

In Re: Manicka Padayachi and anr.

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Court : Chennai

Decided On : Aug-24-1921

Reported in : AIR1921Mad490; 72Ind.Cas.497

Judge : Oldfield, ;Ramesam and ;Odgers, JJ.

Appellant : In Re: Manicka Padayachi and anr.

Judgement :

1. In this case it has been found that first accused bought a tumblerful of arrack of second prosecution witness and after mixing Viram, or corrosive sublimate, with it gave it to deceased, who was taken ill immediately and eventually died. First accused was charged with and convicted of murder and has been found guilty in this Court of administering an unwholesome drug with intent to cause hurt to deceased, an offence punishable under Section 338 of the Indian Penal Code., The case comes before me in consequence of a difference of opinion as to second accused, who was charged with and convicted of abetting first accused.

2. The main evidence against second accused is an alleged confession by first accused, Exhibit D, and the first question is whether, that confession is admissible at all. It is urged that it is not, because, in the words of one of the, learned Judges before whom the case originally came, it does not satisfy the requirements of Section 30 of the Indian Evidence Act inasmuch as it is a confession of guilt only of the lesser offence under Section 328, not of the offence of murder, for which alone, it is said, second accused was being tried. With all respect, I cannot follow

the reasoning involved. Section 30, no doubt, provides that the confession of one accused can be taken into consideration against another, only when they are being tried jointly for the same offence, the offence (as the explanation shows) including abetment or attempt. But it is not possible to hold that persons tried, jointly for a major offence and eventually convicted of a minor ^offence, as first accused has been and second accused may be here, with reference to Section 328 of the Criminal Procedure Code are not tried for the latter also. For, otherwise, their conviction, of the latter, which, it is not disputed, would be legitimate, would be had after no trial at all. The correct view is clearly that persons under trial for a major offence are also being charged with and tried for any minor offence or offences, constituted by the particular ingredients of the major offence which may be proved; and it can make no difference that the conviction of one accused of a minor offence takes place only in appeal, when the course of the proceedings has been, as in the present case, the same against them both.

3. No authority regarding the application of Section 30 to cases in which a conviction of a minor, after trial for a major offence is in question, has been cited ; and it will serve no useful purpose, in view of the foregoing, to go in detail through the cases relied on before me and in the referring orders of the learned Judges, since they deal with issues which do not at present arise, For they support one or other of two distinct principles, of which neither is relevant to this case. Firstly, they are decisions, such as *Imperatrix v. Pitamber Jina* 2 B. 61 , that the accused are not being tried jointly for the same offence, when the offences charged against each and the ingredients thereof are different. Secondly, there are others, such as *Queen v. Belat Ali* 19 W.R.Cr. 67 and *Empress of India v. Ganraj* 1 Ind. Dec. 853, in which the so-called confessions did not implicate both accused concerned equally, because they were not really confessions at all, but were made to show that the deponents were not parties to the crime charged and to shift responsibility for it to the others tried with them. One case of this kind, *Kusir Bap v. Emperor* 21 Ind. Cas. 378 , has been particularly relied on, because the facts in it are said to be similar to those before me, the statement, the admissibility, of which was disputed, having been made by one accused, who gave her husband poison, that she received it from another; but there was actually no admission by her of any offence, since, unlike, first accused in the present case, she did not admit

knowledge that what she administered would cause hurt or have any physical effect. In fact, these decisions merely require a strict interpretation of the references in Section 30 to a joint trial 'for the same offence' and a 'confession' and do not affect the conclusions at present material that Exhibit D was, as its terms will show, a confession and that the two accused were tried jointly for the minor offence punishable under Section 328, when they were so tried for the major offence of murder.

