Abdul Rajak Murtaja Dafedar

Vs

State of Maharashtra

Criminal Appeal No. 245 of 1968

(S. M. Sikri, R. S. Bachawat, V. Ramswami-I JJ)

02.05.1969

JUDGMENT

RAMASWAMI, J. -

1. The appellant was convicted under Sections 302, 307, 325 and 427, I.P.C. and also under Section 126 of the Indian Railways Act by the Additional Sessions Judge of Sangali in Sessions Case No. 9 of 1967. The appellant was sentenced to death under Section 302, I.P.C. No other sentence was awarded for the remaining offences. The appellant preferred an appeal to the Bombay High Court in Criminal Appeal No. 1116 of 1967, which was dismissed on the 17th November, 1967 and the sentence of death imposed on the appellant was affirmed. This appeal is brought by special leave from the judgment of the Bombay High Court.

2. The prosecution case arises out of the derailment of Poona-Wasco Express train at about 4.40 in the early morning of October 10, 1966. The derailment occurred on the Vaddi Bridge which is beyond Miraj station. As a result of this derailment, five bogies were capsized. Out of these five bogies, two went into the stream down below, two were on the slope and one on the track. In this incident ten persons died and a large number of other persons received grievous injuries. The charge against the appellant was that he had removed fish plates, nuts, bolts etc., of the rail joint near Vaddi bridge No. 215 on Miraj-Mhaisal Railway track at Km. No. 743/9 and 10 between 4.05 a.m. and 4.50 a.m. in the early morning of October 10, 1966, with intent or knowledge that he was likely to endanger the safety of the persons travelling in the said train and he caused the Poona-Wasco Express train No. 206 Dn. to be capsized at Vaddi and thereby committed murder knowingly causing deaths of 10 persons who were passengers in that train.

3. The appellant Abdul Rajak Murtaza Dafedar was working at Miraj railway station as gangman in gang No. 13 of which Laxman Madar was the Mukadam or Gangmate and Babu Sopana was the Keyman. The area under this gang was from Km. No. 741/3 to 747/5 covering a railway track of 4 miles or 6 Km. Vaddi bridge falls within this area. Vaddi bridge is at 2 1/2 miles from the railway station of Miraj towards Belgaum. Mhaisal gate is also towards Belgaum at 1 1/2 miles from the railway station on the way to Vaddi bridge. At Mhaisal gate is the quarter of Laxman Madar the gangmate. Near the quarter of Laxman is the tool box where the tools of the gang are kept under lock and key.

4. Vaddi bridge is the biggest bridge out of the seven bridges lying between Km. No. 743/9 to 747/5. The height of the bridge is about 30' to 40'. There are six big arches and two small arches on each side of the bridge. The bridge is of masonary stone. The case of the prosecution is that the appellant quarrelled with Laxman who always found fault with him and did not spare him when he

was absent from or late in attending duties. On two or three occasions Laxman had altercation with the appellant and Laxman had reported against him and Dastgir, a friend of the appellant. On October 9, 1966, an altercation took place between the appellant and Laxman. Laxaman found the work of levelling and packing done by other gangmen except the appellant satisfactory and so Laxman asked the appellant to correct the defect. The appellant got irritated and took exception to the remark of Laxman and rushed towards him with a pick-axe saying that he would break his head. Laxman threatened to report the conduct of the appellant to the Permanent Way Inspector and went away towards the tool box. Laxman got a report written by Maruti about the incident and handed over the report to the Assistant Station Master at about 7 or 7.30 p.m. Train No. 204 was due to arrive and the Station Master was in a hurry and so he despatched the complaint by free service way bill slip through his office boy to the underguard of the incoming train, namely, 204 Dn. According to prosecution case Ramchand Sadre, P.W. 37, saw the appellant going on the track at 3 or 3.15 a.m. P.W. 37 was serving as a Sainik of the Railway Protection Force at Miraj Railway Station. He was on duty at 'G' point from 9 p.m. on October 9, 1966 till 7 a.m. the next day. After the witness saw the appellant going along the track goods train No. 239 arrived at Miraj Railway Station at 4.10 or 4.15 a.m. This goods train had passed the Vaddi bridge at 4.05 a.m. The appellant let the goods train pass and approached the railway bridge at Vaddi with a spanner and removed the fish plates and the keys and jaws of the sleepers of the 18" rail of right hand side of the rail line. When the Poona-Wasco Express Train approached the bridge there was a "thud-thud" sound as if the train was collapsing. The engine driver closed the steam and applied brakes as soon as the engine entered the bridge but before stopping, the engine had covered 3/4ths., length of the bridge. The lights went off, there was screaming and wailing of the people. It was found by the engine driver, guard and others who alighted from the train that the basal wheel of the engine had derailed and the tender of the engine was tilted and to this tender was hanging the first bogie which had vertically fallen down in the stream. The second bogie had completely fallen in the stream. The third bogie had also telescoped like the first bogie resting its one end on the second bogie that had fallen in the stream and the other end at the slope. The fourth bogie had derailed and slanted whereas the front wheels of the fifth bogie had derailed. The engine driver, guard, and one police constable searched and found the affected joint near which had fallen the removed fish plates, nuts, bolts, keys and jaws scattered in undamaged condition. There was also another fish plate and one nut fallen on embankment in undamaged condition.

