

In Re: Gabriel

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Court : Chennai

Decided On : Sep-26-1975

Reported in : 1977CriLJ135

Judge : Ratnavel Pandian, J.

Appellant : In Re: Gabriel

Judgement :

Ratnavel Pandian, J.

1. The appellant who was charged of an offence under Section 302, Indian Penal Code, but convicted under Section 304, Part II, Indian Penal Code, and sentenced to undergo rigorous imprisonment for a period of three years, has preferred this criminal appeal, challenging the abovesaid conviction and sentence passed by the learned Sessions Judge, Kanyakumari in Sessions Case No. 2 of 1974 on his file.

2. The case of the prosecution is as follows : The deceased, Savariaradimai, had two sons viz., Chelliah and Augustin. Chelliah's son is one Anjalees, who is examined as P.W. 1. The deceased was doing business in tamarind. P.W. 1 was assisting and helping the deceased in his trade. So, the deceased used to give him a share in the profits. This was resented by the second son of the deceased, Augustin. On account of this, there was enmity between P.W. 1 and Savariaradimai on the one side and Augustin on the other side. It is the case of the prosecution that Augustin, with a view to wreak vengeance on his father, induced

his friend, the present appellant, to assault his father. It may be noted here that Augustin was himself originally arraigned as the second accused in this case for instigating the present appellant to commit this crime, but he was discharged by the committing Magistrate. It transpires from the evidence that the house of Augustin and the deceased are adjacent and the occurrence in this case took place in front of the house of Augustin. So much so, the houses of P. Ws. 2, 4 and 5 and the tea shop of P.W. 3 are situated near the scene.

3. On the night of 3-10-1973, at 8 p.m., while Savariaradimai was just leaving his house to the shop of P.W. 2, his second son Augustin, who was standing south of his house, abused the deceased in a vile language. The appellant was also present then and he also joined Augustin in abusing the deceased. Thereupon, the deceased mocked at the appellant, stating that his house is on the side of the bank and there was no necessity for him to go over here and abuse him. The appellant thereafter challenged the deceased to come out to the public : road and see the result. At that time, the deceased got down from the courtyard of his house to the main road. The appellant immediately caught hold of his hands and kicked the deceased with his right leg just below the umbilicus. Then, he released the hands of the deceased who raised an alarm that the appellant was killing him by beating. Thereupon, it is stated that the appellant fisted the deceased with his right hand on the left chest of the deceased who fell down with his face upwards on receipt of the beatings. P. Ws. 1, 2, 3 and 4 who were there, are stated to have witnessed the entire occurrence. On that night, there was moonlight, and there was also a street light at a distance of 70 feet from the scene. In addition, the kerosene lamp M.O. 1 was burning in the shop of P.W. 2. P.W. 1, on seeing his grand-father falling down, ran towards him and picked him up. Savariaradimai stated to P.W.] that he was beaten by Gabriel, the appellant, and that he would die and he should be rushed to the Hospital immediately. P.W. 1 led him by walk by supporting him towards the direction of the lamp post. Savariaradimai became unconscious. P.W. 5, who came there, brought water as requested by P.W. 1 and sprinkled the same on the face of the deceased. But, Savariaradimai did not regain his consciousness. P. Ws. 1 and 2 lifted Savariaradimai and took him to the house of Augustin, where he was laid down. At that time, it was found that Savariaradimai was dead. Thereupon, P.W. 1 went to the Kollangade police

station at 10 P.M. and laid a complaint Ex. P-1 before P.W. 10, the Sub-Inspector of Police, who registered the same as Crime No. 265 of 1973, under Section 302 read with Section 34, Indian Penal Code, against the appellant and Augustin. The original first information report is marked as Ex. P-10. P.W. 10 then reached the scene by 12.00 midnight. P.W. 11, the Inspector of Police, Vila-vankode, arrived at the scene at about 0.15 a.m. and took up investigation from P.W. 10, He prepared an observation Mahazar and plan and conducted the inquest over the dead body between 12.30 a.m. and 4 a.m., and examined P. Ws. 1 to 5. He recovered a pair of slippers (M, O. 3 series) under Ex. P-4 from a place just west of the cattle shed of the deceased. Then, he recovered the hurricane light (M.O. 1) from the shop of P.W. 2 under Ex. P-2.

