incident and not to the incident in which the deceased was injured.

7. Having been through the entire evidence and having considered the above-mentioned decisions, we are of opinion that the contention of the learned Public Prosecutor is well founded and this appeal must be allowed. In *The Public Prosecutor v. Allada Satyam* (1945) 2 M.L.J. 144 : L.R. 72 IndAp 148 the accused was charged before the Sessions Judge with murder or culpable homicide. The Public Prosecutor when summing up the case stated that the offence would not come within the scope of murder and this view was accepted by the learned Judge who convicted the accused under Section 304, Indian Penal Code. On appeal against the acquittal on the charge of murder, there was a difference of opinion between the learned Judges. Waller, J. taking the view that the offence committed was murder and the appeal should be allowed and Pandalai, J. being of the opinion that the Sessions Judge's conclusion was supportable though not on the grounds stated by him. The case came before Reilly, J. who while agreeing with Waller, J. that the facts proved by the prosecution established a case of murder declined to allow the appeal because of the concession made by the Public Prosecutor in the trial Court. He observed that if a Public Prosecutor in a mofussal Sessions Court could withdraw from the prosecution on a serious charge and ask only for a conviction on a minor charge and then another officer representing the Crown could come to this Court and ask for a conviction on the serious charge it would be grossly unfair to the accused as at the end of the trial, his counsel had only to reply to the argument of the Public Prosecutor and at that stage had not to meet the serious charge. If this observation is accepted as correct we should not interfere in this case, but with respect, we are unable to agree with the learned Judge. The concession made in the arguments by the Public Prosecutor in that case, it appears to us, did not amount to his having withdrawn from the prosecution on the charge of murder. Nor do we see any prejudice caused to the accused in that case. It is no doubt true that his advocate did not have the opportunity of arguing that the offence made out was only culpable homicide not amounting to murder; but that was hardly necessary as the trial Judge himself was of that opinion and when the appeal against the acquittal was heard, the accused's advocate, had the opportunity to argue that point. It would have been a different

matter if the concession had been made at the commencement of the trial or before the evidence was adduced by the accused. A concession wrongly made on behalf of the accused cannot stand in the way of the appellate Court setting aside a conviction based on such a concession; similarly a concession wrongly made by the Public Prosecutor should not, in our opinion, stand in the way of an appeal against an acquittal based on that concession being allowed. It has been observed by their Lordships of the Privy Council in *Sheo Swamp v. King Emperor* that there is no distinction as regards the powers of the High Court in dealing with an appeal between an appeal from an order of acquittal and an appeal from a conviction.

8. As regards the question of common intention both the Public Prosecutor and the learned Sessions Judge of West Godavari have failed to notice that the facts in *Mahbub Shah v. The King Emperor* (1945) 2 M.L.J. 144 : 1945 L.R. 72 IndAp 148 were entirely different from those of the present case. There, two of the complainant's party were shot at by two of the accused who came on the scene armed with guns to rescue the third accused. One of the men shot at fell down dead while the other was injured. All the three were charged with the offence of murder but only two were tried, as the person who actually fired the shot that killed the deceased was absconding. The High Court of Lahore acquitted the accused for whose rescue the other two accused who fired the shots came on the scene, but confirmed the conviction of the accused who did not fire at the deceased. Their Lordships of the Privy Council set aside that conviction observing that common intention within the meaning of Section 34, Indian Penal Code implied a pre-arranged plan and that to convict the accused before them it should be found that he fired pursuant to the pre-arranged plan to kill, the deceased. Their Lordships further observed that in most cases the pre-arranged plan has to be inferred from the act or conduct of the accused or other relevant circumstances of the case. In the circumstances of that case, their Lordships were of the opinion that the evidence fell short of showing that the appellant and the absconding accused entered into a pre-concerted plan for bringing about the murder of the deceased. In their Lordships' opinion, the only inference justified by the circumstances of that case was that the appellant and the absconding accused shared the intention to rescue the other accused. But in the case before us we feel no difficulty in inferring from the evidence that the accused entered into a pre-arranged plan to kill the

deceased. The mode of attack itself indicates that the four accused were animated with the intention of killing the deceased. The first and second accused were armed with tapper's knives and the second accused aimed first at the throat of the deceased. The third and fourth accused continued to hold the deceased while the first and second accused cut him and this attack continued even after P. Ws. 2 and 3 attempted to intervene. Then there is the evidence of P.W. 6 that the four accused were lying in wait prior to the occurrence. It does not appear that the learned Judge considered this evidence. We therefore consider that if the evidence for the prosecution can be accepted, it clearly follows that all the accused acted with the common intention to kill the deceased. The fact that the third and fourth accused were not armed does not make any difference;

9. It now remains to consider the contention that the evidence should not have been believed. It is no doubt true that P.W. 13 has in cross-examination admitted, that the kammias of the village were not well-disposed towards the first accused; but nothing has been alleged against the witnesses to show that they had any particular reason to be ill-disposed towards the accused personally and to falsely implicate them. It has not been established that any one of the occurrence witnesses was concerned in the bidding at the toddy sales. Day had already dawned by the time the occurrence took place and the deceased and P.Ws. 2, 3, 4 and 5 could certainly have recognised the assailants. It appears to us extremely unlikely that the deceased after having been savagely attacked would have ignored his real assailants and decided, when he must have known that his end was near, to implicate the accused falsely. The fact that the name of P.W. 2 does not find a place in the dying declaration, far from being a point against the prosecution, appears to be one in its favour. It indicates that the deceased stated in that statement all that he could remember at the time. When he was attacked, he might not have noticed P.W. 2, though he had come on the scene. The version of the accused in Ex. K renders the story of the prosecution probable. We are unable to find any support for the contention of the learned Counsel for the respondents that Ex. K relates to a different occurrence. The fact that no complaint was made to the village munsiff in respect of the occurrence in question is hardly of any significance.

10. The occurrence took place in the fields and the hospital is in Achanta where the Village Munsiff lives. Taking the deceased to the hospital direct, was, in the circumstances of the case, a natural course to follow. Considering the distance of three miles and the time the witnesses must have taken to make arrangements to carry the deceased to the hospital, it cannot be said that there was any avoidable delay.

11. We consider that the evidence for the prosecution was rightly believed by the learned Judge and that having regard to our observations on the question of common intention, the respondents are guilty of the offence of murder. We therefore set aside their convictions and convict them instead, of the offence of murder.

12. As for the sentence we should have in the ordinary course imposed on the respondents the extreme penalty of the law, but having regard to the fact that the charge of murder was hanging over their heads for nearly a year and they have been once acquitted, we consider that the lesser sentence would meet the ends of justice. We therefore substitute for the present sentences, the sentence of transportation for life in the case of each of the respondents.

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