

In Re: Muddamsetti Subba Rao and anr.

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Court : Chennai

Decided On : Dec-03-1940

Reported in : AIR1941Mad489; (1941)1MLJ236

Appellant : In Re: Muddamsetti Subba Rao and anr.

Judgement :

Burn, J.

1. These eight appellants were tried jointly by the learned Sessions Judge of Kistna on charges arising out of offences committed at about 9 p.m. on the 19th of February last in Masulipatam town at a place called Javarpet Junction. There was a disturbance at that place and time in the course of which one N. Venkataswami was fatally wounded, another man named Viraswami (P.W. 7) was very seriously injured, a police-constable named Antony (P.W. 4) was slightly injured and one Chandramouli (P.W. 8) was severely wounded in the foot. The first three accused were alleged to have been armed with spears and the other five with sticks. On these facts the learned Sessions Judge framed charges against all the accused under Section 148 read with Section 149 of the Indian Penal Code; he separately charged the second and the third accused with the murder of Venkataswarni. The first accused was separately charged with voluntarily causing grievous hurt with a deadly weapon to Viraswami, and the third accused was charged with voluntarily causing hurt to deter a public servant from his duty--Section 332. Indian Penal Code. Accused 5, 6, 7 and 8 were charged with causing simple hurt to

Chandramouli (P. W. 8) and accused 2 and 3 were charged with causing simple hurt with a dangerous weapon to Viraswami (P.W. 7). The learned Sessions Judge, disagreeing with the assessors (who perversely said that none of the accused was guilty of anything), held that all the accused were guilty of all the offences with which they had been charged. He sentenced the second and the third accused to death for the murder of Venkataswami, the first accused to five years' rigorous imprisonment for the offence under Section 326, all the accused to two years' rigorous imprisonment for rioting armed with deadly weapons, the third accused to two years' rigorous imprisonment for an offence under Section 332, the second and the third accused to two years' rigorous imprisonment for an offence under Section 324 and accused 5, 6, 7 and 8 to rigorous imprisonment for six months for the offence of simple hurt. . Hence these appeals. Mr. Jayarama Aiyar who has appeared for the appellants has conceded that there is no possibility of doubting the occurrence or the commission of the various offences with which the accused were charged. Accused 1, 3, 4 and 8 admitted their presence at the scene of offence and at the time stated by the prosecution witnesses. Accused 2 and 7 pleaded alibi, and accused 5 and 6 merely denied that they knew anything about the occurrence, and said they had been impleaded on account of enmity. Accused 2 and 7 adduced evidence in support of their pleas of alibi. The seventh accused examined three witnesses, D.Ws. 3, 4 and 7, to prove that he was at Godugupet, another part of Masulipatam. The learned Counsel for the appellants has stated frankly that he is not able to ask us to rely upon the evidence given by these three defence witnesses. The second accused examined D.Ws. 5 and 6, and the evidence of these two witnesses is on the face of it rather more respectable than that given by D.Ws. 3, 4 and 7. But the great defect in this plea of alibi put up by the second accused is that when he was examined in the Sub-Magistrate's Court he did not mention it. The second accused was arrested very soon after the occurrence and there was no suggestion put to the police that, as soon as he was arrested, he expressed any astonishment or alleged himself to have been elsewhere. We think it is inconceivable that, if this plea had been a true plea, he could have failed to mention it when questioned by the Magistrate.

2. It is not possible to doubt the truth of the story told by the prosecution witnesses in its main lines; nor is it possible to doubt the presence and the participation in the

rioting of all these accused persons. Mr. Jayarama Iyer's arguments have been chiefly directed towards showing that it would be unsafe to convict the second and the third accused for the murder of Venkataswami. He has examined the evidence given by all the witnesses of the occurrence with great care and has attempted to persuade us that, although in the main they are witnesses of truth, yet in the circumstances they could not have been expected to observe with accuracy which of the rioters inflicted the fatal blow on Venkataswami. This is practically the only point seriously urged in these appeals.