5. The engine driver made a complaint to the Police Sub-Inspector, Bandigiri. Panchanama of the scene of offence was prepared. The things lying at the spot were not touched but were guarded and an area of half a mile was cordoned off. On October 10, 1966 at 7 a.m. all the gangmen including the appellant collected at pole No. 744/4 for daily work but were asked by the police officers to be seated below the bridge as their statements were to be recorded. Laxman and appellant were also detained for interrogation. On the same night at 8-30 p.m. near the spot of the accident the police dog Sheru of C.I.D., Poona was brought. The appellant, Laxman and five other persons were made to stand in a row facing the rail line in the presence of Panchas. The police dog Sheru was made to smell the affected joint. The leading strap was held by the controller of the dog. The dog after smelling the articles near the affected joint went towards the embankment where one fish plate was lying, smelt it and then went to the row of persons and smelling two persons, smelt the appellant also and bounced upon him with its forelegs resting on the chest of the appellant.

6. On October 17, 1966, the appellant offered to produce the spanner from the place where he had hidden it near the railway track. A Memorandum of his statement was drawn in the presence of Panchas. It is said that the appellant led the Panchas and the police officers to the place between pole No. 744/6-7 and there dug out the earth and took out the spanner and produced it. On October

29, 1966, the appellant made a confession before the Executive Magistrate, Ext. 130.

7. The appellant pleaded not guilty to the charges. He alleged that there was no altercation between him and Laxman and that he did not threaten Laxman with pick-axe. As regards the confessional statement the appellant said that he did not understand Marathi properly and therefore did not know what was written in the statement. He also denied that he had gone to the spot to recover the spanner in the presence of Panchas. As regards the police dog Sheru the appellant said that after smelling the articles on the spot the dog passed him without bouncing upon him.

8. The trial court based the conviction of the appellant on - (1) movement of the appellant on the day of the incident as stated by Ramchand Sadare, P.W. 37; (2) discovery of the spanner with which the nuts and bolts were removed; (3) the confession statement of the appellant made to the Executive Magistrate; and (4) the identification of the appellant by the dog Sheru. The High Court accepted the prosecution evidence on all these points and affirmed the conviction of the appellant.

9. It was contended on behalf of the appellant in the first place that the confession, Ext. 130, recorded by Taluka Executive Magistrate; P.W. 54, was not voluntary. It was pointed out that the appellant was arrested on October 10, 1966 at 11 p.m. and was kept in remand till October 18, 1966. On October 18, a remand application was made and time was granted for a week. On October 25, 1966, the Magistrate directed that the accused should be detained in District Jail at Sangli. The appellant was produced before the Magistrate on October 28, 1966, when there was preliminary questioning and warning given to the appellant. On the next day the appellant was produced before the Magistrate and the confession was made. The argument was stressed on behalf of the appellant that he was in prolonged police custody for at least a fortnight before the confession was made and therefore it must he held that the confession was not voluntary. Reliance was placed on the judgment of this Court, in Nathu v. State of U.P. (AIR 1956 SC 56), in which the appellant was kept in the custody of C.I.D. Inspector on 7th August and the confession was recorded on 21st August. It was held that prolonged custody immediately preceding the making of the confession was sufficient, unless it was properly explained to stamp it as involuntary. No attempt was made in that case to explain the prolonged custody. In the absence of such explanation it was held by the Court that the confession was not a voluntary confession. In the present case the appellant was kept in jail custody for three days from October 25 to October 28, 1966 and on October 28, the Executive Magistrate made the preliminary questioning of the appellant, gave him a warning and sent him back to the District Jail at Sangli. On the next day the appellant was produced before the Magistrate and the confession was recorded. It is clear that the appellant had spent four days in judicial custody and he was not under the influence of the investigating agency for at least four days. Again he had 24 hours to think after he was told by the Magistrate that he was not bound to make any confession and if he made one it would be used against him. It is manifest that the material facts of the present case are not parallel to those of Swaran Singh v. State of Punjab (AIR 1957 SC 637), and the ratio of that case has no application to the present case. It was also argued that the wife of the appellant used to go to the police station with her child and it was at her persuasion that the appellant had agreed to make the confession. The suggestion was that the confession was not voluntary but was made on account of some inducement. But no such suggestion was made to the police officers. The only question put to the Deputy Superintendent of Police, Chavan, was whether the wife of the accused used to go the police station everyday and the witness denied it. According to Chavan, she went to the police station only on October 13 and 18, that is, only on two occasions. No further suggestion was made to Chavan. Apart from this, if any coercion or inducement was used the appellant was the person who should make such a complaint. The appellant, in answer to question No. 77 regarding the confession merely said that he did not make the confession. He did not say that the confession

was made on account of any inducement or coercion on the part of the police. Both the trial Court and the High Court have upon an examination of all the circumstances reached the conclusion that the confession of the appellant was voluntary and we see no reason to take a different view.