4. On 4-10-1973, at 11 a.m. P.W. 8, the Civil Assistant Surgeon attached to the Government Hospital, Kuzhithurai conducted the autopsy on the dead body and found an external injury viz., a contusion 1' X 1' at the outer side of the left elbow. On dissection, there was no fracture detected. On internal examination, he found the bladder ruptured and noticed a rent over the middle of the flap of the bladder. 1/4' X 1/8' X 1/3'. The prostrate front part was found contused. He has opined that Savariaradimai should have died of shock due to injuries to the bladder. Ex. P-7 is the post-mortem certificate. Continuing his investigation, P.W. 11 then examined P.W. 8. P.W. 10 arrested the appellant on 8-10-1973. After completing the investigation, charge-sheet was laid on 28-11-1973 by P.W. 11 against the present appellant and Augustin and Augustin has been subsequently discharged by the committing Magistrate as aforesaid.

5. The appellant, when examined under Section 342, Criminal Procedure Code has denied all the incriminating circumstances appearing against him and added that he was not aware of the enmity or misunderstanding between the deceased and his son and that he was arrested even on 5-10-1973. The plea of the accused is that P.W. 1 had misbehaved with his brother's daughter Rajammal and since he chastised P.W. 1 for that, there arose misunderstanding between them. He also stated that there was misunderstanding between him and P.W. 2 as P.W. 2 had inflated the accounts standing in the name of the appellant and that P. Ws. 3 and 4 are deposing falsely against him at the instance of P.W. 1.

6. The prosecution examined eleven witnesses including official witnesses and marked Exs. P-1 to P-12 and M. Os. 1 to 3 to substantiate its contention. The learned trial Judge, after considering the evidence, has found the appellant guilty under Section 304, Part II, Indian Penal Code, and convicted and sentenced him as mentioned above.

7. P. Ws. 1 to 4 are the witnesses who speak about the actual occurrence. Of these witnesses, P. Ws. 1 and 4 were treated in the committal Court as hostile to the prosecution since both the witnesses did not speak about the overt act attributed to Augustin and P.W. 1 in addition to that had given a varied inconsistent version regarding the factum of laying the complaint at the Kollankode police station. P.W. 1 in his earliest statement Ex. P-1 has stated that Augustin told the appellant to beat the deceased and the appellant, who is a close friend of Augustin, has committed this murder only at instigation of Augustin to oblige him. The Police, after investigation, arraigned Augustin as the second accused in the charge-sheet, charging him with an offence punishable under Section 302 read with Section 34, Indian Penal Code. But, P.W. 1 in his evidence would depose in the chief-examination that his uncle Augustin, standing south of his house, abused his grand-father and in the next sentence in the same breath he obliterated his previous answer by saying that his uncle Augustin did say anything and completely omits the overt act of Augustin instigating the present appellant to beat his grand-father. In the cross-examination he would depose that at the time of the occurrence he did not at all see his uncle Augustin. But he saw him only in the morning at 10 or 11 A.M. Therefore, it is clear that P.W. 1, though he has mentioned in Ex. P-1 that the whole occurrence took place only at the instigation of Augustin, has now given a complete go-bye to that portion of the prosecution case by completely exonerating even the presence of his uncle Augustin. This inconsistent and incongruous version of P.W. 1 would in turn indicate that P.W. 1 has no respect for truth and that he gives evidence before the Court with some reservations. The names of P. Ws. 2 to 5 are mentioned in Ex, P-1. But, we have to see whether the evidence of these witnesses could be accepted and acted upon as their names themselves have come on record even at the earliest opportunity. P.W. 5 is admittedly not an eye-witness to the actual occurrence. But, her son Verghese is mentioned as one of the eye-witnesses to the occurrence. But, the

