

In Re: Mahali and ors.

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Court : Chennai

Decided On : Apr-01-1969

Reported in : 1970CriLJ288; (1970)1MLJ450

Judge : Ramakrishnan and; Kailasam, JJ.

Appellant : In Re: Mahali and ors.

Judgement :

Ramakrishnan, J.

1. Three persons, Mahali, Maran and Palani, Harijans, residents of Hanniyada of Nilgiris were sentenced to death by the learned Sessions Judge of Coimbatore for the offence of murder under Section 302 read with Section 34, I. P. C, subject to confirmation by the High Court. The referred Trial is now before us. The condemned prisoners have also appealed and their appeals are also before us.

2. On the night of 18-2-1968 it was found by P. W. 2 a watchman that a tank near Nilgiri's near Koonur, which used to receive supply from a dam higher up was not receiving its usual supply of water. The concerned authorities of the Water Works Department ultimately traced the block in the flow of water to a dead body wedged into the outlets hole of a 'break' pressure tank' which is shown in the rough sketch, Ex. P. 18 prepared by the police during the investigation. This break pressure tank is a rectangular structure, 71/2' x 31/2 with a depth of 7'3'. The in-let pipes and out-let pipes are so placed that a depth of 6' of water is maintained. The tank is

covered with R. C. C. Slabs 7 in number laid one by the side of the other. P. W. 1, Ebben Samuel, Commissioner of Coonoor Municipality, was present at the time when the block 'by means of the dead body which was partially hanging from the over-flow pipe was removed. When the covering slabs were removed another dead body with its hands and legs tied was found in the same chamber. Subsequent post mortem examination showed that these two persons had met with their death by asphyxia due to drowning. The wellknown tests for such asphyxiation like the section of the lungs exuding watery frothy mucus and similar other symptoms were clearly present. There is little doubt that these two unfortunate persons met with a watery grave in the small confined space of the break pressure tank above mentioned. The post mortem doctor fixed the time of the occurrence as 24 to 48 hours prior to the post mortem examination which was held on the 20th morning by the Civil Assistant Surgeon of the Lawley Hospital, P. W. 16. The prosecution case was that the death took place on the night of 18-2-1968.

3. The villagers gathered near the scene where the dead bodies were found, one Palaniyal identified the bodies as those of two Harijans, Subban and Bethan, who were brothers. They will be referred to for the sake of reference as D. 1 and D. 2 in this judgment.

4. The prosecution has given an account 1 of the motive for the occurrence. D. 1 and D. 2 and one Velan are the sons of P. W. 4. Velan is married to one Palanal. P. W. 8 a girl aged 15 years. About ten days before the occurrence when P. W. 8 was near the water tap accused 1 wanted to drag her into conversation. She protested; for this action her father in law P. W. 4, scolded accused as well as accused 2 whereupon accused 1 replied that he would do something to the family of P. W. 4 within eight days. The point to note is that accused 2 was not present when accused 1 tried to drag P. W. 8 into conversation. Secondly accused 3 is not at all associated with this motive. Accused 1 and 3 and the approver, P. W. 5, Raju are all young Harijans and also residents of Hanniyada.

5. Regarding the actual incident, the approver, P. W. 5 Raju, alone has given evidence. P. W. 5 accepted the invitation of accused 1 on the evening of 18-2-

1968 to attend a cinema. On the way they were joined by accused 2 and

3. They were proceeding along the Coonoor road evidently to go to Coonoor for the cinema. Apparently Subbam, D. 1 also used to join these young people on similar occasions in the past. When P. W. 5 asked whether D. 1 was going to join them that evening accused 1 is said to have told P. W. 5 that a week previously D. 1 had abused him and threatened to beat him with chappal and that he (accused

1) was going to question D. 1 about it. At about this time D. 1 and D. 2 left their house to go to Bandhumi Village. It was the practice of D. 1 and D. 2 to graze the cattle of Bandhumi villagers and collect food from the villagers every night by way of remuneration. It was for that purpose that D. 1 and D. 2 left their house for on the night of 18-2-1968 with a tiffin carrier M. O.

2. One of them was wearing chappals and was having a bed sheet covering their head. Their route lay along the Coonoor road. Near a culvert which is marked on the sketch mentioned above. D. 1 and D. 2 met the party comprising of P. W. 5 and accused 1 to

3. A quarrel ensued between them and accused 1 proposed that to resolve the quarrel D. 1 should go to a Mahakali temple which is also shown in the sketch away from the Coonoor road for the purpose of taking an oath. that temple is about 2 miles from the place where according to the approver the conversation took place P. W.

9. Natesan who was returning to his house in Bandhumi village, saw the party of the deceased as well as the accused and P W. 5 near the culvert at about 8 p. m. They were simply talking. P. W. 9 did not notice any evidence of quarrel. At first, according to the approver D. 1 refused to go to the temple indicated by the accused and wanted to go to another temple instead and finally on the pressure of accused 1, D. 1, accepted accused's suggestion. They proceeded from the culvert for a distance of about 1 1/2 mile and the break pressure tank was near the place which they reached by that time. Then suddenly accused 2 snatched the tiffin carrier from D. 2; accused 3 caught hold of D.