10. The next question is regarding the discovery of the spanner. The Deputy Superintendent of Police, Chavan, P.W. 86 was questioning the appellant from the 11th to the 16th October. It was on the 17th October that the appellant was prepared to point out where he had kept the spanner. Two Panchas were called, one of whom is Narayandas Shedji, P.W. 46. In his presence the memorandum of what the appellant stated was made. Therein the appellant said "the same spanner while coming back, I have kept hidden in the shrub on the corner of railway line between pole Nos. 744/6 and 744/7. I will produce the same personally". The appellant then led the Panchas and the police to the spot where he had kept the spanner under the shrubs about 6 inches below the earth which he dug out for taking out the spanner. The Panchanama is Ext. 112. The spanner was found about 5 furlongs from the bridge towards the residence of the appellant. The evidence of the Deputy Superintendent of Police and the two Panchas has been accepted both by the trial court and the High Court. The discovery of the spanner at the instance of the appellant is an important circumstance which corroborates the confession of the appellant that he had removed the fish plates, nuts, bolts and the keys and jaws of the sleepers from the railway line on the alleged date.

11. It was lastly urged on behalf of the appellant that the lower courts ought not to have relied upon the evidence of dog tracking and such evidence was not admissible in order to prove the guilt of the appellant. The evidence of tracker dogs has been much discussed. In Canada and in Scotland it has been admitted. But in the United States there are conflicting decisions :

> "There have been considerable uncertainty in the minds of the courts as to the reliability of dogs in identifying criminals and such conflict of opinion on the question of the admissibility of their actions in evidence. A survey of the cases, however, reveals that most courts in which the question of the admissibility of evidence of trailing by bloodhounds has been presented take the position that upon a proper foundation being laid by proof that the dogs were qualified to trail human beings, and that the circumstances surrounding the trailer were such as to make it probable that the persons trailed was the guilty party, such evidence is admissible and may be permitted to go to the jury for what it is worth as one of the circumstances which may tend to connect the defendant with the Crime." (Para 378 Am. Juris, 2nd Edn., Vol. 29, p.429).

There are three objections which are usually advanced against the reception of such evidence. First, since it is manifest that the dog cannot go into the box and give his evidence on oath, and consequently submit himself to cross-examination, the dog's human campanion must go into the box and report the dog's evidence, and this is clearly hearsay. Secondly, there is a feeling that in criminal cases the life and liberty of a human being should not be dependent on canine inferences. And, thirdly, it is suggested that even if such evidence is strictly admissible under the rules of evidence it should be excluded because it is likely to have a dramatic impact on the jury out of proportion to its true evidential value. In R. v. Montgomery (1866 NI 160) a police constable observed men stealing wire by the side of a railway line. They ran away when he approached them. Shortly afterwards the police got them on a nearby road. About an hour and half later the police tracker dog was taken to the base of the telegraph pole and when he had made a few preliminary sniffs he set off an tracked continuously until he stopped in evident perplexity at the spot where the accused had been put into the police car. At the trial it appeared that other evidence against the accused that they had been

stealing the wire was inconclusive and that the evidence of the behaviour of the tracker dog was crucial to sustain the conviction. In these circumstances the Court of Criminal Appeal ruled that the evidence of the constable who handled the dog on its tracking and reported the dog's reactions was properly admitted. The Court did not regard its evidence as a species of hearsay but instead the dog was described as "a tracking instrument" and the handler was regarded as reporting the movements of the instrument, in the same way that a constable in traffic case might have reported on the behaviour of his speedometer. It was argued in that case that the tracker dog's evidence could be likened to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli. The comparison does not, however, appear to be sound because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. But dogs are intelligent animals with many thought processes similar to the thought processes of human beings and wherever you have thought processes there is always the risk of error, deception and even self-deception. For these reasons we are of the opinion that in the present state of scientific knowledge evidence of dog tracking, even if admissible, is not ordinarily of much weight.

In the present case it is not, however, necessary for us to express any concluded opinion or lay down any general rule with regard to tracker dog evidence or its significance or its admissibility as against the appellant. We shall assume in favour of the appellant that the evidence of P.W. 72 and of the Panchas with regard to the identification of the appellant by the tracker dog is not admissible. Even on that assumption we are of opinion that the rest of the prosecution evidence namely the confession of the appellant Ext. 130 and the discovery of the spanner conclusively proves the charges of which the appellant has been convicted.

13. For these reasons we affirm the judgment of the High Court of Bombay, dated 16/17 November, 1967 in Criminal Appeal No. 1116 of 1967 and dismiss this appeal.

</html