said Verghese has not been examined. P.W. 4 has also completely exonerated the presence of Augustin in the scene place and that is why he was treated as hostile in the committal Court as stated supra. In the Sessions Court he has stated that he saw Gabriel (appellant) and Augustin taking together at 8 P.M. on the day and Augustin instigated the appellant to beat the deceased and thereupon the appellant beat the deceased and therefore no safe reliance can be placed on the evidence of P.W. 4 who develops his evidence from the committal Court to the Sessions Court. Coming to the evidence of P. Ws. 2 and 3, they would state that Augustin was also present at time of the occurrence. But, I find from the depositions of these two witnesses P. Ws. 2 and 3 before the Committal Court that both these witnesses have not spoken anything about the presence of Augustin. But, these two witnesses have not been treated by the prosecution as hostile though the other two witnesses P. Ws. 1 and 4 were sought to be cross-examined by the prosecution on the ground that they have not spoken to the presence of Augustin. Whatever may be the intention of these two witnesses, one thing is clear to my mind that all these witnesses have joined together in the Committal Court with one mind to exonerate the presence of Augustin and the instigation made by him. But, in the Committal Court, P. Ws. 2 to 4 have changed their version, but have stuck on to the present version falling in line with the averments made in Ex. P-1. It is no doubt true that throughout the prosecution case no main overt act has been attributed to Augustin, except that he instigated and the appellant committed this crime only at the instance Augustin. Here, I may point out that even though they have completely given up the case as against Augustin, if the evidence is otherwise acceptable against the appellant, the Court can act upon the same and sustain the conviction of the appellant. Mr, Shanmugham, appearing for the appellant, has vehemently urged that the evidence of these witnesses cannot be accepted since the very birth of the first information report Ex. P-1 containing the names of the witnesses is shrouded with suspicions. The present version of the prosecution is that the first information report was laid before the police at 10 P.M. of course, P.W. 1 in the trial Court has stuck on the version that he gave the first information report at 10 P.M. at the Kollankode police station. But, Mr. Shanmugham has pointed out that the portions of the evidence of P.W. 1 given in the Committal Court, marked as Exs. D-1, D-2, D-3 and D-4 would indicate that at

the time when P.W. 1 went to the Kollankode police station, he was asked to go away stating that the police would come and take a statement from him, but nothing was recorded from him afterwards, and then he was taken to the Thoduvatti Station at 4.30 A.M. and his signature was obtained in Ex. P-1 only on the next day at 12.00 noon and at that time P. Ws. 3 and 4 were present and their statements were also recorded. Therefore, he submits that Ex. P-1 came into existence on the next day. i.e., on 4-10-1973 at about 12.00 noon and not at 10 p.m. on the day of occurrence, as now alleged by the prosecution, and therefore, no reliance can be placed on Ex. P-1 and the evidence of P. Ws. 2 to 4 whose names are mentioned belatedly. After going through the entire deposition of P.W. 1 in the Committal Court, I find that unfortunately the defence has not brought out on record a portion of the evidence of P.W. 1 in the chief-examination itself, viz., that no statement was made by him at the Kollankode police station and he was asked to go saying that they would come and make enquiries, which is fatal to the prosecution. But, I do not propose to take that portion of the evidence while assessing the evidence of P.W. 1. However, suffice to say that if the admission of P.W. 1 in Exs. D-1 to D-4 is accepted, then the question would arise whether the accusation made in Ex. P-1 against the appellant can be taken as the one coming at the earliest point of time and the names of the witnesses were also mentioned at the earliest opportunity so that safe reliance can be placed on their evidence.

