Aftab Ahmad Khan

Vs

The State of Hyderabad

Criminal Appeal No. 82 of 1953

(B.K. Mukherjea, Vivian Bose, Ghulam Hasan JJ)

06.05.1954

JUDGMENT

GHULAM HASAN J. -

The appellant was tried and convicted by the Special Judge, Warangal, for various offences under the Hyderabad Panel Code. These correspond to section 302, 307, 347 and 384 of the Indian Penal Code, the sentences awarded under the first two sections respectively being death and life imprisonment, and separate sentences of two years' rigorous imprisonment under the latter two. The two learned Judges of the High Court, who heard the appeal, differed, Manohar Pershad J. upholding the convictions, and the sentences and M. S. Ali Khan J. acquitting the appellant. The third learned Judge, A. Srinivasachari J., on reference which was occasioned by the difference of opinion agreed with Manohar Pershad J. Leave to appeal to this Court was granted by the two agreeing Judges.

The occurrence which led to the prosecution of the appellant took place on September 13, 1948, which was the beginning of the first day of Police action in Hyderabad. The appellant, who was Reserve Inspector of Police stationed at Mahbubabad at the material time, according to the prosecution story, visited two villages Rajole and Korivi accompanied by a number of Razakars and the Police. He arrested Janaki Ramiah (P.W. 5) and Nerella Ramulu (P.W. 9) at Rajole and took them to Korivi. Outside this village in the waste land he spotted four men going to their fields and shot at them with his gun. The deceased Mura Muthiah and Somanaboyanna Muthandu (P.W. 2) were injured in the knee, while the other two Kotta Ramiah (P.W. 3) and Kancham Latchiah (P.W. 4) were uninjured. The latter two hid themselves behind the babul trees. P.W. 2 also ran away and hid himself in the bajra fields a few yards away but the deceased remained where he fell. The appellant searched for the three persons who had run away. He caught P.W. 3 and P.W. 4 and brought them to the spot where the deceased was lying but he could not trace P.W. 2. The appellant seeing that Mora Muthiah was not dead, shot him in the chest and killed him. The whole party consisting of P.W. 3, P.W. 4, P.W. 5 and P.W. 9 then went to Korivi village. The appellant stayed at the house of one Maikaldari in the village and spent the night there. Maikaldari and one Berda Agiah (P.W. 8) both asked the appellant why he had arrested P.W. 3 and P.W. 4, for they were not Congress men. Upon this the appellant released them. The prosecution story proceeds that the father (P.W. 1) of the deceased saw the appellant in the night of the 13th September and asked him why he had killed his son. The appellant without saying more advised him to cremate the dead body. P.W. 1 borrowed wood from the people and cremated the body. Four months later the appellant went and stayed at the Government bungalow Korivi, sent for P.W. 1 and offered him Rs. 200/- as hush-money for not disclosing the offence. The offer was refused. P.W. 3 and P W. 4 who had been released told the father of P.W. 2 next morning that his son was lying injured in the bajra field. He went and had P.W.

2 removed to the hospital where his injuries were attended to. On the same morning the appellant, who had detained P.W. 5 and P.W. 9 in custody, asked them to pay Rs. 200/- when they would be released P.W. 5 went with a constable to the house of P.W. 6 and P.W. 7 and borrowed Rs. 100/- from each of them. On this being paid he was released. P.W. 9 was unable to pay any money and he was let off.

The defence was a denial of the offence. The appellant denied having gone to the village in question or having committed any of the offences attributed to him. He stated that he was posted at Mahbubabad in order to stop the subversive activities of the communists and that the witnesses being communists had falsely implicated him. He produced witness in defence.

The First Information Report was lodged on April 14, 1949. This delay was due to the distributed conditions prevailing at the time and does not affect the trust of the story. The appellant was prosecuted and the charge-sheet submitted against him on October 30, 1949. The charge was framed by a Munsif Magistrate who committed the appellant to the Sessions. As already stated, the learned Special Judge convicted and sentenced the appellant and his convictions and sentences were upheld by a majority of two Judges.

