Duraipandi Thevar and Others

Vs

State of Tamil Nadu

Criminal Appeal No. 17 of 1972

(C. A. Vaidialingam, I. D. Dua, A. Alagiriswami JJ)

24.11.1972

JUDGMENT

DUA, J. -

1. The five appellants in this appeal by special leave were tried in the court of the Additional Sessions Judge, Tirunelveli for offences under Sections 147, 148, 302 and 302, read with Section 149, I.P.C. Accused Nos. 1 and 4 were sentenced to death under Section 302, I.P.C. the injuries inflicted by them on the deceased having been held to be fatal whereas accused Nos. 2 and 3 were sentenced to imprisonment for life the injuries caused by them to the deceased being simple but with the common intention of causing his death. Accused No. 5 was sentenced to rigorous imprisonment for ten years under Section 149, read with Section 302, I.P.C. because he had only instigated his associates to kill the deceased. Accused Nos. 1 to 4 were not awarded any separate sentence under Section 148, I.P.C. and accused No. 5 was similarly not awarded any sentence under Section 147, I.P.C.

2. The High Court on appeal confirmed the conviction and sentences of accused Nos. 1 to 4 but so far as Accused No. 5 is concerned his conviction was altered to one under Section 326, I.P.C., read with Section 149, I.P.C. but the sentence of rigorous imprisonment for ten years was maintained. His conviction under Section 147, I.P.C. was also confirmed but no separate sentence was awarded.

3. In this Court Shri R. K. Garg has addressed elaborate arguments in support of the appeal and has assailed the conclusions of the High Court holding the appellants guilty of the offences for which they have been convicted and sentenced.

4. Before broadly stating the prosecution story the relationship of the accused persons inter se may be noticed. Accused Nos. 1 to 3 are brothers and accused No. 5 is their paternal uncle and married to the sister of accused No. 4. They are all residents of village Adhanoor. About four or five years earlier the deceased Mottayan had caused injuries to Accused No. 2. The deceased and P.W. 1 who are children of the same mother from different fathers were tried for those injuries but acquitted. Previously the deceased also used to live in village Adhanoor. After the aforesaid occurrence he started living in this sister's house in village Melaseithalai. About three months prior to the present occurrence however he returned to Adhanoor village and again settled down there with his family. About ten days prior to the present occurrence there was a quarrel between Ramaiah (P.W. 5) and Krishna Thevar, accused No. 4 in connection with a ridge in a dry land. In this quarrel all the five accused were armed with aruvals. On behalf of P.W. 5, the deceased Mottayan also armed himself with an aruval. At the intervention of some mediators, however, the trouble was averted, but all the five accused are stated to have threatened that they would do away with the deceased. On January

