

In Re: Rethinaswamy and ors.

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Court : Chennai

Decided On : Apr-19-1965

Reported in : (1967)2MLJ276

Appellant : In Re: Rethinaswamy and ors.

Judgement :

M. Anantanarayanan, J.

1. The appeals have been instituted by the first accused (Aziz), the second accused (Antoine), the third accused (Bacha), the fifth accused (Rettinasamy) and the tenth accused (Sadasivame), from the convictions and sentences of the Tribunal Criminal, Karikal, dated 21st December, 1963. The appeals have been preferred as Pourvoi en Cassation to us, and also under Section 10 of the Pondicherry (Administration) Act, XLIX of 1962. The matter involves a careful scrutiny of the following inter-related aspects. Firstly, the procedure followed in the French Courts, particularly as the trial at the Criminal Session was by jury. Secondly, the relevant provisions of the French Code Penal, under which the convictions have been imposed. Thirdly, the established facts of the record of evidence. Finally, the principles of law upon which we could interfere in a case of this character, in the context of the facts established against each appellant individually and the degree to which such interferences would be warranted.

2. We shall first deal with the facts of this case, at least as established in broad outline. We shall also indicate the parts stated to have been played, according to the evidence, by the appellants, who are now before us. After this, we shall proceed to scrutinize the related aspects of the criminal procedure adopted in the French Courts culminating in the trial by jury, the relevant provisions of the Code Penal, and the degree to which those ingredients have been held correctly established on the facts.

3. The broad charge was that the first and fifth accused among the appellants, along with another Sabapady alias Kichenassamy Nadar, who has been acquitted, a certain Devendirane, with a view to wreak vengeance on him for providing information to the Customs authorities at Karikal in respect of the systematic smuggling of goods carried on by the acquitted accused and these accused. Accused Nos. 2 to 4 are said to have directly assisted in the kidnapping or abduction. The tenth accused is the driver of the taxi in which the abducted victim was ultimately taken to the spot of murder. Prosecution further claims that accused Nos. 1 to 3 inflicted physical torture upon Devendirane, that the young man died then, or a little subsequently, and that accused Nos. 5 to 7 and the ninth accused, the last three of whom are not before us, took the dying victim or the dead body in a country craft (catamaran) out into the sea, and threw the young man overboard. Admittedly, the body has never been recovered. Sabapady alias Kichenassamy Nadar, who according to the prosecution, was the true architect of this crime, was not physically present during the operations, and has been acquitted upon a plea of alibi, which was accepted by the Tribunal Criminal. One Ramayen, a minor, was also charged for complicity, being the son of the aforesaid Sabapady Nadar; his case is not now before us.

4. There can be no doubt at all that Devendirane (deceased) was a valuable informer of smuggling operations to the Karikal Customs authorities, and it seems to us equally clear that Sabapady alias Kichenassamy Nadar, and accused Nos. 1 and 5 were in a group conducting smuggling operations on a large and determined scale. In August 1959, as a result of information given by Devendirane, a large quantity of smuggled camphor was seized in the village of Sabapady. In April, 1960, again, there were two seizures in rapid succession, of a very large quantity

of smuggled goods mainly cycle parts, stored clandestinely, in huts in Kuppuchetty Chavadi village. These seizures made Sabapady and accused Nos. 1 and 5 so furious with Devendiran, that they hatched this plan to abduct this young man, and to subject him to serious physical violence.

5. We have the evidence of the actual kidnapping and abduction of the victim, on the 28th April, 1960, the vehicle used being the taxi driven by the tenth accused. It is not necessary to proceed into all the particulars here. The victim was physically maltreated, in the taxi itself, and then taken to a place on the coast near Kanniyakovil, after which the victim was forced to walk towards a casuarina tope, two kilometres to the southeast. After this, we have only the unreliable and mutually incriminating statements of several co-accused. But it is clear that the young man was either done to death, with stick blows and other forms of violence, or that he was so seriously injured that he was in a comatose condition. A country craft (catamaran) was brought by the fifth accused and three of his men, and the young man was placed in a gunny, and taken in the boat some distance into the sea, where the gunny was weighted by a sand-bag, and the body itself thrown into the sea. It has never been recovered. One point of some importance is whether, under those circumstances, a conviction for murder could be sustained, in the absence of the corpus delicti, or medical evidence about the cause of death. But as laid down by Lord Goddard, C.J., in *Regina v. Onufrejczyk* L.R. (1955) 1 Q.B. 388, it is now well settled law that the recovery of the body is not essential for proof of a charge of murder. The fact of death by homicidal violence can be proved by circumstantial evidence, provided that the jury are warned that the evidence must irresistibly lead to that conclusion. In the present case, if the evidence is believed there can be no doubt whatever that this Devendiran was done to death, and that his unconscious or dead body was then taken out into the sea and drowned in the sea.