It has been argued by Mr. Peerbhoy, learned counsel on behalf of the appellant, that his client had no fair trial and has detailed a number of circumstances as supporting his contention. We think it unnecessary to deal with each and every one of these circumstances as in our opinion they do not affect the substance of the matter and are too trifling to justify the conclusion that the appellant suffered any prejudice or that any miscarriage of justice had resulted. We shall confine ourselves only to a few of them which need examination. It was complained that the appellant was not furnished with copies of the statements of prosecution witnesses recorded by the Police and this hampered the appellant in cross-examining the witnesses with reference to their previous statements. It appears that the appellant filed an application through counsel on August 28, 1950, asking for copies of such statements under section 162 of the Code of Criminal Procedure. The corresponding section of the Hyderabad Penal Code is 166 which is not the same as section 162. While under section 162 it is the duty of the Court to direct a copy of the statement of a witness recorded by the Police in the course of investigation to be furnished to the accused with a view to enable him to cross-examine such a witness with reference to his previous statement, no such duty is imposed by section 166 and the matter is left entirely to the discretion of the Court. This application was made for re-cross-examination of witnesses which obviously refers to the last stage of the prosecution evidence. The order passed on the application as translated is unintelligible and does not convey the real intention of the Court. The original which was shown to us, however, leaves no doubt whatever that the Court ordered that the case diaries and the statements were in Court and the appellant's counsel could look into them with a view to help him in the re-cross-examination of the witnesses but if the Court later felt the necessity of furnishing copies, the matter would be considered. No complaint was made before the Special Judge about any prejudice having been caused to the appellant by this order, nor was this point taken before the High Court. Had the appellant any legitimate ground for grievance on this score, he would no doubt have raised it before the High Court. We think, therefore, that there is no substance in this point.

It was also contended that the prosecution should have produced the duty register of the appellant who was a Government servant in order to put the matter beyond doubt whether the accused had left the Head-quarters on the crucial date. We do not think that it was any part of the duty of the prosecution to produce such evidence, particularly in view of the fact that direct evidence of the offence was produced in the case. It appears, however, that the appellant himself summoned the

Sub-Inspector of Police with the attendance register for 1358 Fasli, corresponding to October, 1948. The Deputy Superintendent of Police in his letter had stated that the entries for October were made in the register for 1357 Fasli and that register was destroyed during the Police action. The appellant's counsel inspected the register and on noticing that the entry for October did not find a place therein and had been made in the previous register for 1357 Fasli, which was destroyed during the Police action, he withdrew the witness. The appellant satisfied himself from the inspection of this register that the desired entries were not to be found. Since the register containing the material entries was destroyed, it was impossible for the prosecution to discharge the alleged burden of proving the entries in the duty register on the material date.

It was also faintly contended that there was no evidence to show that Mura Muthiah had actually died. The father of the deceased gave evidence that the dead body of his son was cremated by him and in this he was supported by other witnesses. There is no force in this point.

Upon the whole we are satisfied that the appellant has not been able to substantiate his contention that he did not have a fair trial.

