K. C. Mathew and Others

Vs

The State of Travancore-Cochin

Criminal Appeal No. 97 of 1953

(N. Chandrashekar Aiyar, T. L. Venkatarama Ayyar, Vivian Bose JJ)

15.12.1955

JUDGMENT

BOSE J. –

This is a case of rioting in which two police constables were killed. Thirty one persons were put up for trial. The learned Sessions Judge acquitted twenty one of them on all the charges and acquitted the remaining ten of the most serious charge of all, namely the offence falling under the sections of the Travancore Penal Code which correspond to section 302 of the Indian Penal Code read with section 149. But she convicted them on several of the lesser charges and imposed sentences ranging from two to five years on each count and directed that the sentences should run consecutively except in the cases of accused 5 to 8 and 18. She sentenced each of them on only one count and so there was only one sentence.

The convicts appealed to the High Court and the State of Travancore-Cochin also appealed against the acquittals on the murder-cum-rioting count.

The High Court dismissed the appeals made by the ten accused and allowed the appeals against the acquittals and imposed the lesser sentence of transportation in each case. These ten accused now appeal here.

The accused are said to be communists. Two of them, namely numbers 30 and 31, were arrested on 27-2-1950 at about 1 p.m. and were confined in the Edappilly police lock up. The prosecution case is that the other 29 accused entered into a conspiracy to release their comrades and in pursuance of that conspiracy attacked the police station at about 2 a.m. on the 28th armed with deadly weapons such as choppers, knives, bamboo and other sticks and a dagger. Two police constables, Mathew and Velayudhan, were killed in the course of the raid.

The first point taken before us is that the charge is not according to law and has prejudiced the appellants in their defence. The complaint on this score is that each accused has not been told separately what offences he is being tried for. They have all been lumped together as follows :

> "The aforesaid offences having been proved by the evidence adduced by the prosecution, you the accused 1-29 have committed offences punishable under....."

and then follow a string of ten sections of the Travancore Penal Code.

We are satisfied that the charge neither caused, nor could have caused, prejudice. The body of the charge set out the fact that the accused 1-29 formed an unlawful assembly and stated the common object; and then the charge specified in detail the part that each accused had played. In the circumstances, each accused was in a position to know just what was charged against him because once the facts are enumerated the law that applies to them can easily be ascertained; and in this particular case it was just a matter of picking out the relevant sections from among the ten mentioned. There is nothing in this objection; section 225 of the Criminal Procedure Code expressly covers this kind of case.

The next argument was that the examination of each accused under section 342 of the Criminal Procedure Code was defective and that that caused prejudice. We agree that the examination was not as full or as clear as it should have been but we are not satisfied that there was any prejudice.

It is to be noted that the question of prejudice was not raised in either of the Courts below nor was it raised in the grounds of appeal to this Court. The point was taken for the first time in the arguments before us and even there counsel was unable to say that his clients had in fact been prejudiced; all he could urge was that there was a possibility of prejudice.

We agree that the omission to take the objection in the grounds of appeal is not necessarily fatal; everything must depend on the facts of the case; but the fact that the objection was not taken at an earlier stage, if it could and should have been taken, is a material circumstance that will necessarily weigh heavily against the accused particularly when he has been represented by counsel throughout. The Explanation to section 537 of the Criminal Procedure Code expressly requires the Court to

> "have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings".

Another strong circumstance is this : the petition for appeal does not set out the questions that, according to the appellants, they should have been asked nor does it indicate the answers that they would have given if they had been asked. Again, though that is not necessarily fatal ordinarily it will be very difficult to sustain a plea of prejudice unless the Court is told just where the shoe pinches. It is true that in certain exceptional cases prejudice, or a reasonable likelihood of prejudice, may be so patent on the face of the facts that nothing more is needed; but that class of case must be exceptional. After all, the only person who can really tell us whether he was in fact prejudiced is the accused; and if there is real prejudice he can at once state the facts and leave the Court to judge their worth. But if the attitude of the accused, whether in person or through the mouth of his counsel, is : "I don't know what I would have said. I still have to think that up. But I might have said this, that or the other", then there will ordinarily be little difficulty in concluding that there neither was, nor could have been, prejudice. Here, as elsewhere, the Court is entitled to conclude that a person who deliberately withholds facts within his special knowledge and refuses to give the Court that assistance which is its right and due, has nothing of value which he can disclose and that if he did disclose anything that would at once expose the hollowness of his cause.

