

SUPREME COURT OF INDIA

A.J.Peiris

Vs.

State of Madras

Crl.A.No.5 of 1954

(Mehr Chand Mahajan, C.J.I., Vivian Bose and Ghulam Hasan, JJ.)

18.03.1954

JUDGEMENT

GHULAM HASAN, J.:

1. This appeal is brought by special leave against the appellate Judgment and order dated July 31, 1953, of the Madras High Court, upholding the conviction and sentence of death of the appellant under section 120-B, read with section 302 and Section 109 of the Indian Penal Code passed by the Sessions Judge, South Kanara, on November 29, 1952.

2. The appellant A. J. Peiris was charged along with Augustine Souza and David Souza with having conspired with one Albert Patrao between November and December 1950 to Murder George, the deceased, and that in pursuance of this conspiracy George was murdered on December 20, 1950, at Kuthethur in Mangalore Taluk at about 10 P.M.

There was also a charge under section 201 of the Indian Penal Code for causing the disappearance of the evidence of murder. The Sessions Judge of South Kanara, who tried the case, convicted the appellant under section 120-B, read with section 302 and section 109 of the Indian Penal Code and sentenced him to death. The other two accused were convicted under section 302/34 of the Indian Penal Code and sentenced to death. No conviction was recorded in respect of the charge under section 201 of the Indian Penal Code.

3. The appellant Peiris is a native of Ceylon who used to reside in Ceylon House, Bombay. He posed as a big diamond merchant and a prosperous business man who had numerous contacts with Maharajas and other big people as his clients. Between 1922 and 1942 he appears to have had at least ten convictions to his credit for theft, house-breaking and other offences. In 1946 he met a woman called Lucy Patrao who was then living in Bombay and married her. Lucy is the sister of Albert Patrao who figures as an approver (P. W. 60) in the case. David Souza is the maternal uncle of Lucy and Albert.

In 1947 or so Peiris set up a house in Bangalore where he met George who was then working as salesman in the Radio shop of one Suresh Trivedi (P. W. 32). George worked with Trivedi for a year and half but left him in the latter half of 1947. Early in 1949 Peiris moved to Mangalore where he took a house in which George began to live as a member of his household. In 1950 he moved into a house in Bijey where George continued to live in his household. This house was expensively furnished and gave an impression to the visitors that it was occupied by a prosperous man. Peiris

himself was absent most of the time and visited Mangalore from time to time when he stayed in Bijey.

On September 13, 1950, the sub-Inspector of Police, Crime Branch, Mangalore, searched this house on information received from the Bombay Police, Peiris concealed himself and avoided the police. He disappeared soon after saying that he was going to Bombay. Lucy stayed with George in this house. The two became unduly familiar and conducted themselves as if they were husband and wife. George after moving into the house at Bijey took to excessive drinking. Augustine and Albert became frequent visitors to the house and the three used to go about a great deal and drink together. They became intimate friends, Georgae's immoderate drinking upset Peiris who became nervous that George might not betray him. It is alleged that George and Peiris exchanged hot words when Peiris returned to the house a month and a half after the search.

4. In November 1950, Albert was working in a restaurant in Bombay but Peiris persuaded him to leave service and come with him to Mangalore. Albert reluctantly agreed and came to Mangalore with Peiris on November 22. Peiris introduced George to him as his clerk. The story as given by the approver then proceeds that Peiris told Augustine and Albert that George was drinking heavily, was wasting his money and was creating lot of trouble. He apprehended that he might betray his secrets. He told Albert that George should be murdered.

Albert at first refused to be a party to this conspiracy but eventually agreed when he was told by Augustine that he would give the necessary help to him. Augustine told Peiris that he had agreed to murder George as Peiris had promised to pay Rs. 12,000/- to him to save his properties. Albert was still unwilling but as a result of further discussion between the three persons he decided to join. This conversation took place on November 24 and 25. Peiris suggested that the murder should be committed within 10 to 20 days, that the corpse should be destroyed so as to leave no traces of identity and that the head should not be traced.

On November 26, Augustine suggested that the murder should be committed in Kulur, place five miles away from Mangalore, Augustine proposed that Albert should speak to his uncle David and bring him into the conspiracy. On December 2, Peiris sailed from Mangalore to Bombay. Not having heard anything about what had happened in the meantime he sent a letter to H. K. Thingalaya (P. W. 13) asking him for news about his house-hold. P. W. 13 after visiting his house in Bijey and meeting George sent a telegram (P. 21) on December 11 saying that all was well.