8. In the trial Court, P.W. 1 swears that Ex. P-1 was recorded from him at Kollankode police station at 10 P.M. This portion of the evidence is corroborated by P.W. 10, the Sub-Inspector of Police, who deposes that on 3-10-1973 at about 10 p.m., P.W. 1 appeared before him and gave a statement which was reduced into writing under Ex. P-1, and thereafter he sent copy of Ex. P-1 under the printed form marked as Ex. P-10 to the Additional First Class Magistrate, Kuzhithurai, and another one to the Inspector of Police P.W. 11 through a constable (P.C. 393). P.W. 11 states that he received the copy of Ex. P-1, i.e., the first information report at 11.30 p.m. on 3-10-1973. Then, the main question is whether the first information report came into existence at 10 P.M. as now put forth by the prosecution or whether it was subsequently prepared to suit the prosecution case in the light of the admission of P.W. 1 in Exs. D-1 to D-4. Under these circumstances, the only safeguard against the subsequent fabrication of such

important documents that too in grave crimes, is only the judicial safeguard, viz., we have to go to the copy of the first information report received by the Magistrate, to find out whether it was received by the Magistrate, at the earliest point of time, without any delay, and if there is any such delay, whether the said delay has been properly and satisfactorily explained by the prosecution. After going through Ex. P-10, as well as Ex, P-1, I find that the Magistrate has not signed anywhere therein, noting down the time and date of the receipt of this document.

9. At this juncture, I would like to point out that this Court has been repeatedly pointing out by judicial observations to the effect that it is imperative that the first information report should be despatched immediately without any delay by the investigating officers to the Judicial Magistrates, that on receipt of the said documents the Magistrates should initial the same, noting therein the time and date of the receipt of the said important documents and that this would provide the only judicial safeguard against any subsequent fabrication of the documents in grave crimes. There is no doubt that delay in lodging the first information report quite often results in embellishment, which is a creature of afterthought. On account of the delay, the vital and valuable piece of evidence, viz., the first information report, not only gets bereft of the advantage of spontaneity, but also danger creeps in by the introduction of coloured version, exaggerated account or concocted story, as a result of deliberation and consultation. If any delay occurred, the prosecution must explain it by adducing satisfactory and acceptable evidence. If no explanation is forthcoming, then it creates a doubt in the minds of the Judicial Officers as to the genuineness of the first information report. The Tamil Nadu Police Standing Order No. 577, while dealing with despatch of express reports in cases of murder, culpable homicide, dacoity, robbery etc., says that the copy of the first information report shall be sent direct to the local Sub-Magistrate and others and shall be sent in the quickest way possible. Mr. K.N. Mudaliar and Paul, JJ., have observed in *Karunakaran Jabamani Nadar In re* , that the original report of complaint recorded under Section 154, Criminal Procedure Code, and the printed form of the first information report prepared on the basis of the said report or complaint , inquest reports and statements of witnesses recorded during the inquest and other documents of special importance, should be despatched by the investigating officers without any delay to the Magistrates and they should bear the

initials of the Magistrates with reference to both the time and date of their receipt. While making the above observation, their Lordships in the same judgment have also referred to a circular in R.O.C. 2272-A/74-F1 dated 20-6-1974 sent to the Subordinate Courts. I went through the circular and found that the High Court has emphasized the importance and the urgent need for the trial courts noting the time of the receipt of the complaints, the printed first information reports, inquest reports and also statements following the inquest reports and other documents. In P. Dig 241/74 dated 16-9-1974 of our High Court, the extract of the Judgment in Karunakaran Jabamani Nadar In re has been communicated to all the Subordinate Courts for information and for strict observance of the directions contained therein.