The purpose of section 342 is set out in its opening words -

> "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him".

If the accused is not afforded that opportunity, he is entitled to ask the appellate Court to place him

in the same position as he would have been in had he been asked. In other words, he is entitled to ask the appellate Court, which is the ultimate Court of fact, to take the explanation that he would have given in the first Court into consideration when weighing the evidence in just the same way as it would have done if it had been there all along. But if he does not ask this in the last Court of fact he is in little better position when the case comes here than he would be in had he, say, omitted to call, in his defence, a witness who, he says, would have deposed in his favour. In very exceptional cases he might be allowed to call such a witness even at such a stage, but if he does not ask for that when his case is under appeal he would normally have but slender hope of succeeding here. It is true he is in a stronger position when section 342 is in question because the section places a solemn and serious duty on the Court, and the accused can very rightly and properly complain if the Court fails to do its duty; but when all is said and done, he cannot claim to be placed in a better position than he would have been in had the Court discharged its duty at the outset. Therefore, all he is entitled to say on appear is, "I was not asked to explain this matter. Here is my explanation; this is what I would have said : please consider it". But if he does not take up that position at the appellate stage and complains of prejudice for the first time here, the inference is strong that the plea is an afterthought and that there was no real prejudice.

However, as the true meaning of "prejudice" in section 537 and other sections of the Code is not yet properly appreciated, probably for want of an authoritative decision by this Court, we invited counsel to tell us what questions his clients should have been asked and at any rate to indicate what, according to him, they might reasonably have said. His main grievance on this score is that none of the appellants has been asked about the common object and he said it is obvious that most of them could very reasonably have said that they had no idea that it was murder and that they did not even know that any of the members of the assembly carried lethal weapons.

It is necessary at this stage to explain that both courts find that there was an unlawful assembly and that the police station at Edappilly was raided and that arms and ammunition and some of the station records were carried away by the raiders; also that two of the police constables who were on sentry duty were murdered. The only point on which they differ is about the common object.

The charge set out that the common object was to rescue the 30th and 31st accused by force and to murder the policemen on duty as well as to loot the records, arms and ammunition of the police station. The learned Sessions Judge found, mainly because of a concession made by the Public Prosecutor, that the common object could not be placed higher than that of rescue despite these fact that some of the members were armed with deadly weapons; accordingly she (for the learned Sessions Judge was a lady) acquitted all the accused of the charge under section 302 of the Indian Penal Code read with section 149, or rather under the corresponding provisions of the Travancore Penal Code.

The State appealed against these acquittals and the High Court thereupon convicted on the murder-cum-rioting charge and imposed the lesser sentence. The convicts also appealed but their appeals were dismissed.

In view of the admission made by the learned Public Prosecutor we do not think the High Court was justified in holding that the assembly had the common object to murder but we do not think that that makes any difference to the result.

Even if it be assumed that the common object was only to rescue the two accused who were in the lock up, it is obvious that the use of violence was implicit in that object. People do not gather

together at the dead of night armed with crackers and choppers and sticks to rescue persons who are guarded by armed police without intending to use violence in order to overcome the resistance of the guards; and a person would have to be very naive and simpleminded if he did not realise that the sentries posted to guard prisoner at night are fully armed and are expected to use their arms should the need arise; and he would have to be a moron in intelligence if he did not know that murder on the armed guards would be a likely consequence in such a raid; and what holds good for murder also holds good for looting in general. Now section 149 applies not only to offences actually committed in pursuance of the common object but also to offences that members of the assembly know are likely to be committed. It would be impossible on the facts of this case to hold that the members of the assembly did not know that murder was likely to be committed in pursuance of a common object of that kind by an assembly as large as the one we have here. Accordingly, even if the common object be not placed as high as murder the conviction on the murder-cum-rioting charge was fully justified. This answers the main ground of appeal.

