Jayaraj

Vs

State of Tamil Nadu

Criminal Appeal No. 101 of 1973

(R.S. Sarkaria, N.L. Untwalia JJ)

30.03.1976

JUDGMENT

SARKARIA, J. -

1. Jayaraj, appellant (A-1), and six others (to be hereinafter called A-2, A-3, A-4, A-5, A-6 and A-7) were tried by the Sessions Judge, Tirunelveli for causing the death of Pattu Nadar and attempting the murder of Cruz Manickam. In addition, A-2 to A-7 were charged under Section 147 and A-1 under Section 148, Penal Code. The trial Judge, acquitted all the accused of all the charges framed against them.

2. On appeal by the State, the High Court of Madras, set aside the acquittal of A-1 and convicted him under Section 302, Penal Code for the murder of Pattu Nadar and sentenced him to imprisonment for life. The High Court maintained the acquittal of A-2 and A-3 on the murder charge but convicted each of the two under Section 323, Penal Code, the former for causing simple hurt to the deceased and the latter for causing simple hurt to PW 3, and sentenced each of them to pay a fine of Rs. 50 or, in default to undergo one month's further rigorous imprisonment. The acquittal of A-4 to A-7 on all the charges was upheld.

3. Hence this appeal by A-1.

4. The occurrence in which PW 3 received injuries and Pattu Nadar was fatally hurt took place on February 28, 1971 at 2.30 p.m. in a busy locality of Tuticorin town. The deceased and the eyewitnesses belonged to the DMK party, while the accused were workers of the Congress (Organization). There was political rivalry between the two parties. It was the eve of the general elections to the State Assembly. Election fever was raging and the workers of these rival parties were by canvassing for their respective candidates who were contesting from this constituency. At about 2.30 p.m., PW 3 and the deceased were standing on Davispuram Road in front of the office of the DMK party, and were conversing with each other. This road runs from north to south. All the seven accused came there armed, in a body. A-1 had a 'bichchua' (a dagger-like knife), while his companions were carrying sticks. A-1 exhorted his own companions to assault PW 3. Thereupon, A-3 and A-5 gave stick blows to PW 3 felling him to the ground. The deceased ran towards the south and then turned east into Rama Nadar Villai Street. A-1, A-2 and A-4 chased him, followed by the rest of the accused. A-1, A-2 and A-4 overtook the deceased. A-1 then stabbed Pattu Nadar with the 'bichchua' in the abdomen. As a result, the liver, stomach and mesentery of the victim were injured and his intestines came out. Simultaneously, A-2 and A-4 gave stick blows on his head. PWs 1, 9 and 10 witnessed this occurrence. They raised an alarm whereupon the assailants ran away towards the east taking their weapons with them. PW 8 and one Shanmuga Nadar, immediately lifted the

injured, removed him into the adjacent compound of PW 10, pushed his intestines back into the wound and bandaged it while the injured was leaning against a drumstick tree standing there. Pattu Nadar and PW 3 both were then put in a taxicab and taken to the local Civil Hospital, about 1 1/2 miles away. On the other hand, PW 1 went straight from the spot to the police station, two furlongs away, and lodged the first information, Ex. P-1, at 2.50 p.m. On the basis of this report, the Police Inspector (PW 14) registered a case regarding an offence under Section 307, Penal Code.

5. In the hospital, Dr. Sankara Pandian (PW 6) examined Pattu Nadar at 3 p.m., and PW 3 at 3.15 p.m. Thereafter, at 3.30 p.m. he sent the note, Ex. P-3, to the local magistrate (PW 5) requesting the latter to come over to the hospital to record the statements of the injured persons. In response to that note, the magistrate went to the hospital and recorded the statement Ex. P-4 of Pattu Nadar after the medical officer had certified that the deponent was fit enough to make a statement. In Ex. P-4, the deponent denounced Jayaraj, appellant as the person who had stabbed him with a knife. The magistrate then tried to record the statement of PW 3, who, after stating one sentence, was unable to say anything more, as he was, according to the doctor (PW 6), drowsy.

6. The investigating officer (PW 15) reached the scene of occurrence at 3.30 p.m. He found blood on the ground an on the drumstick tree in the compound of PW 10. He also found blood on the road in front of the DMK office.

7. Pattu Nadar died in the hospital on March 9, 1971.

8. Accused Nos. 1 and 2 surrendered in the court of a magistrate on March 15, 1971. The other accused were arrested, subsequently.

9. Mr. Krishnamoorthy, appearing for the appellant contends that the view of the evidence taken by the trial Court was also reasonably possible, and that consequently the High Court was not justified in reversing the acquittal. Counsel has tried to support this reasoning of the trial Court, which, according to him, had been effectively dispelled by the High Court.

10. We have carefully examined the material evidence on the record with the aid of the Counsel on both sides. We are satisfied that the High Court was fully justified in reversing the acquittal.