10. Venkataraman, J., sitting with Ganesan, J., in Perumal Naicker In re (Judgment D/- 9-5-1972 in R.T. 18/1972) (Mad) has pointed out as follows:

Repeatedly we have pointed out the importance of the first information report reaching the concerned Sub-Magistrate expeditiously, and several cases had to be thrown out because of the delay in the first information report reaching the Sub-Magistrate. It may be that in several of those cases the delay was due to time being taken for concocting the first information report. But it is possible that in other cases the delay had no sinister significance. It is, therefore, obvious that the first information report should be delivered to the concerned Sub-Magistrate with the utmost expedition. Where there is delay, it is for the prosecution to lead evidence in explanation of the delay. Almost invariably the prosecution neglects its duty in this regard and leaves it to the Court to come to its rescue by saying that the delay admits of some reasonable explanation. It is high time that such a practice is stopped.

11. In In re L. Appayya Naik, , a Division Bench of the Mysore High Court has held that where the first information recorded by a police patil accompanies a first information report sent by a police officer, the Magistrate should affix his initials both upon the first information and upon the first information report in order to protect the first information against the reproach that it was subsequently fabricated.

12. Section 157 of the Criminal Procedure Code contemplates that when the first information report is recorded, the first duty of the police officer is to send a report of the same to the Magistrate and the object of sending the report to the Magistrate is that he may have an early information and be in a position to act, if necessary, under Section 159. (Old Sections 157 and 159 correspond to new Sections 157 and 159. Except for some verbal changes in Section 157 of the new Code, no alteration has been made in either of these sections). The present Section 154, Criminal Procedure Code, corresponds to Section 154 of the old Code. Sub-section (1) of the present Section reproduced word for word the old Section 154. Sub-sections (2) and (3) of the present section are new. Sub-section (2) entitles the informant to a copy of the information as recorded under Sub-section (1) and the same shall be given to him forthwith free of cost. This statutory right was not given under the old Code. The present Sub-section (2) was introduced on the recommendation of the Law Commission which considered the practice of granting a copy of the report to the informant to be a healthy one and proposed that it should be placed on a statutory basis. Sub-section (3) provides that any person aggrieved by a refusal on the part of an officer-in-charge of a police station to record the information referred to in Sub-section (1), may send the substance of such information in writing and by post to the Superintendent of Police concerned, who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by this Code. Thus, our Parliament has, in order to safeguard the authenticity of the version made by the informant at the earliest point of time, without giving any room for any complaint of tampering with it and also to protect it from any subsequent variations or additions, introduced Sub-section (2). The purpose of introducing Sub-section (3) is two-fold, viz., (1) to give remedy to the persons aggrieved by a refusal on the part of the police officer incharge of the police station to record the first information, and (2) to reinforce and emphasize the position that the said officer has to record the information relating to a cognizable offence without any delay so as to avoid any complaint from the informant about any inaction or refusal on the part of the said officer. By the introduction of these two mandatory provisions, the long-felt and cherished

privilege and right of the citizens of this country have been fulfilled. Therefore, in my view, if the time is noted in these vital documents, the noted time would conclusively decide the eventual fate of the case in regard to the appreciation of the documents filed on behalf of the prosecution, without leaving the Court to speculate.

13. Regarding the duty of the Magistrate to note the time and date of receipt of the information report, it is painful to note that despite the instructions issued by this Court, even now instances are not lacking where the Magistrates have failed to note the time and date of receipt of such first information reports and have not even initialled such reports. This case is one such instance wherein the Magistrate has not carried out the elementary duty cast on him viz., to note time and date of the receipt of the first information report with his initials. In the present case. Ex P-10 contains only the seal of the Court, showing that it was received on 4-10-1973. That date 4-10-1973 would spread upto 12.00 midnight of that day. Unless the exact time is known either from the endorsement or by evidence, we cannot exactly fix the time at which the report was received by the Magistrate. If we take the evidence of P.W. 1 in the Committal Court, marked as Exs. D-1 to D-4, this report Ex. P-1 would have been prepared only at 12.00 noon on 4-10-1973. In those circumstances, if the report Ex. P-1 had been prepared at 12 noon on 4-10-1973, Ex. P-10, Copy of Ex. P-1 would have been received by the Magistrate on 4-10-1973 itself. So, by the mere seal of the Court, it is not conclusively possible to scrutinise the evidence of the other witnesses to arrive at a just conclusion whether the copy of the information report, Ex. P-10, was prepared on 4-10-1973 or on 3-10-1973. In case the Magistrate had signed after noting down the time of the receipt of Ex. P-10, before 12 noon on 4-10-1973 or on the night of 3-10-1973 itself, it could be presumed that P.W. 1 committed a mistake in the trial Court while giving the time of recording Ex. P-1. When the initial of the Magistrate with the time and date is conspicuously absent on Ex. P-10, we have to fall back only on the evidence of P.W. 1 and see whether Ex. P-1 was recorded on 3-10-1973 or on 4-10-1973.