But to go back to the argument about section 342 of the Criminal Procedure Code. What we have to assess here is the explanation which counsel says each appellant could reasonably have given in the trial Court if he had been asked for one, namely that he did not know that any member of the assembly carried lethal weapons and that murder was likely to result. The answer to that is plain. There is nothing to indicate that the appellants are deficient in intelligence and understanding, and if they are judged by the standard of men of reasonable intelligence, as they must be, then an explanation of this kind cannot be believed. Men who band themselves together to rescue persons locked behind prison bars and guarded by armed police do not set out with bare hands and doves of peace; of course, they arm themselves with implements that are strong enough to break open locks and break down doors and iron bars and it is obvious that implements of this kind can be used with deadly effect should the need and the desire to use them in that way arise. It hardly matters whether each member knew the exact nature of the implements, namely that some had choppers and some sticks. It is enough that they knew that instruments that could be used as deadly weapons would necessarily have to be carried if the purpose underlying the common object was to be achieved. Therefore, even if the answer now suggested to us had been given in the trial Court it would have made no difference to the result.

Turning next to the first accused, counsel said that he was not asked about identification in his examination under section 342. But that is not correct. The question put was -

> "P.Ws. 1 and 4 say that they had seen you, beating constables Mathew and Velayudhan, etc."

The point about identification is implicit in this question and we are satisfied that this appellant understood what the question imported because the cross-examination of these witnesses discloses that the question of identity was present to the mind of the cross-examiner; the specifically questioned each witness about the matter.

Next, it was said that no question was put to the first accused about any robbery, but we need not examine this any further because the matter becomes academic once the murder-cum-riot conviction is upheld and once we make the sentences concurrent instead of consecutive as we intend to do.

The arguments on this point about the rest of the appellants except the seventh accused, followed the same pattern and we need not examine them separately.

As regards the seventh accused, the only point of substances in his case is that he was not asked to explain his presence at Kadiparambu where the agreement to rescue and the planning are said to have taken shape. Counsel said that this accused lives there, so the mere fact that he was seen among a crowd that had gathered there in the day time could not be regarded as a circumstance of suspicion. That would have had force had it not been for the fact that he was again seen at the police station at 2 a.m. and was identified as one of the rioters who took an active part in the raid.

We have gone into the question of possible prejudice under section 342 in the way we have because, as we have said, appellants do not appear to appreciate what is necessary when this kind of plea is raised. We do not intend to lay down any hard and fast rule but we do wish to emphasise that what we have done in this case is not to be regarded as a precedent and that in future it will be increasingly difficult to induce this Court to look into questions of prejudice if the requisite material is not placed before it and if appellants deliberately withhold from the Court assistance which it is in their power to render; an inference adverse to them must be expected if that attitude is adopted.

Counsel then tried to attack the credibility of the witnesses and the correctness of the finding generally but, following our usual practice, we decline to interfere with concurrent findings of fact where there is ample evidence which, if believed, can be used in support of the findings. That is the position here.

The only ground on which interference is called for is where the sentences were directed to run consecutively. The High Court confirmed the convictions and sentences passed by the learned Sessions Judge but when it allowed the appeal by the State and passed the lesser sentence it said that "the sentences passed on each accused will run concurrently". We are not sure whether the learned Judges meant that the sentences imposed by them should run concurrently with the others or whether thy meant to allow the appeal to that extent. In order to remove all doubts, we allow the appeal to the extent of directing that the sentences imposed on each accused shall run concurrently and not consecutively. Except for that, the appeal is dismissed.

</html