6. We shall, a little later, notice the articles of the Code Penal, which are relevant with regard to the several convictions of the appellants before us, and we shall also notice the facts which may justify in each case, the application of the concerned article of the French Penal Code. For the moment, we shall note the broad facts of the procedure adopted as this is one of the very early cases coming

up to this Court on appeal from a Criminal Session of the Pondicherry Courts, and the variations in the procedure alone would by themselves, appear to merit scrutiny and reference. The matter was investigated, and enquired under relevant heads of offences by the Juge d' Instruction, and the statement of the accused were recorded besides the evidence of witnesses, as also the answers of the accused in confrontation in the presence of those witnesses, as provided for by the Code of Instruction-(Criminal) which was then applicable to. Pondicherry territory. Under Article 133 of this Code, the Judge then remitted the matter to the Chambre de Mises en Accusation which is the Session of the Tribunal Superieur d' Appel. This body deliberated the case, and then, referred the trial to the Tribunal Criminal, Karikal which plays the part of Cour d' assizes under Article 231. In effect, the Chambre found that the facts were adequate to establish the charges prima facie, and that the accused should be tried on them; this would appear to be a procedure parallel to our own committal proceedings.

7. Before the Court of Session, the trial was conducted with the aid of a jury. The jury, by a majority verdict, affirmatively found in respect of the charges that now concern us against accused Nos. 1, 2, 3, 4, 5 and 10. The Court has ultimately accepted these verdicts, acquitting Sabapady and exempting the case of minor Ramayen, and sentenced accused Nos; 1, 2, 3 and 5 to twenty years of hard labour and accused No. 10 (the taxi driver) to ten years of hard labour, while accused Nos. 4, 6, 7 and 9 were sentenced each to five years of hard labour.

8. It is very pertinent to note the grounds, whether they arise under the Pondicherry (Administration) Act, or by virtue of the powers we have inherited from the Cour de Cassation (Paris), upon which we could properly interfere with a majority verdict of a jury, of this kind. As in the system of jurisprudence that has been administered in this country, from the British period, the jury would appear to be the sovereign and exclusive judges of fact, even under the French processual law. But the verdict can certainly be questioned by means of a Pourvoi en Cassation, on grounds held admissible by the precedents.. They are, generally stated, the violation of formalities prescribed on pain of nullity in cases of non-compliance; a violation of law; the incorrect application of law; and, finally, incompetence or excess of power. The respective domains of the jury and the

Court have been enunciated in precedents of the Cour de Cassation which are to be found in Dolloz, Repertoire Pratique volume VII, Code of Criminal Instruction, Sections 1821, 1822, 1825, 1846, 1847 and 1849. For our present purpose, it is important to note that, under Section 1822, while the jury are the sovereign judges of fact, the question whether those facts and circumstances establish the ingredients of a crime and, if so, the particular character of the crime so established, is a question for the Court to decide; in other words, a fallacy or defect in this application of the law to the facts, can constitute a valid ground for interference in cassation.

9. Having stated so far, we may next proceed to consider the articles of the French Code Penal that have been applied to the present case and the individual cases of the appellants in relation to the convictions. Article 341 relates to unlawful detention of a person and, under Article 344, Paragraph 3, the punishment for the offence is death, if the persons arrested or imprisoned or detained have been physically tortured. Under Article 295 voluntary homicide is defined as murder, and, under Article 296 every murder committed with premeditation or accompanied by lying in wait for the victim is assassination. Article 302 relates to the punishment for murder, and Article 303 for assassination. Articles 59 and 60 deal with the principles of being an accessory to a felony or misdemeanour, and to what would constitute the offence of abetment under our own criminal law.