On December 12 Albert went to David and suggested to him that he should assist in the murder of George. He told him that Augustine had promised to speak to Peiris to pay him Rs. 2,000/-. David being only a daily labourer at first protested but later agreed. The party having perfected their plan took George on December 19 from the house in Bijey to David's house in Kuthethur where they spent the night. On December 20, George was made to drink heavily so much so that he became completely helpless and had to be helped to get up. They took him to a hillock behind David's house which was about a furlong away and made him sit down there.

According to the approver a rope was looped round the neck of George under instructions from Augustine, and he and David pulled at both ends of it. George was thus strangled. His clothes were taken off and put into a bundle together with the shoes. The body was carried to a well about 15 or 20 feet away. The corpse was thrust into a gunny bag. It was carried to a well nearby which was being dug. A pit was made in the earth thrown up by the well. The gunny bag was then opened and the head severed from the trunk. The head was tied in a piece of cloth. The trunk was pushed back

into the gunny bag which was buried in the mound of earth.

The skull in its wrapping of cloth was cast into the well after it had been weighted with stones. The shoes and socks were deposited in a rock nearby and the clothes were brought to the house of David where they were burnt. On the morning of the 21st Augustine and Albert left David's house. On the 23rd, about 10 or 11 a.m. a coolie while working discovered the gunny bag which he untied and noticed a human hand sticking out. The matter was reported to the Patel who informed the police. Albert came to know of it and went to Bijey's house. He told Augustine whom he found there not to stir out of the house.

On December 28m Lucy sent an express telegram to Peiris saying 'On receiving this wire start home'. Peiris flew to Madras and from there travelled by train to Mangalore which he reached on the 1st of January, 1951. On January 5, Peiris and his wife, her brother and sister all left Mangalore by the mail train travelling first class for Bangalore. They were, however, detrained at Podanur and were arrested by the Railway Police. They were produced before the Magistrate and released on bail. On the 8th January, Peiris ran away from the bail to Bombay where he was arrested on March 20, 1951. He was brought to Mangalore and kept in the sub Jail but he escaped from there in August 1951. He was eventually arrested in Delhi in October, 1951

5. On July 24, 1951, the Police submitted the charge-sheet against all the three accused and Albert. Albert, however, could not be traced and the Magistrate proceeded against the other accused and committed them to the Sessions on August 4, 1952. On July 28, 1952. Albert was arrested in Bombay. He was produced before the 7th Presidency Magistrate as he offered to make a confession. The Magistrate gave him time up to the 12th August to reflect over the matter and sent him to court custody directing that no Police Officer should meet him. His confession was recorded on three days, 14th, 18th and 19th August, after all the formalities had been duly observed, on 25th he was sent to Mangalore from Bombay.

On the 28th he was granted pardon (P. 18) by the District Magistrate, South Kanara. His statement was then recorded as an approver (P. 85). The inquiry before the Committing Magistrate had already been concluded when Albert was examined as a supplementary witness under section 219 of the Criminal Procedure Code in the presence of the accused. The accused were further examined under section 342 of the Code of Criminal Procedure. In the court of Sessions the approver resiled from the statement he had made before the Committing Magistrate and the learned Sessions Judge thereupon treated his evidence given before the Committing Magistrate under Section 288 of the Code of Criminal Procedure.

6. The case against the appellant rests on the evidence of the approver which is corroborated in material particulars by other prosecution evidence in the case. The Sessions Judge accepted that evidence and convicted the appellant. In appeal the two learned Judges, Balakrishna Ayyar, J. and Chandra Reddi, J. agreed in upholding the conviction of the other two accused but differed in respect of the guilt of the appellant.

Balakrishan Ayyar, J. was of the opinion that the approver's evidence regarding the guilt of the appellant was fully corroborated, while Chandra Reddi, J. did not think it safe to rest the conviction upon the material on the record. The case was then referred under the provisions of section 378 of the Criminal Procedure Code to a third Judge Rajagopalan, J. who agreed with Balakrishna Ayyar, J. in upholding the appellant's conviction and sentence.

7. The only question which has been argued before us on behalf on the appellant is that Albert was an accomplice or a co-accused in the Court of the Committing Magistrate, that before tendering the pardon to him he had not been discharged and consequently his evidence as an approver was not legally admissible. It is also contended that as the commitment had already been made, the only court which could direct tender of pardon was the court of Sessions Judge and not the District Magistrate who actually tendered the pardon. We are of opinion that there is no substance in either of the two contentions.