28, 1970, at about 8.45 a.m. the deceased and Kookkiah Thevar (P.W. 1) after taking their food proceeded to the dry land of the deceased which was situated to the south of Adhanoor village. Their object was to harvest the kambu crop. P.W. 1 was following the deceased at a distance of about half a furlong. After proceeding some distance when they reached the junction of the footpath and the cart track running west to east to the south-west of the dryland of Dorairaj P.W. 2 the five appellants began to chase the deceased. Accused Nos. 1 to 4 were armed with bill-books. Seeing them the deceased called out "brother brother" and ran towards North of the lands of P.W. 2. Accused No. 5 instigated his companions to cut the deceased. Soon thereafter accused No. 2 (Mookkiah Thevar) obstructed the deceased and Duraipandi Thevar, accused No. 1, gave him a cut on his head with a bill-hook, Accused No. 2 gave the deceased from behind another injury on his right shoulder. The deceased raised alarm and turned towards the left and ran for about 4 or 5 bhagams. P.W. 2 who was baling out water from his well, and his brother Paulraj (P.W. 3) who was irrigating the said water, witnessed this occurrence and appealed to the accused not to cut the deceased. At that time Nataraj Thevar accused No. 3 cut the deceased on the right upper arm with a bill hook. The deceased then fell down but suddenly rose and tried to run but after running for about 7 or 8 bhagams towards the west, fell down. At that time Krishna Thevar accused No. 4 lifted the left hand of the deceased and gave him a cut on his left arm pit with a bill-hook. After inflicting these injuries on the deceased all the accused ran away carrying their respective weapons with them. When P.Ws. 1 to 3 went near the deceased he asked for some drinking water. P.W. 2 ran and fetched water but the deceased expired before he could drink it. P.W. 1 then went to the Panchayat Board officer to inform the village munsiff of the occurrence. The village munsiff was not there : he was reported to have gone to the house of the Karanam. P.W. 1, therefore, went to the house of the Karanam and made his statement (Ex. P-1) which was recorded at about 10 a.m. by the village munsiff (Shri Arumugam) who has appeared as P.W. 8. Exhibit P-1, it may be pointed out, contains full details of the occurrence with the names of all the accused and the nature and extent of their participation in the alleged offence, as also the presence of P.Ws. 2 and 3 in their fields. At this stage it may be mentioned that according to P.W. 8 he had gone to the Panchayat office before going to the house of the Karanam and had there learnt from the thalayari Solaippan that Doraiswami Thevar and others had cut the deceased. According to P.W. 8, as elicited in his cross-examination, the thalayari had told the witness that it was "Doraiswami Thevar vagaira" who had cut the deceased without giving the names of all the accused persons and that the thalavari's information was only based on the talk that was said to be going on in the village. P.W. 8 had gone to the house of Karanam because the records were there. We have mentioned this because on behalf of the appellant it has been strenuously argued that the information given by P.W. 1 to P.W. 8 and recorded by the latter cannot be considered as the first information report because P.W. 8 had already learnt of the occurrence and had gone to the house of the Karanam merely because the records were there. The earlier informant having not been produced as a witness, according to Shri Garg not only should an adverse inference be drawn against the prosecution but Ex. P-1 should also be held to be inadmissible in evidence being not the first information report but being a statement recorded subsequent to the earliest information about the crime. P.W. 8 after recording the statement of P.W. 1 went to the garden of Doraiswamy P.W. 2 and saw the dead body and prepared the vadast Ex. P-3. P.W. 8 then sent Ex. P-1 and Ex. P-3 to the sub-inspector concerned and sent his own report Ex. P-5 and Ex. P-4 (a copy of Ex. P-1) to the Sub-Magistrate. The two constables came to the spot at about 2 p.m. as deposed by Dorairaj P.W. 2. The Sub-Inspector, however, came at about 3.30 p.m. and remained there till about 6 p.m. when he prepared the inquest report (Ex. P-6).

5. The trial court accepted the evidence of P.Ws. 1, 2, 3, 6 and 7 to be true and believing them held that the accused persons had assaulted the deceased Mottayan in the land of P.Ws. 2 and 3 at about 9

a.m. on January 28, 2970. The court also accepted the evidence of these witnesses with regard to the motive for the assault. The four injuries inflicted on the deceased were thus held to have been caused by accused Nos. 1 to 4 on the head and the left arm-pit of the deceased. Injuries Nos. 1 and 4 were held to be fatal as deposed by Dr. Sethu, Civil Assistant Surgeon who conducted the post-mortem and appeared as P.W. 4. On the basis of this evidence the Trial Court convicted the accused, as already noticed.

6. The High Court agreed with the reasoning of the trial Judge in accepting the testimony of P.Ws. 1, 2 and 3. The High Court, as already noticed, converted the conviction of accused No. 5 from Sections 302/149, I.P.C. to one under Sections 326/149, I.P.C. but maintained the sentence of rigorous imprisonment for ten years.