[After discussing the evidence and concluding that the second and third accused were proved to be guilty of murder and confirming the death sentence for murder, their Lordships proceeded]:

3. The learned Sessions Judge has not explained why he framed a charge under Sections 148 and 149 against all these eight accused; nor has he explained in his judgment, why he thinks Section 149 has any application. The evidence is clear that the first three accused were armed with spears and the other five with sticks. There is no evidence of any witness to show that the sticks in this case were dangerous weapons. The charge framed should therefore have been under Section 147 against accused 4, 5, 6, 7 and 8 and under Section 148 against accused 1, 2 and 3 only, and the accused should have been convicted accordingly. It is just possible that the learned Sessions Judge was guided by the decision in the case of Subbigadu reported at p. 559 of Vol. 50 of the Madras Law Journal. It is there stated that if some members of an unlawful assembly are armed with deadly weapons in prosecution of the common object of the unlawful assembly and if rioting is committed, the other members of the unlawful assembly who are not armed with deadly* weapons may be convicted under Section 148 read with Section 149. With respect, we think that this decision is of doubtful authority. Section 148 appears to differ from Section 147 precisely in the same way that Section 144 differs from Section 143. Under Section 143 any member of an unlawful assembly is liable to punishment up to six months. Under Section 144 'whoever being armed with a deadly weapon is a member of an unlawful assembly is liable to imprisonment for two years'. In exactly the same way, under Section 147, whoever is guilty of rioting is liable to imprisonment up to two years; and

under Section 148 whoever being armed with a deadly weapon is guilty of rioting is liable to imprisonment for three years. The same distinction appears in the sections of the Indian Penal Code dealing with robbery. Section 392 provides a punishment for robbery and Section 397 provides an enhanced punishment, in the shape of a minimum sentence, for any robber who at the time of committing robbery or dacoity uses a deadly weapon, and similarly Section 398 provides some punishment for the robber or dacoit who is armed with a deadly weapon. We think that it is clear, as held by the Calcutta High Court in the case *Sabir v. Queen Empress* I.L.R.(1894) Cal. 276, that it is only the robbers who are actually armed with deadly weapons who can be charged and convicted under Section 348. In the case of the robbery sections there is ample authority for the view that we are taking--*Emperor v. Nageswar* I.L.R.(1906) All. 404, *Emperor v. Dulli* I.L.R.(1924) All. 59, *Emperor v. Ali Mirza* I.L.R.(1923)Cal. 263, and in our own Court *Arunachala Thevan v. Emperor* (1911) 22 M.L.J. 186. We think with respect that in *Subbigadu's* case it is incorrect to say that Section 148 describes a separate offence. The only offence that Section 148 describes or refers to is the offence of rioting and provision is made for enhanced punishment if the rioter at the time of rioting is armed with a deadly weapon. Section 149, we think, is intended to lay upon all the members of an unlawful assembly responsibility for any offences, other than the offence of rioting, committed by any member of the unlawful assembly in prosecution of the common object. Section 149 can hardly have been intended to make rioters constructively guilty of the offence of rioting. If the matter had been of any importance in this case we should have felt it necessary to refer to a Full Bench the question whether the case of *Subbigadu* has been correctly decided. But in this case it is not necessary since the punishment, for an offence under Section 147 is two years rigorous imprisonment. In modification of the judgment of the learned Sessions Judge we alter the conviction under the first charge to a conviction under Section 143 for accused 1, 2 and 3 and Section 147 for accused 4, 5, 6, 7 and 8.

4. Viraswami, as we have already said, was very severely hurt. His chest was pierced so that his lung was protruding in one place. It is clear that he had a narrow escape with his life. Why the learned Sessions Judge did not charge the first accused with attempt to murder on the third charge we do not know. It would

have been much more appropriate than a charge under Section 326. If Viraswami had no bones broken, the only kind of grievous hurt with which he can be charged in respect of Viraswami was that which is involved in putting Viraswami's life in danger. If a person inflicts hurt upon another with the intention of putting his life in danger, that is the same thing as saying that the offender is trying to kill the man whom he attacks. The first accused may therefore consider himself fortunate in that he was not charged and convicted of an offence under Section 307. The remaining convictions are justified by the evidence and the sentences call for no interference.

5. The learned Public Prosecutor has brought to our notice that in this case the accused appear to have assembled with a store of weapons close by including three spears. It would have been appropriate to charge all the other accused except the second and third accused with liability for the murder of Venkataswami under Section 149 of the Indian Penal Code. Considering the antecedents of the factions in Masulipatam it would have been difficult for any of the accused to show that he did not expect murder to be done. There is however no petition by the Provincial Government and therefore it is not necessary to say more on this subject.

6. The result therefore is that the appeals of all the accused are dismissed, the only modification being in the matter of the convictions on the first charge.