2. and accused 1 and 2 pushed D. 1 down. Accused 1 pressed him; accused 2 tied his hands and legs with the mufflers of accused 2 and
3. Then accused 1 and 2 pulled the muffler round the neck of D.
1. with a view to strangle him; D. 1 fainted. Then accused 1 and 2 tied the hands of D. 2 behind the back with his muffler. Then all the accused removed the covering slabs of the tank and threw both D. 1 and D. 2 into the tank and closed it with the slabs. They threatened P. W. 5 not to divulge what he had seen to anybody, took him to the temple and made him to swear on oath to keep the matter secret. The lid of the tiffin carrier was thrown there and the chappals also were thrown nearby.
6. As to what the accused and P. W. 5 did thereafter there is evidence. The three accused came to the house of P. W. 12 at about midnight, told him that they had been to the cinema and wanted to sleep at his place. They did so. P. W. 11 Doraiswami, deposes that the usual practice followed, was for P. W. 5 and accused 1 to 3 to sleep in the house of the uncle of P. W. 11 every night. But they did not do so on the night of 18-2-1968. The above are the broad details as to the circumstantial evidence as well as the evidence of the approver, for connecting the accused with a very heinous crime. The accused pleaded not guilty to the occurrence and did not examine any defence witnesses.
7. Leaving apart for a minute the evidence of the approver, P. W. 5, which we shall presently refer to in some more detail the rest of the evidence which is circumstantial is not sufficient to bring home the guilt of the accused beyond reasonable doubt. To begin with, the motive which arose out of a quarrel near the water tap between accused 1 and the deceased's sister-in-law appeared to be a hardly sufficient for a scheme of murder. Even in this quarrel near the water tap accused 2 is not a participant. It is accused 1 who is said to have given a threat to do something to the family of P. W. 4. Accused 2 is not associated with the threat. Accused 3's name is not at all mentioned as one concerned in the motive.
8. Taking the association of the deceased and the accused prior to the occurrence and at places proximate to the scene of occurrence leaving apart for a minute the

evidence of the approver, P. W. 5, P. W. 9 says that at 8 p.m. he saw the accused in the company of the deceased and P. W. 5 at a culvert at the Coonoor road. But this culvert is 1 1/2 miles from the scene of occurrence, A reference to the sketch shows that a foot-path leads for a considerable distance from the culvert to the break pressure tank. It is significant P. W. 9 did not notice any angry words exchanged between the two groups of people. According to him they were merely standing and talking. Regarding the incidents after the occurrence there is only inadequate evidence. According to P. W. 11 there is only inadequate evidence. According to P. W. 11 it was the usual practice of the accused and P. W. 5 to sleep in the house of one Thadi Karuppan, the uncle of P. W. 11. P. W. 11 is a small boy aged 10 years. He states that on the particular night. 18-2-1968 accused and P. W. 5 did not come to Thadi Karuppan's house for sleep. The evidence of P. W. 12 is that the accused slept in his house giving the reason that they had gone to a cinema. It is a perfectly plausible reason. It does not point to an inevitable inference that these three persons participated in a murder in the meanwhile.

8-A. Now we will take up the evidence of the approver, P. W. 5. He is related to accused 1 and 3 being a first cousin. According to his evidence he was a passive spectator of the incidents near the break pressure tank, when accused 1, 2 and 3 murdered the deceased. He was arrested along with the other accused on the 20th of February, two days after the occurrence. He was kept in the lock up Thereafter to the police he gave for the first time the present version of the occurrence. Then he was taken to the Sub-Magistrate, Ootacamund, and before the Sub-Magistrate also he gave the statement which was recorded under Section 164 Cr. P. C. on 13-3-1968. There also he has-been given the broad details of the occurrence in the manner he had given in Court. No doubt there are certain contradictions between the earlier statements and the version of P. W. 5 in Court, to which we shall briefly refer to. But the point to remember is that in all these statements he had completely exonerated himself from any blame and claimed to have been only a passive spectator.

9. The question which arises therefore is whether in such circumstances P. W. 5 could be properly considered as an accomplice for the purpose of Section 133 of the Evidence Act. The Section lays down that an accomplice shall be a competent

witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. While Section 133 of the Evidence Act lays down the above position of law, it has been long recognised that as a rule of prudence and caution, the testimony of an accomplice should be corroborated in material particulars for this purpose meaning evidence which will have relevancy both to the crime as well as to the criminal. This rule of prudence and caution is derived from the principle set out in illustration (b) to Section 114 of the Evidence Act, that Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. This presumption presupposes that the witness in question is an accomplice in the sense of one who has assisted the accused in the crime in some way so that he is 'tarred with the same brush' as the other accused persons, though not to the same extent. It is usual in such circumstances to rule out for the purpose of treatment as an accomplice a person who totally exculpates himself. The further question that arises is whether the same rule as to corroboration that is required in the case of an accomplice who turns approver and gives evidence for the prosecution should be insisted upon in the case of a person whose evidence discloses that he is not an accomplice at all. In such cases, apart from the provision in Section 133 and the presumption in illustration (b) to Section 114 of the Evidence Act, prior decisions have laid down that the principle of caution and the requirement of corroboration on material particulars should also be applied if the circumstantial evidence calls for it.