8. In support of the first contention reliance is placed on the following cases : - 'Mahandu v. Emperor', AIR 1920 Lah 215 (A), --- 'Alladad v. King-Emperor', 9 Pun Re Cr. 1906 p. 19(B); -- 'Reg. V. Hanmanta', 1 Bom 610(C).

9. The facts proved in the case do not support the first contention. The order of the District Magistrate tendering pardon to the approver was passed on August 28, 1952. Albert admitted before the District Magistrate that the confessional statement made by him at Bombay a copy of which was read over to him was voluntarily made by him and that he accepted it as a true statement of all that transpired in connection with the conspiracy and also about the murder and disposal of the dead body of George. The District Magistrate thereupon passed the order that it was a fit case for tendering pardon to him under section 337(1), of the Criminal Procedure Code. The objection that the tender of pardon was illegal in the absence of a formal order releasing Albert as an accused was never raised before the courts below.

Apart from this we are of opinion that there is no merit in this objection. We think that the moment the pardon was tendered to the accused he must be presumed to have been discharged whereupon he ceased to be an accused and became a witness. The first case relied on was a case to which the provisions of section 337 of the Code of Criminal Procedure did not apply. It is also distinguishable on the ground that the accused there was mentioned in the charge-sheet sent by the Police and only a promise had been made to him that he would not be prosecuted and that he should be discharged from his bail and examined as a witness. The Police did not remove him from the category of the accused and in fact they could not do so as he could be discharged only by the order of the Magistrate.

In the Present case the pardon was tendered by the Magistrate and there is nothing whatever to show that albert was treated as an accused after the tender of the pardon. In the second case the offence concerned was not exclusively triable by the court of Sessions and the pardon was not granted under section 337 of the Code of Criminal Procedure. There the evidence was held inadmissible on the ground that the promise not to prosecute was given and accepted after the commencement of the trial and the witness was examined on oath while he still held the position of an accused person.

In the last case the tender of pardon was illegal because the offences to which the trial related were not triable exclusively by the court of Sessions. The Sessions Judge after telling the accused that the pardon was illegal, examined them as witnesses and asked them whether they adhered to the statements which they had made. The High Court expressed a doubt whether such evidence was admissible as the impression caused by the promise of the pardon had not been fully removed but they declined to decide the question. They proceeded on the ground that as the makers of the statements were accused persons and as they had not been legally pardoned, they could not be examined as witnesses until they had been discharged.

10. The second contention is also devoid of substance. By section 338, Criminal Procedure Code,

power is no doubt given after the commitment to the court of which the commitment is made to tender pardon, before judgment is passed, to any person supposed to have been directly or indirectly concerned with any offence or order the Committing Magistrate or the District Magistrate to tender the pardon. The section vests the court to which commitment is made, with power to tender pardon or order the Committing Magistrate or the District Magistrate to tender pardon during the trial of the case but it does not take away the power conferred under the proviso to section 337 (1) of the Criminal Procedure Code the material portion of which is as follows:

"In the case of any offence triable exclusively by the High Court or Court of Sessions The District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or any Magistrate of the first class may, at any stage of the investigation or inquiry into, or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof:

Provided that, where the offence is under inquiry or trial, no Magistrate of the first class other than the District Magistrate shall exercise the power hereby conferred unless he is the Magistrate making the inquiry or holding the trial

11. The proviso contains an additional provision which empowers the District Magistrate to tender pardon where the offences are under inquiry or trial. The present case is covered by the proviso to section 337 and not by section 338 of the Criminal Procedure Code. We hold, therefore that the tender of pardon by the District Magistrate on August 28, 1952, was valid. It is significant that in the courts below no objection was raised to the validity of the pardon tendered by the District Magistrate.

12. A faint attempt was made on behalf of the appellant to challenge the conviction on the merits by contending that the confession was not true or voluntary and that there was no sufficient corroboration by other evidence in the case. This contention involves an investigation into pure questions of fact which we decline to entertain, as we do not think that a finding of fact depending upon the merits or appreciation of the evidence is open to reconsideration is an appeal brought by special leave. Learned counsel has referred to certain passages in the judgments of the courts below and has attempted to argue that the confession is not corroborated by other evidence in the case. We see no reason to differ from the view taken by the Sessions Judge and the High Court on this point. No flagrant error of law or procedure has been pointed out to us in the findings of the courts below, nor are we satisfied that in arriving at findings of fact any miscarriage of justice has resulted to the appellant.

13. We accordingly hold that the conviction and sentence are fully justified and dismissed this appeal.

Appeal Dismissed.

</html