14. Then, coming to the inquest report Ex. P-3, it has been received by the Court on 5-10-1973, as seen from the seal as well as the initial with the date of the

Magistrate. But, the statements recorded during the inquest were not received on the date of receipt of Ex, P-3, but only on 8-10-1973. It is the case of the prosecution that P, Ws. 1 to 5 were examined during the inquest and the inquest was over even by 4.00 A.M. on 4-10-1973. Under these circumstances, I am not able to understand how the statements, of the witnesses recorded during the inquest have been sent to the Court by a delay of four days, which delay remains unexplained. When the evidence of P.W. 1, marked as Exs. D1 to D4, is seen under the background of the date of receipt of these documents, I entertain a genuine doubt whether Ex. P-1 could have been prepared on 3-10-1973 itself. A suggestion has also been made to P.W. 10 and P.W. 11 that this Ex. P-1 was prepared only on the next day at 12 noon in Thouduvatti police station, which is not the concerned station. Of course, both the witnesses have denied the suggestion, which denial contradicts the positive admission of P.W. 1 in the Committal Court. If the evidence of P.W. 1 in the Committal Court is accepted, then it is needless to say that Ex. P-1 was prepared after the inquest was over. As mentioned supra, the evidence creates an impression that Ex. P-1 could not have come into existence as now spoken by the prosecution witnesses in the trial Court and therefore, I hold that no safe reliance can be placed on the averments in Ex. P-1. It is but natural that the witnesses mentioned in Ex. P-1 generally fall in line with the prosecution case given at the earliest opportunity. Therefore, the evidence of these witnesses has to be scrutinised very carefully and it must be beyond any shadow of doubt. But, the evidence of these witnesses in the Committal Court, as aforesaid, is tainted with a tinge of falsehood so far as the overt act of Augustin, who was accused-2 before the Committal Court, is concerned.

15. For the reasons mentioned above, I am of the view that it is not at all safe to place any reliance on the evidence of these witnesses whose names have come in the belated first information report and the evidence is tainted and coloured.

16. It may be noted that the prosecution has not let in any evidence satisfactorily explaining the receipt of the first information report by the Magistrate on the next day. Much less, any attempt was made by the prosecution to clarify the position. The deceased in this case was aged 78 on the date of the occurrence and he died on account of the rupture in the bladder which has caused a severe shock

resulting in his death, P.W. 8, the Medical Officer, admits in the cross-examination that rupture of the bladder may also be caused due to fall. The evidence of P.W. 1 that after the deceased fell down, he was carried to the house of Augustin, where he was laid and he died there itself, is yet another improbable version on the side of the prosecution. If really Augtutin had been responsible for the death of the deceased, it is a matter of grave doubt as to how P.W. 1 could have carried the deceased to the house of Augustin himself. All the abovemen-tioned reasons create a reasonable suspicion about the case of the prosecution viz., whether the prosecution has come forward with the whole truth or has suppressed a major portion of the real case, viz., as to the recording of Ex. P-1, the presence of Augustin instigating the present appellant to commit the murder, the presence of the eye-witnesses, etc., etc.

17. In the result, giving the benefit of doubt to the accused, I allow this appeal, set aside the conviction and sentence and acquit the appellant of the offence with which he stood charged.

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