10. Thus in *Vemi Reddy Satyanarayan v. Hyderabad State* : 1956 CriLJ777 the concerned witness was P. W. 14 who took no part whatever in the commission of the offence or in any active or passive preparation for the same. He was not a participis criminis. After securing his release from his temporary masters he went away with his father to his village. He did not divulge the secret of the murder to anyone except his own father. The Supreme Court observed that though he was not an accomplice the Court would still want corroboration on material particulars as he was the only witness to the crime and as it would be unsafe to hang the accused on his sole testimony unless the Court was convinced that he was speaking the truth.

11. In *Hafijuddi v. The Emperor*. : AIR1934 Cal678 it is observed:

So far as the statutory provisions are concerned, there is nothing in law to justify the proposition that evidence of a witness, who happens to be cognisant of a crime, or who made no attempt to prevent it. or who did not disclose its commission should only be relied upon to the same extent as that of an accomplice. The real question in such a case is the degree of credit to be attached to the testimony of such a witness; and that depends on all the facts and circumstances of the particular case.

12. In the present case P. W. 5 had been made to go through all the formalities of grant of pardon, before he was called on to give evidence as an approver. It is a mystery to us why all these formalities were adopted in his case, even though from the very beginning he has not implicated himself in any manner in the occurrence and claimed to be only a direct eye witness. There is a further evidence that he along with Accused I assisted other people in carrying the dead bodies to a safe place after they were discovered in the tank on 19-2-1968. It is only after he was arrested along with the other accused, and taken to the police lock up and kept there for sometime that he came with the version of his having been an eye witness. The version itself was given on the 20th two days after the occurrence. The belated appearance of his testimony will be a strong circumstance which will require independent corroboration of his testimony. Secondly there are several intrinsic improbabilities and suspicious features in what he has deposed. All the three accused are young people. Their ages ranging between 18 and 20. The two deceased also are 19 and 17 years of age. P. W. 5 wants us to believe that without any struggle or resistance D. 1 and D. 2 allowed themselves to be tied up by three other young men and then hurled into the break pressure tank. These young Harijans would have strongly resisted and inflicted some injuries on the bodies of their assailants atleast nail marks and the like, in the ordinary circumstances. But according to P. W. 5 none of these things happened. To say the least this is improbable as well as surprising, P. W. 5 would go to the extent of saying that none of the deceased raised shouts. In Sessions Court he said that D. 1 Subban did not shout because he was unconscious. But before the police he stated that D. 1 shouted. In any event there is no reason why D. 2 should not have

shouted. In the Sessions Court P. W. 5 mentioned that accused 1 and 2 attempted to strangle D. 1. But to the police, P. W. 5 did not mention anything about this attempt to strangle D. 1. To the police P. W. 5 did not mention that D. 1 became unconscious. In the Sessions Court he said that D. 1. became unconscious and therefore did not shout. There are several other discrepancies as to the manner in which the actual occurrence took place between the evidence of P. W. 5 in court and his earlier statements.

The learned Sessions Judge was of the opinion that these are not material discrepancies. We are unable to agree. Considering the fact that we are required to accept the evidence of P. W. 5 that two apparently healthy young men allowed themselves to be tied and thrown into the tank without any struggle or protest by three other young men, these discrepancies in the evidence of P. W. 5. assume significance. Along with this we should take into account the fact that though P. W. 5 did not inculcate himself to all intents and purposes he was treated as an approver. Pardon was given to him and he was kept under arrest throughout, even during the time of his giving evidence. He was therefore acting under strong pressure to give evidence according to a particular pattern. Further the occurrence took place on the night of the 18th. From the morning of 19th P. W. 5 was present along with the other villagers, it was not till the 20th two days later that he came forward with the present version. These are circumstances which are very strong infirmative features in his testimony. It is therefore necessary to look for independent corroboration, both as to the crime and criminal before we could accept his testimony for convicting the accused. We have referred to the circumstantial evidence in the earlier part of the judgment and expressed our conclusion that they are not sufficient to connect the accused with the crime. There was also evidence about the recovery of some items of property of the deceased persons on the information supplied by P. W. 5. This evidence about the place wherefrom M. Os. 11 and 12 were recovered, places where the tiffin carrier and chappals worn by one of the deceased were recovered on the information furnished by P. W. 5 would amount to an awareness on the part of P. W. 5 of the places where these articles were concealed or thrown. But they cannot provide circumstantial evidence for connecting the particular accused with the particular offence with which they are charged. The requirements of prudence and caution

make it necessary for the prosecution to supply such evidence in this case. This has not been done.

13. For the aforesaid reasons we are of the opinion that the evidence of the approver, P. W. 5 is not in itself reliable and safe to be acted upon, that it require material corroboration both as regards the crime and the criminal, but the rest of the evidence does not afford such corroboration.

14. We therefore find the accused not guilty and acquit them and direct them to be set at liberty.

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