The next contention advanced by the appellant's learned counsel is that there was a misjoinder of charges, that though the charges of murder and attempt to murder could be joined the tried together, the charges of extortion and wrongful confinement were distinct offences for which the appellant should have been charges and tried separately as required by the mandatory provisions of section 233 of the Code. The first two offences took place on September 13, 1948, in the night, while the act of extortion took place next morning on the 14th and the latter charge had nothing whatever to do with the offences committed on the previous night. Learned counsel contends that where, as here, there is disobedience to an express provision as to the mode of trial contained in section 233, the trial is wholly vitiated and the accused is not bound to show that the misjoinder has caused any prejudice to him. The contention is based on the case of Subramania Ayyar v. King-Emperor (28 I.A. 257) showing that the misjoinder of distinct offences being prohibited by the express provision of the Code renders the trial illegal and does not amount to a mere irregularity curable by section 537. This was a case in which the accused was charged with 41 acts extending over a period of two years which was plainly against the provisions of section 234 which permitted trial only for offences of the same kind if committed within a period of twelve months. The decision of Lord Halsbury, Lord Chancellor, in this case was distinguished in the case of Abdul Rahman v. The King-Emperor (54 I.A. 96) by the Privy Council. That was a case of conviction on a charge of abetment of forgery in which the depositions of some witnesses were not read over to the witnesses but were handed over to them to read themselves. It was held that though the course pursued was in violation of the provisions of section 360, it was a mere irregularity within section 537 and that as no failure of justice had been occasioned, the trial was not vitiated. Both the above cases were referred to by the Privy Council in Babulal Chaukani v. King-Emperor (A.I.R. 1938 P.C. 130). The question in that case arose as to the true effect of section 239(d), which provides that persons who are accused of different offences committed in the course of the same transaction may be charged and tried together. The question was whether the correctness of the joinder which depends on the sameness of the transaction is to be determined by looking at the accusation or by looking at the result of the trial. It was held that the relevant point of time is the time of accusation and not that of the eventual result. The charges in this case were conspiracy to steal electricity and theft of electricity both under the Electricity Act and under the Penal Code. The Privy Council referred to the fact that the parties had treated an infringement of section 239(d) as an illegality vitiating the trial under the rule stated in Subramania Ayyar v. King-Emperor (28 I.A. 257) as contrasted with the result of irregularity as held in Abdul Rahman v. The King-Emperor (54 I.A. 96). The Privy Council merely assumed it to

be so without thinking it necessary to discuss the precise scope of the decision in Subramania's case, because in their view the question did not arise. Again in Pulukuri Kottaya and Others v. Emperor (A.I.R. 1947 P.C. 67) the Privy Council treated a breach of the provisions of section 162 of the Code as a mere irregularity curable under section 537 and as no prejudice was caused in the particular circumstances of that case, the trial was held valid. Reference was made to Subramania Ayyar v. King-Emperor (28 I.A. 257) as one dealing with the mode of trial in which no question of curing any irregularity arise but if there is some error or irregularity in the conduct of the trial, even though it may amount to a breach of one or more of the provisions of the Code, it was a mere irregularity and in support of this reference was made to Abdul Rahman v. The King-Emperor (54 I.A. 96). Several decisions of the High Courts were referred to in course of the arguments with a view to showing what is the true state of the law in view of the Privy Council decisions referred to above but we do not think that that question arises in the present case. We are of opinion that the present is not a case under section 233 of the Code and it is, therefore, unnecessary to consider whether the violation of its provisions amounts to an illegality vitiating the trial altogether or it is a mere irregularity which can be condoned under section 537. Section 233 embodies the general law as to the joinder of charges and lays down a rule that for every distinct offence there should be a separate charge and every such charge should be tried separately. There is no doubt that the object of section 233 is to save the accused from being embarrassed in his defence of distinct offences are lumped together in one charge or in separate charges and are tried together but the Legislature has engrafted certain exceptions upon this rule contained in sections 234, 235, 236 and 239. Having regard to the facts and the circumstances of this case, we are of opinion that the present cases fall under section 235. It provides that if in one series of acts so connected together as to from the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence. The prosecution story as disclosed in the evidence clearly shows that the offence of extortion committed on the 14th September was one of a series of acts connected with the offence of murder and attempt to murder committed on the previous day in such a way as to form the same transaction. The prosecution case was what when the appellant accompanied by his party came, he caught hold of two persons (P.W. 5 and P.W. 9) at Rajole and proceeded to Korivi. He took them into custody without any rhyme or reason. Then outside the village seeing the deceased, P.W. 2, P.W. 3 and P.W. 4 he shot at them. The deceased fell down while the others ran away. He pursued them and brought two of them back to the spot where the deceased was laying but was yet alive. He shot him in the chest and killed him. Then he proceeded to the village itself where he stayed for the night. He released P.W. 3 and P.W. 4 on the intercession of certain persons but kept P.W. 5 and P.W. 9 in wrongful confinement and released them only next morning after extorting Rs. 200 from P.W. 5. These incidents related in the evidence leave no manner of doubt that from the moment the appellant started from the Police Station, he committed a series of acts involving killing, injuring people, unlawfully confining other and extorting money from one of them. We are satisfied that the series of acts attributed to the appellant constitute one transaction in which the two offences which are alleged to be distinct were committed. The case falls squarely within the purview of section 235 of the Code and we are, therefore, of opinion that such misjoinder was permitted by the exception. No question of contravention of any express provision of the Code such as section 233 arises and in the circumstances it is not necessary for us to consider how far the violation of any express provisions of the Code relating to the mode of a trial or otherwise constitutes an illegality which vitiates the trial as distinguished from an irregularity which is curable under section 537. This conclusion in our opinion disposes of the contention about misjoinder of the charges. The fact that the offence of extortion was committed at a different place and at a different time does not any the less make the act as one committed in the course of the same transaction.