10. We shall now proceed to scrutinize the individual cases of the appellants. But, before doing so, we desire to observe that no facts appear to have been established even on the record, as it stands which would justify the application of the sections, relating to murder and assassination (Articles 295, 296, 302, 303 and 304) to any of the appellants. The truth here is that while we have evidence, and acceptable evidence, concerning the plain kidnapping and abduction of the victim Devendirane, the actual circumstances of the murder are shrouded in an almost impenetrable obscurity. There is no approver in the cast, and, on this aspect, we have really to depend on the statements on confrontations of the several appellants, to the extent to which they implicate the concerned deponents and co-accused. But a remarkable feature of the case, which however, is by no means unnatural is that while every appellant admits the circumstances of abduction, and

the ultimate carriage of the victim to the sea, where his body was thrown, each appellant is equally anxious to implicate the others and not himself, in the actual murder. There is no independent evidence corroborative of the charge of murder, against any appellant. The statements of co-accused are considered as accomplice evidence, but under the French Criminal Law, they are worthless unless they are corroborated in detail. As laid down by Dalloz, Repertoire Pratique, volume 12, paragraph 102.

One co-accused cannot be a witness against the other co-accused when they are tried under the same proceedings.

11. Upon these grounds, therefore, we have no hesitation in setting aside the convictions upon what, under our law, would be termed capital charges. There is no legal evidence to substantiate those charges, and, the total absence of legal evidence constitutes a valid ground for our interference.

12. But we are equally clear that the convictions under Article 341 read with Articles 344, 59 and 60, of the French Penal Code ought to be sustained, for the abduction, kidnapping and physical torture of the victim even en route, are abundantly established by the statements, confrontations and corroborative evidence of witnesses like Cannousamy, Caliaperoumal, Marimouthu and Muthammal. Accused No. 10 explicitly admitted his presence and participation, and the handing over of Devendirane (victim) to the three fishermen, accused Nos. 6, 7 and 9 serving under accused No. 5, near Kanniyakovil. Accused No. 5 admits that the body was taken out into the sea and thrown into the sea, though he would have it, that he fetched the catamaran at the bidding of the first accused, for a totally different purpose, according to his impression; the entire command to dispose of the body was a most unpleasant shock for him, and while he was a privy to the abduction and kidnapping of the victim, and even to the use of some physical violence by the others, he never dreamt that anybody would proceed so far as the murder of victim. The first accused has made similar admissions, at least of complicity and participation in the abduction, kidnapping and physical violence employed in the course of unlawful detention, towards the victim. Strictly speaking, Article 344, Paragraph 2 may not apply, since we do not know who

among the assailants was specifically responsible for physical torture of the victim. But there can be no doubt that Article 341 applies, and under Article 19:

A sentence to hard labour for a limited time, shall be imposed for no less than five nor more than twenty years.

We, therefore sustain those convictions which would strictly speaking, enable the Court of Sessions to impose a punishment up to twenty years of hard labour in this case.

13. But, on the matter of sentence, there is undoubtedly room for interference by this Court; it is not in dispute that that such interference is competent where warranted, by virtue of our powers derived from Section 10 of the Pondicherry (Administration) Act (XLIX of 1962). The offence itself occurred on 28th April, 1960, and there would appear to have been a prolonged detention of the appellant in custody which would be normally inconceivable under the criminal processual law and the Constitution, prevalent in the rest of this country except Pondicherry area, and now prevailing there after the recent extension of our criminal law to that State also. Further, for the grounds already stated by us, we are unable to sustain the convictions of the appellants upon the main charge of murder, which is really a grave charge. It is even conceivable that the kidnapping and violence were originally intended for quite a different purpose of intimidating the victim (Devendirane) into submission, and of compelling him to attest or sign some document which could be used against him; his captors probably never intended to go so far as murder and that must have the unfortunate result of some excessive violence employed by some one or other of the underlings. For these reasons, we are of the view that in the case of accused Nos, 1, 2, 3, and 5, who are the appellants who took the major part in the kidnapping and abduction, a sentence of seven years' hard labour will be adequately deterrent in the interests of justice. Accordingly we alter the sentences to such periods which will be inclusive of all periods of imprisonment undergone by these appellants after the committal by the Chambre de Mises en Accusation. In the case of the taxi driver (accused No. 10), it is quite likely that he was a relatively unwilling tool of the more designing and forceful personalities hence we reduce the sentence to five years'

hard labour, again to commence from the same date Finally we may observe that there were no arguments addressed before us on the quantum of damages awarded in this case to the wife of the deceased, the injured party civile. This is a matter totally within the competence of the trial Court, and we direct that the convicted accused are jointly and severally liable for payment of these damages under the provisions of Article 55 of the Code Penal.

14. We desire to record our obligation to Mr. C. Ramakrishna who acted as amicus curiae for accused 2, 3 and 10 and also the fact that the translations of the voluminous records of statements confrontations and evidence into English from the French were carried out in the High Court.

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