7. Dealing first with argument that Ex. P-1 is not the F.I.R. we need only refer to the statement of P.W. 8 where he says that the information given by the thalavari was based only on the talk in the village and that Duraiswami Thevar vagaira were stated to have cut the deceased, without giving the names of all the accused persons. Now this information was apparently based on the talk in the village and the thalavari himself was not an eye-witness to the occurrence. It was clearly open to the authorities concerned to take action on this information if they so chose, but it was equally open to them to wait for more authentic or reliable information for taking appropriate action, treating the earlier information as based on mere village gossip. It seems that P.W. 8 chose the latter course. In any event before P.W. 8 had taken any action on the basis of the thalavari's information, P.W. 1 gave P.W. 8 fuller and more reliable and detailed information as an eye-witness, confirming the commission of the offence. The information said to have been given by the thalavari was not recorded as contemplated by Section 154 Cr.P.C. and investigation into the alleged offence was not started on the basis of that information. We do not mean to lay down that the receipt and recording of an information report is a condition precedent to the setting in motion of investigation into a criminal offence. The fact, however, remains that in this case no investigation had actually started on the basis of the information said to have been given by the thalavari before Ex. P-1 was recorded by P.W. 8. The statement (Ex P-1) made by P.W. 1 shortly after the thalavari's information was duly recorded by P.W. 8 who got it signed by P.W. 1 and witnessed by two witnesses and it was thereafter that P.W. 8 proceeded to the spot for verifying as to what had happened there. When P.W. 8 went to the spot he saw the injuries on the deceased in the garden of P.W. 2 and prepared vadast (Ex. P-3) in which he stated that the information about the murder had been received by him from the thalavari Solaiappan and the complaint had been made by Mookkaiah Thevar, the elder brother of the deceased. Exs. P-1 and P-3 were both sent by P.W. 8 to the Sub-Inspector at about 11.30 a.m. They were received at the police station at about 1 p.m. and Ramaswami (P.W. 12) the police writer registered crime No. 10 of 1970 under Section 302, I.P.C and prepared Ex. P-16 which he describes as the first information report. He sent that report urgently to authorities concerned. The whole of Ex. P-16 which purports to have been recorded under Section 154, Cr.P.C. has not been separately printed in the paper book. Its contents have been described in the printed paper book to be the same as Exs. P-1 and P-3. From its printed headings, however, it is clear that in column No. 1 the informant and the complainant is stated to be Mookkaiah son of Sevathaiah Thevar. From what has just been stated it is crystal clear that the statement Ex. P-1 was not made in the course of investigation. It was certainly not so treated by the investigating agency. That statement was, therefore, rightly put in evidence when its author the informant, was examined as P.W. 1. Nor have we otherwise discovered any suspicion attaching to Ex. P-1. No deliberate delay with any ulterior motive in recording it is shown or even suggested with any plausibility. The trial court and the High Court have both relied upon Ex. P-1 as the F.I.R. and we find nothing objectionable in these conclusions. In substance Ex. P-1 appears to us to be the real F.I.R. on the basis of which the

investigation started though technically Ex. P-16 was described by P.W. 12 to be the F.I.R. But Ex. P-16 being the same as Exs. P-1 and P-3 (Ex, P-16 must necessarily have been prepared in point of time after Ex. P-1) it is impossible to hold information given by the thalavari to amount to first information report so as to render Ex. P-1 inadmissible in evidence. At best it may be said that the information given by the thalavari and the more detailed information conveyed by P.W. 1 in his statement recorded as Ex. P-1 taken together constitute information which induced P.W. 8 to proceed to the place of occurrence to inquire into the matter. Indeed, this is how the police officer at the police station also dealt with the matter when registering the case.

8. Shri Garg's criticism on the non-production of the thalavari as a witness for the prosecution is without substance because his information was only based on the talk in the village. His evidence based on personal knowledge could not have, therefore, unfolded the prosecution story. What he had stated to P.W. 8 would similarly be of little value as corroborative of his evidence on the point. Now if that statement is ignored the prosecution case would obviously not suffer in any material respect : but if it is not ignored then incomplete version though that statement is, the mention of Doraiswami Thevar vagaira in it is deposed by P.W. 8 would serve to corroborate the prosecution story in one very material particular : in any event that information certainly does not contradict or conflict with the prosecution version. Omission to specifically name the other accused persons clearly negatives any reasonable suspicion about that information being fabricated and inspired by inimical motive, in which case the other persons could also have been named without difficulty.

9. Shri Garg has strongly contended that in the inquest report there is no mention of Doraiswami (P.W. 2) and Paulraj, (P.W. 3). This omission, according to the learned counsel, suggests that these witnesses were not present at the place and time of the occurrence and, therefore, had not actually witnessed it. Now the Sub-Inspector of Police Venkatachalam appearing as P.W. 13 swore that he had examined P.Ws. 1 to 3 and 5 and also prepared the inquest report. He no doubt admitted that the names of P.Ws. 2 and 3 were not mentioned in columns 3 and 4 of Ex. P-6 (the inquest report). He, however, explained in re-examination that the name of P.W. 1 was mentioned in those columns and that was sufficient according to the practice. It was not suggested that this was not the practice, P.Ws. 2 and 3 also swore in the witness box that they had been examined by the Sub-Inspector. Nothing was elicited from these three prosecution, witnesses which would discredit their testimony with respect to the examination of P.Ws. 2 and 3 by P.W. 13 when the inquest was prepared. Incidently, this point was neither raised in the trial court nor in the High Court on behalf of the accused. In the trial court the only ground on which the evidence of P.Ws. 2 and 3 was sought to be discredited was alleged enmity with Accused No. 5 on account of some Panchayat elections. In the High Court the testimony of P.Ws. 2 and 3 was assailed on the basis of other criticism but not on account of omission of their names from the inquest report. The High Court, however, agreed with the trial court in accepting the testimony of P.Ws. 1, 2 and 3 who had deposed as eye-witnesses to the occurrence. The testimony of P.W. 1 was held by the High Court to be corroborated by Ex. P-1 and the evidence of P.Ws. 6, 7, 8 and 13 to corroborated the testimony of the three eye-witnesses, P.Ws. 1, 2 and 3. It may be recalled that in Ex. P-1 the names of P.Ws. 2 and 3 were mentioned by P.W. 1. The suggestion, therefore, that these two witnesses were included in the list of prosecution witnesses as an afterthought, after even the preparation of the inquest report is completely unfounded.