Turning to the merits of the matter, we are not satisfied that any prejudice was caused to the appellant in fact. It is not possible to say that the Court being influenced by the evidence on the question of extortion was easily led into the error of believing the evidence on the question of murder. The witnesses on the point of extortion are P.W. 5 and P.W. 9. These are the two persons who were taken away from village Rajole and were wrongfully confined, P.W. 5 being released on payment of Rs. 200 and the other let off without payment. These two witnesses are also witnesses to the fact of murder, in addition to the other three witnesses, P.W. 2, P.W. 3, and P.W. 4, P.W. 5 was injured by the gun-shot but survived. The other two were scared on hearing the gun-shot and ran away taking protection under the babul tree. It is not possible to contend that the Sessions Judge having believed the evidence of extortion from P.W. 5 must have been persuaded into believing that the story of murder deposed to be him must be correct, for there is not only the evidence of P.W. 5, but three other independent witnesses.

Lastly it was contended that the judgment of one of the agreeing Judges Manohar Pershad J. is purely mechanical and does not show that he has applied his mind to the facts of the case. No such complaint is made about the judgment of the other agreeing Judge Srinivasachari J. It is true that the learned Judge has made copious quotations verbatim from the evidence of the witnesses and his comment upon the evidence is not as full and detailed as might be expected but this practice of writing judgments in this way seems fairly general in Hyderabad though we cannot help saying that it is not to be commended. It is the obvious duty of the Court to give a summary of the evidence of material witnesses and to appraise the evidence with a view to arriving at the conclusion whether the testimony of the witness should be believed. We do not think, however, that the criticism that the judgment is mechanical and does not show a proper appreciation of the evidence is well-founded.

The prosecution evidence was believed by the trial Judge and the defence evidence to the effect that the deceased was killed by the Military and that the appellant was not present at the time of the occurrence was disbelieved. This finding was accepted by both the learned agreeing Judges. This Court cannot interfere with the finding arrived at on an appreciation of the evidence. We are satisfied that there is no good ground for disturbing the convocation of the appellant.

The only question which remains for consideration is whether the sentence of death is the appropriate sentence in the present case. No doubt there are be special circumstances which justify the imposition of any other but the normal; sentence for the offence of murder. We think, however, that where the two Judges of the High Court on appeal are divided in their opinion as to the guilt of the accused and the third Judge to whom reference is made agrees with one of them who is upholding the conviction and sentence, it seems to us desirable as a matter of convention though not as a matter of strict law that ordinarily the extreme penalty should not be imposed. We according, while maintaining the conviction of the appellant, reduce his sentence to one of transportation for life. In other respects the appeal stands dismissed. All the sentences will run concurrently.

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