

In Re: Balan Alias Balusami Mudali and ors.

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Court : Chennai

Decided On : Nov-07-1972

Reported in : 1973CriLJ1311; (1974)2MLJ460

Appellant : In Re: Balan Alias Balusami Mudali and ors.

Judgement :

K. S. Venkataraman, J.

1. Three persons were tried by the learned Sessions Judge of Salem in connection with the murder of one Palani Chetti. The first accused has been convicted of the offence Under Section 302, Indian Penal Code, for causing the death of Palani Chetti by squeezing his testicles on 23rd February, 1972. The second accused has been convicted Under Section 109 and Section 302, Indian Penal Code, for abetting the offence of murder by pushing the said Palani Chetti on the ground and by catching hold of the legs of Palani Chetti to enable the first accused to squeeze his testicles. The third accused has been similarly convicted of the offence Under Section 109 and Section 302, Indian Penal Code of abetting the murder, by catching hold of the hands of Palani Chetti when A-1 squeezed his testicles. All the three have also been convicted Under Section 201, Indian Penal Code. They have been sentenced to death, subject to confirmation by this Court for the major offence Under Section 302 or Section 109 and Section 302, Indian Penal Code and to rigorous imprisonment for two years, each for the offence Under Section 202, Indian Penal Code.

2. Palani Chetti used to purchase fried gram from P.W. 2 (Raman alias Ramaswami) and sell it in shandies, in particular at Tiruchengode. P.W. 1, Sellammal, was the concubine of Palani Chetti. She says that Palani Chetti left the house on the morning of Tuesday, 22nd February, 1972 and did not return home thereafter.

3. On Tuesday, 22nd February, 1972, P.W. 2 found Palani Chetti under the influence of drink when he was selling the fried gram at Tiruchengode. P.W. 2 advised Palani Chetti not to do business after drinking arrack.

4. The prosecution case is that on Wednesday, 23rd February, 1972, Palani Chetti, the three accused, witness Mukkuni alias Murugesan (P.W. 5) and witness Balavannan (P.W. 3) played cards from morning till 6 P.M. Palani Chetti won the game. P.W. 3 went away to his house. The rest went away to a toddy-shop. They all drank toddy. The accused and P.W. 5 asked Palani Chetti to pay for the toddy (evidently because he had won the game). But he declined. After taking toddy, they played cards again. At that stage, accused 1 and 2 beat Palani Chetti with hands and he fell down. The third accused caught hold of his hands; the second accused held his legs; the first accused squeezed his testicles. Palani Chetti cried that he was dying. In fact he died. The second accused took the dhoti of Palani Chetti, tore it and tied it around the neck of the dead man. He went up a building, and A-1, A-3 and P.W. 5 lifted the body and hung it. The dhoti gave way. Thereafter they hung the corpse from a tree.

5. On 24th February, 1972, the village Headman, P.W. 11, got information that the corpse of a male was hanging in a tree in the shandipet. He went to the spot and saw the body of Palani Chetti hanging from the tree. He sent his usual report to the Police. The Police came on the scene and held the inquest. The post-mortem examination was conducted by the doctor, P.W. 8. She found that death was due to squeezing of the testicles and the contributory cause was asphyxia. The hyoid bone, however, was not broken.

6. The accused are alleged to have been absconding. P.W. 13, the Inspector of Police, arrested accused 2 and 3 on 24th March, 1972 and the first accused on 29th March, 1972. He sent a requisition to the Magistrate to record the

confessional statement of the first accused. The first accused was produced before the Sub-Magistrate, P.W. 9 at 1-45 P.M. on 1st April, 1972. P.W. 9 took the usual precautions, gave him the usual warnings and gave him time for reflection till 3rd April, 1972. He repeated the prescribed questions and on being satisfied that the first accused was going to give a voluntary statement, recorded the statement, Exhibit P-8.

7. In Exhibit P-8, the first accused refers to their playing cards together and going to the toddy-shop and to the deceased declining to pay the money for the drinks. He proceeds:

We were all drunk. Rajamanickam (A-2) pushed Palani Chetti down and caught hold of his throat. Palani Chetti cried out 'Ayyoh'. I squeezed his testicles. The others were by the side. Because I squeezed his testicles, Palani Chetti breathed his last. Rajamanickam (A-2) untied his (deceased's) dhoti, tore it and wound it round the neck and got up a tiled house. We lifted the body and hung it. But the dhoti gave way. Hence we took the corpse to a neighbouring tree and tied it up there. It was about 9 o'clock in the night.

8. Accused 1 retracted his confession both in the committal Court and in the Court of Session and said that he made it because of police pressure. The three accused denied participation in the occurrence. They did not adduce any evidence.

9. Besides the confession, Exhibit P-8, the prosecution sought to rely on the evidence of P.Ws. 3, 5, 6 and 7. In particular, according to them, P.Ws. 5, 6 and 7 were actual witnesses to the murder. But, unfortunately for the prosecution, they turned hostile even in the committal Court, and even in the Sessions Court they were hostile to the prosecution. Because they were hostile to the prosecution even in the committal Court, their depositions in the committal Court were not marked Under Section 288, Criminal Procedure Code, at the trial, because it would have served no purpose. P.W. 3, also turned hostile to the prosecution at the trial, and his statement in the committal Court was not marked Under Section 288, Criminal Procedure Code, as even that was virtually hostile to the prosecution. However, all these persons, P.Ws. 3, 5, 6 and 7, had given statements Under Section 164,

Criminal Procedure Code, supporting the prosecution. The learned Sessions Judge has relied upon these statements Under Section 164, Criminal Procedure Code, as corroborating the retracted confession. In this, he is clearly wrong, because statements Under Section 164, Criminal Procedure Code, are not substantive evidence and they could only be used to corroborate the witnesses if they themselves gave direct evidence in the committal Court, that would have been marked as substantive evidence Under Section 288, Criminal Procedure Code. In the absence of substantive evidence of the witnesses, whether directly given in the Court of Session or given in the committal Court and marked Under Section 288, Criminal Procedure Code, the mere statements of those witnesses Under Section 164, Criminal Procedure Code, cannot be substantive evidence and cannot be used in any manner to corroborate the retracted confession, Exhibit P-8. The position is well settled. It is enough to refer to the decision of their Lordships of the Supreme Court in *State of Delhi v. Shri Ram Lohia* : AIR 1960 SC490 , where their Lordships says that statements recorded Under Section 164, Criminal Procedure Code, are not substantive evidence in a case and cannot be made use of except to corroborate or contradict the witness.