10. Great stress has been laid by Shri Garg on the following sentences in the cross-examination of Dr. Sethu, P.W. 4, who had performed post-mortem on the dead body of the deceased :

> "Inquiry no. 1 alone will cause instantaneous death. The victim should have got

> sudden and severe shock on receipt of injury No. 1. It is possible that on receipt of injury No. 1 the victim could have fallen and died immediately. If the victim had shock and unconsciousness on receipt of injury No. 1, he could not have run could have moved."

On the basis of these sentences it has been argued that the deceased must have died instantaneously on receipt of injury No. 1 and, therefore, all those witnesses who have deposed that the deceased ran for a short distance thereafter are not telling the truth and had indeed not witnessed the occurrence. On the basis of this part of the medical evidence Shri Garg has further suggested that those who are stated to have inflicted injuries on the deceased after injury No. 1 could also not be held guilty of murder because their injuries would in all probability be inflicted on a dead man. The counsel sought support for his submission from certain passages from Modi's Medical Jurisprudence and Toxicology, from Tailor's Principles and Practice of Medical Jurisprudence, Vol. 1 and from Medical Jurisprudence and Toxicology by Glaister. We are unable to accept the submission. The text-books cited by Shri Garg are of little assistance. They merely tell us about what concussion of brain means and what would be the normal effect of certain injuries to the scalp or the brain. They also describes the complications of the fracture of the skull. For understanding the nature and the effect of the injuries in question we have primarily to look to the medical evidence on the record. The part of the statement of P.W. 4 on which Shri Garg has placed reliance has to be read along with the rest of the statement made by the witness. In re-examination the witness explained the position in the following words :

> "The formation of shock depends upon the resisting power of the individual victim. The resistance power depends upon the age, health, physical formation etc. If shock comes 15 or 20 minutes after the injury it must be due to bleeding. If the shock had not set in, immediately after receipt of injury No. 1, the victim could have run for some distance. Instantaneous death is meant by me as the one after setting in of shock and haemorrhage. Even in the case of instantaneous death, the victim could have uttered few words."

In further cross-examination with the permission of the Court the witness did state that according to medical parlance instantaneous death means death instantly after the receipt of an injury though he again explained that he had stated in the C.C. that in this case the victim could have run at the most only 5 or 6 yards. From this testimony it is not possible for us to hold that the deceased died the moment he received injury No. 1 and that it was impossible for him to run for several bhagams or to utter some words. We are, therefore, unable to hold that the first injury must necessarily have instantaneously killed the deceased and that P.Ws. 1 to 3 have falsely stated that the deceased ran for some distance even after receiving the first injury and that he asked for some water which was brought but he expired before he could drink it. The medical evidence it may be pointed out, is usually opinion evidence and in this case the doctor did not unequivocally state that the deceased must necessarily have died the moment he received injury No. 1. Nothing was stated by the Doctor in court about the resistance power of the deceased and it cannot be held that the deceased was so weak that he must necessarily have died the moment he received injury No. 1 or become unconscious and died without regaining consciousness. It is noteworthy that the body of the deceased has been described by the Doctor (P.W. 4) in his evidence as also in the post-mortem certificate to be that of a well-nourished male of 28 years. The Doctor has not deposed that in view of the nature and extent of injury No. 1 the deceased must have died instantaneously without being able to run at all and without being able to ask for water as deposed by the eye-witnesses. It is also worth noting that this precise argument was not advanced either in the trial court or in the High

Court. In the High Court the evidence of P.W. 1 to the effect that the deceased having fallen down after receipt of three injuries again rose and ran for five bhagams to fall again, was criticised only on the ground that there was no mention of this fact in Ex. P-1. The High Court did not feel impressed by this criticism. This omission in Ex. P-1 was not considered sufficient to discredit the testimony of P.W. 1. The instinct of self-preservation according to the High Court, must have impelled the deceased to run for some distance even after receiving the injuries inflicted by accused Nos. 1 and 2 as this was not in conflict with the medical evidence as deposed by P.W. 4. We agree with this view.