4. Before stating the terms of Exhibit D, I deal with the other objection to it that it was never really given by first accused or, if given, is entitled to no weight against second accused, because the former afterwards denied having given it. It is true that he did so before the Sessions Judge, who questioned him directly regarding it, and that before the Committing Magistrate, who did not do so, he admitted only having been drinking with deceased, but denied having put anything in his arrack and gave no explanation for its effect. But Exhibit D was taken by fifth prosecution witness the Monigar of the village, where the arrack shop, at which first accused and deceased were drinking is situated, and it is not suggested that he had any reason for creating evidence against either. The suggestion made by first accused at Sessions, that he may have desired to exculpate the shopkeeper, is unsupported and is not probable. Fourth prosecution witness, a man of some credit who attested Exhibit D, did not admit anything, which detracted from its weight. It no doubt is referred to in fifth prosecution witness's evidence only as a note of what first accused said and it was not sent with the first report, Exhibit E, but there is no reason for doubting that it is a correct record of the substance of what was said and what was given to the Police on their arrival. There is nothing improbable in first accused making such a statement, when he found the effect of the drug on deceased so much greater than he had expected. There is, in my opinion, no reasonable doubt that Exhibit D was given as it purports to have been. The objection that it was not given voluntarily is supported only by the suggestion that the words used by fifth prosecution witness in inviting first accused to give it must be taken with reference to the former's official position as holding out an inducement. They were according to fifth prosecution witness, who alone speaks to them, that first accused should tell the truth and that to tell the truth was always good; and they involve no inducement, express or implied. In these circumstances,

Exhibit D must be treated as admissible evidence to be taken, in the words of Section 30, into consideration against second accused and its weight is not, in my opinion, materially affected by the fact that first accused later denied having given it.

5. First accused in Exhibit D said that (1) he administered to deceased in arrack a drug which he had received from second accused (2) the drug was to make deceased purg in order that second accused, his brotherly might carry him back to the family-home, which, contrary to the former's wish, he had left. Exhibit D accordingly contains a full admission of first accused's liability under Section 328; and the question is then, of its effect against second accused when, as Section 30 permits, it is taken into consideration, against him. This portion of the Section has been construed in many decisions. But their result, so far as it is definite, seems to be only what in the present case would be clear independently of them, that a conviction cannot be based exclusively on the testimony of a person, who cannot be cross-examined, if he is uncorroborated or corroborated only by an accomplice. No further general rule as to the extent or' nature of the corroboration to be required emerges from the judgments, which naturally deal directly with the particular circumstances on each occasion before the Court; and it can, therefore, be said only that the corroboration must be on material particulars and taken with the confession must justify belief in the substantial truth of the latter.

6. Of the four headings of the prosecution evidence relied on for this purpose, the first that regarding motive, affords corroboration, both generally and with reference to first accused's account of the reason second accused gave him; and it, in my opinion, goes as far as is necessary in this direction. It is alleged that it establishes a liaison between the wife of deceased and second accused and that this explains the latter's desire to induce deceased, his brother, to return to the family-house, which he had left about ten days earlier. The suggestion against deceased's wife may be true. But the evidence for it is indirect and in some respects defective; and it is, therefore, safer to reject it.

7. There is, however, no sufficient reason for doubting the; evidence that second accused, as first accused said in Exhibit D, desired his brother's return and there is

no improbability in his having hoped to compass it by bringing him back, when he was ill and helpless. It is urged that this motive is disproportionate to the means employed; but the objection can be accepted only on the assumption, which is negatived by the judgments in the case of first accused, that the causing of more serious harm than a temporary physical disturbance was intended. Next, there is the evidence of 7th prosecution witness who deals in medicines, that shortly before the date of the death he saw second accused outside his shop, when he was sailing Viram, or corrosive sublimate, to third accused, who has been acquitted. There is no reason for doubting the independence of the witness or the truth of his evidence. There is, however, no corroboration, and it is argued further that second accused might have come to the village, the ordinary shopping resort for the neighbourhood for his own purposes and his presence outside the witness's shop may have been a mere coincidence; and it is true that no actual conversation or other intercourse between him and third accused is alleged. But, on the other hand, he is referred to as standing only eight feet from 7th prosecution witness on the koradu, he has made no attempt to show on what other business he was there; and he did not call, third accused, who was acquitted under Section 289(2), Criminal Procedure Code at the conclusion of the prosecution case and who could have supported his denial of any connection between them. It seems to me very probable that 7th prosecution witness's evidence is true. But it is merely consistent with the prosecution case and does not advance it appreciably on the material points, to which I now turn, second accused's possession of corrosive sublimate and his having given it to first accused.