10. Since the judgment of the learned Sessions Judge is vitiated by a fundamental error, we have had to examine the evidence ourselves with greater care. So far as the confession of the first accused is concerned, we find one circumstance which throws doubt on its being voluntary. We refer to the circumstance that according to the evidence of P.Ws. 1 and 3, the first accused as well as accused 2 and 3 were kept in the Police Station even from Friday, following the occurrence, that is to say, even from 25th February, 1972, which means a month before the dates of their alleged arrest, according to P.W. 13. If the confession was recorded after detention of the first accused in the custody of the Police for more than a month, obviously it cannot be safely said that it was 'voluntary'. Incidentally we have to point out that the learned Magistrate P.W. 9 should have recorded the questions put to the accused and his answers in view of Sections 164 and 364, Criminal Procedure Code, and Rule 74 of the Criminal Rules of Practice. He only narrated what happened.

11. Even assuming for the sake of argument, that it was voluntary, still, according to the decisions of the highest Court, corroboration would be necessary, since it has been retracted. It is sufficient to refer to the decision of the Supreme Court in *Subramania Goundan v. The State of Madras* : 1958 CriLJ238 , where their Lordships point out:

But the view taken by this Court on more occasions than one is that as a matter of prudence and caution which has sanctioned itself into a rule of law, a retracted confession cannot be made solely the basis of conviction unless the same is corroborated -- one of the latest cases being *Balbir Singh v. State of Punjab* : 1957 CriLJ481 .

Their Lordships proceed to observe:

But it does not necessarily mean that each and every circumstances mentioned in the confession regarding the complicity of the accused must be separately and independently corroborated, nor is it essential that the corroboration must come from facts and circumstances discovered after the confession was made. It would be sufficient, in our opinion, that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession.

12. Their Lordships point out that the standard of corroboration required in the case of a retracted confession is not so high as that required in the case of the testimony of an accomplice. In that particular case, their Lordships found that the confession was true and genuine and it was further corroborated by the presence of human blood on material objects Nos. 10, 11 and 12 which were recovered from the possession of the accused.

13. In this particular case, we have seen that the principal witnesses, P.Ws. 5, 6 and 7, who were put forward as eyewitnesses to the occurrence, did not support the prosecution. Even if P.W. 3 had given evidence, as was expected by the prosecution, and had not turned hostile, it would have only meant that the accused and the deceased were together sometime before the occurrence and would not have carried matters further.

14. The learned Sessions Judge has referred to the evidence of P.W. 4 in the committal Court that he found the deceased in the company of the accused and P.W. 5 in the toddy-shop on the date of occurrence at about 6 p. M. that they took toddy, that the accused and P.W. 5 demanded money from the deceased for paying for the toddy, but that the deceased refused to pay and so there was a quarrel amongst them and that he (P.W. 4) after witnessing this quarrel, left for his house. We may at once observe that the evidence of P.W. 4 in the committal Court was not brought on record Under Section 288, Criminal Procedure Code, at all. Actually a sentence of his evidence in the committal Court was brought on record as Exhibit D-4 by the defence to contradict him. Hence, legally, it was not permissible for the learned Sessions Judge to rely on any other portion of the evidence of P.W. 4 given in the committal Court (see Kumaraswami Naicker : (1963)1MLJ330 , In re.). It may further be observed that even if it was permissible to look into that evidence, it would not have carried matters far, because, it did not relate to the actual quarrel in which the accused are alleged to have committed murder of Palani Chetti; it referred to an antecedent quarrel.

15. It is true that the medical evidence may be said to corroborate the confession to some extent, because the doctor found that death was due to squeezing of the testicles and asphyxia was the contributory cause. But at the same time, we are bound to remark that though in the confession, the first accused said that the second accused pressed the throat of the victim, the hyoid bone was intact. But this medical evidence would not necessarily show that the persons who committed the murder were all or any of the accused.

16. Thus the fact remains that besides the confession, Exhibit P-8, there is absolutely no evidence to connect any of the accused with the murder. There were not even blood-stains on the garments of any of the accused.

17. For all the above reasons, we feel bound to set aside the convictions of the first accused.

18. We might straightaway observe that so far as the second and third accused are concerned, there was absolutely no justification for the learned Sessions Judge to convict them, because, so far as they are concerned, the statements of

P.Ws. 5, 6 and 7 Under Section 164, Criminal Procedure Code, are not substantive evidence and under those circumstances the confession of the first accused could not even be taken into consideration Under Section 30, Evidence Act. The meaning of Section 30, Evidence Act, as pointed out in more decisions than one, is that if, apart from the confession of the co-accused, there is sufficient evidence against the remaining accused, which if accepted, would be sufficient to sustain a conviction the confession of the co-accused may be used to lend assurance to that evidence in order to convict the remaining accused. *Haricharan Kurmi v. State of Bihar* : 1964 CriLJ344 .

19. In the result, we set aside the convictions and sentences of the accused, acquit them and set them at liberty. The appeals are allowed.

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