11. The further criticism that the evidence of P.W. 1 suggests that he and the deceased had at about 8.45 a.m. eaten or drunk kambu kanji - which takes several hours to digest-and that the deceased died at 9 a.m. and this conflicts with the medical evidence according to which "34 ounces of partly digested food one hour digestion duration" was found in the stomach at the time of post-mortem, is also difficult to accept. The deposition of P.W. 1 with respect to the time when he and the deceased ate or drunk kambu kanji and when the occurrence in question took place cannot be considered to be meticulously precise as if he had noted the time by reference to a watch : he must be considered to have deposed about the time more or less according to his general impression. It may also be remembered that his evidence was recorded after a long interval. This criticism was rejected by the High Court and we think rightly. The criticism about the exact distance the deceased is stated by the witnesses to have run after the receipt of the first injury is also misconceived because evidence on this point cannot be exact and precise. It is always based on general impression and due allowance must always be made of time lapse between the observation and the deposition, keeping in view the intelligence, power of observation and the retentive memory of the witness concerned.

12. Shri Garg also submitted that P.W. 13 did not see any streak of blood in the field whereas according to P.W. 1 when the deceased ran, blood streamed out of his wounds and fell on the ground. From this the counsel wants us to infer that P.W. 1 was not present at the spot and is telling an imaginary story. The argument is not easy to accept. P.W. 13 arrived at the spot at about 3.30 p.m. and prepared the observation mahazar, Ex. P-7 and also prepared the inquest report. In Ex. P-7 he clearly stated that blood had been seen soaked in the ground where the corpse lay as also at a distance of about 53 ft. Exhibit P-9 shows that blood-stained earth was collected by P.W. 13 from the place 53 fit away from the dead body. This is also corroborated by P.W. 8. It is, however, to be borne in mind that the deceased was wearing inter alia a dhoti, a banian and a towel as deposed by P.W. 1. They were all blood-stained as deposed by P.Ws. 1, 8 and 13 and shown by the serologist's report, Ex. P-15, proved by P.W. 1. Some of the blood coming out of the wound must have been absorbed by these clothes.

13. It was next urged that the story about the deceased asking for water and the water having been brought is a concoction because the vessel in which the water was brought was not taken into possession by the investigating agency. We do not think it was necessary to take the vessel in question into possession as it had no direct connection with the commission of the offence. Nor was it necessary to take into possession the irrigating material as argued by Shri Garg. The investigating officer rightly exercised his discretion in leaving out this unnecessary material.

14. We have gone into the records of the case which this Court normally does not do under Article 136 of the Constitution. We have done so because it was seriously suggested that in this case there has been grave miscarriage of justice because the medical evidence has not been given due consideration and that this evidence is in direct conflict with the testimony of the eye-witnesses. In criminal appeals under Article 136 involving sentences of death when such arguments are raised this

Court in the interests of justice does feel inclined to examine them with anxious care to interfere if the cause of justice so demands. After having gone through the record to which our attention has been drawn we are, however, unable to find support for the appellants submission.

15. The learned counsel finally submitted that the sentence is too harsh and that this was not the case for maximum penalty which is inflicted only in brutal and callous murders. Certain decisions were cited in support of the submission that if all the facts have not been clearly disclosed on the record and it is not proved by clearest evidence as to which blow proved fatal then the sentence of death is not the proper sentence. He added that when Section 34, I.P.C. is utilised for convicting all the accused then the extreme penalty of death is not called for. In our opinion, the submission on the question of sentence is not supportable on the record and the conclusions of the court below. Here medical evidence is absolutely clear that injuries Nos. 1 and 4 were necessarily fatal. The evidence has been believed as to who were the authors of these two fatal injuries. The murder was clearly brutal and callous. The sentence of death was been imposed by the trial court and confirmed by the High Court only against accused Nos. 1 and 4 who gave the fatal injuries. There is absolutely no doubt on this point. Even without invoking Section 34, I.P.C the sentence is justified. Section 34 is invoked only to hold constructively liable persons who were parties to an attack with a common intention. In this case those accused persons have not been given the extreme penalty. We are, therefore, unable to agree with the submissions advanced by the learned counsel. The appeal accordingly fails and is dismissed.

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