8. The evidence as to possession is that in consequence of statements to the Police Sub-Inspector, 18th prosecution witness by first accused and afterwards by second accused, the latter's house was searched twice, a Vegetable cutter and a pestle being found on the first occasion and a grinding stone on the second, all these bearing, as analysis has shown, traces of mercury; and at the trial the statement of second accused just referred to, which no doubt is alleged to have been made in presence of the Sub-Magistrate, but was not separately recorded, was relied on as an admission of the identity of the mercury then found with that administered by second accused. As regards this statement, its details were no

doubt elicited on second accused's behalf in cross-examination of 7th prosecution witness; but it must be conceded that the effect of what he said is not clear and before me the attempt to argue, from it was abandoned. The evidence regarding the finding of the grind stone has also been attacked; but it is unnecessary to consider whether the attack was successful, because the argument from the presence of mercury on the stone is similar to that relating to the vegetable cutter and pestle and adds nothing to it. As regards the mercury on the two last mentioned utensils, 13th prosecution witness, the Monigar, no doubt, said that the cutter was found in the room occupied by second accused's mother; 12th prosecution witness, however, a brother of deceased, and 2nd accused did not corroborate this; whilst 8th prosecution witness said it was taken from the kitchen; and, in any case, in view of the close quarters, at which those concerned lived, it does not seem to me that anything in second accused's favour follows if 13th prosecution witness's statement is accepted. Ramesam, J., in his judgment has laid stress on the fact that analysis revealed the presence only of mercury, not Viram, or corrosive sublimate. But it is not clear that analysis was directed towards distinguishing or could have distinguished between the two and it is a fair inference from the use of a pestle, that the solid Viram, corresponding with corrosive sublimate, not the liquid mercury, was in question. There seems to me no reasonable doubt that corrosive sublimate was, shortly before deceased's death, in second accused's possession; and, as he has adduced nothing to explain this or transfer responsibility to any other member of his family the inference must so far be against him.

9. There remains, however, the question, on the answer to which the decision must really turn, whether there is evidence to corroborate the allegation in Exhibit D that second accused gave the Viram, of which he was possessed, to first accused; and the answer must on the best consideration I can give, be that there is not. There is no direct corroborative evidence on the point: and in the circumstances of the case an inference from the proved possession of Viram by two men in succession to the identity of the Viram in question and its transfer from the one to the other would exclude reasonable doubt, only if Viram were so rare a substance and its possession by any particular individual so extraordinary, as to exclude the possibility of other explanations. But this is not established. It is true

that accused has not attempted to prove actual possession of Viram for any innocent purpose by any inmate of his house and has not suggested any explanation of first accused's possession other than the latter alleged. But it is clear that Viram is really procurable and although 7th prosecution witness denies any sale for the last two years except to third accused, he presumably is not the only vendor in the neighbourhood. That the drug is a common medicine is shown by the quotation in the judgment of Ramesam, J., from Maclean's Manual, III, 845; and it is further, I believe, a cosmetic. It is accordingly impossible to hold that any special explanation need be required for its possession by either first or second accused or that there is evidence from which the giving of it by the latter to the former can be inferred.

10. In these circumstances, Exhibit D is uncorroborated in a material respect and second accused cannot be convicted on it. The case is one of suspicion and it must fail for want of essential evidence. The appeal of second accused must, therefore, be allowed and he must be acquitted and released.

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