11. The mainstay of the prosecution case was firstly the dying declaration, Ex. P-4, made by Pattu Nadar before the magistrate, and, secondly, the account of the two connected incidents given by the eyewitnesses, PWs 1, 3, 4, 8, 9 and 10.

12. The trial Court construed - rather misconstrued - the dying declaration, (Ex. P-4) to mean that the injuries to the deceased were caused in the DMK office on Davispuram Road. It also made much of certain omissions in the dying declaration, to wit, that the deceased did not specifically say therein that he had run away to the south, but was chased, overtaken and assaulted in Ram Nadar Vallai Street, that he did not mention about PW 3 and his beating by anybody. Misconceiving what was stated and assuming what was not stated, the trial Judge seems to have worked out the conclusion that Ex. P-4 conflicts with the direct evidence of the eyewitnesses. He discarded the evidence of PWs 1, 3, 4, 8, 9 and 10 mainly on the ground that they all belonged to DMK party and their evidence could not be acted upon without independent corroboration. The trial Judge read something sinister in the fact that PW 3 while in the hospital, did not speak anything about the occurrence, beyond one sentence. He repelled the explanation of PW 3 (although it was confirmed by the doctor, PW 6) that on account of supervening drowsiness, he was unable to make a complete

statement at that time.

13. The High Court examined this reasoning and rightly found it hollow and unsustainable.

14. It may be noted that the Magistrate who recorded the dying declaration, Ex. P-4, had divided it into paragraphs. The first paragraph is to be effect :

I was sitting in the DMK Sangham situate in our street at 2 p.m. today.

Thereafter, in the second paragraph, it is recorded :

Jayaraj, son of Seria Pushpam stabbed me in the stomach. The younger by name Thomas beat with stick on my head. The person by name Jayaraj stabbed me with knife. The son of Gnanautham attacked me on my head and my hand with sticks. Some others were also present. I swooned immediately after I was attacked. I do not know what happened later.

15. The trial Court failed to note the significance of dividing the dying declaration into two paragraphs. What he said in the second paragraph is not in the context of what finds mention in the opening paragraph of Ex. P-4. In any case, it would be a travesty of construction to read into Ex. P-4 that the deponent was stabbed while sitting in the DMK Sangham. Indeed, it was nobody's case that he received the fatal injury in the DMK Sangham which in the siteplan, Ex. P-17, is shown to be a building or ahata.

16. This siteplan read with the statement of the witnesses, would show that the distance between (point No. 2), the first scene of occurrence where PW 13 was assaulted and the chase of the deceased commenced, and the place (point No. 3) where the deceased was overtaken and stabbed, is hardly 45 or 50 yards. The substance of the matter was, as to who had stabbed the deceased. When the deponent was in severe bodily pain, and words were scarce, his natural impulse would be to tell the magistrate, without wasting his breath on details, as to who had stabbed him. The very brevity of the dying declaration, in the circumstances of the case, far from being a suspicious circumstance, was an index of its being true and free from the taint of tutoring. The substratum of the dying declaration was fully consistent with the ocular account given by the eyewitnesses.

17. PW 3 was an injured witness. He was the victim at the first scene of occurrence on the road in front of the DMK election office which adjoins DMK Sangham. He deposed not only to his own beating by A-3 and A-5, but also about the running away of the deceased towards the south, chased by A-1, A-2 and A-4, and followed by the other accused. Of course, he did not see what happened thereafter to the deceased in Rama Nadar Vallai Street. The fact remains that his evidence furnished valuable corroboration with regard to the pursuit of the deceased by A-1, A-2 and A-4.

18. The evidence of PWs 1, 9 and 10, who had witnessed the stabbing of the deceased by A-1, could not he rejected on the facile ground that they all belonged to the DMK party. As already noticed, it was the eve of the elections. Canvassing activity must have been at its height. The presence of the witnesses therefore near about the place of occurrence was highly probable.

19. PW 1 was an election worker of the DMK candidate who was contesting the election. He testified that he was gong to the DMK office, and was at the junction (point No. 1 in the siteplan) of Davispuram Road and Rama Nadar Vallai Street from where he saw the pursuit of the deceased and then his stabbing by A-1 (from a distance of about 25-26 yards). He also claimed to be a witness of the assault on PW 3, which had preceded the chase of the deceased and his stabbing.

20. PW 9 was a resident of the very locality. His house is adjacent to the DMK Sangham. He was pasting election posters in favour of DMK candidate, at the entrance of "Anna Udal Payirchi Nilayam" which is situated in Rama Nadar Vallai Street on the eater side of the water tap. Thus the witness claimed to have seen the stabbing of the deceased by A-1, from a very close distance.

21. The place where the stabbing incident took place is very near to the house of PW 10. She was a natural and probable witness. Indeed, immediately after the stabbing, the victim was removed into her ahata and it was there that his wound was bandaged. She had no animus against the appellant. There was no ground to disbelieve her.

22. The direct evidence of the eyewitnesses received assurance from the medical testimony regarding the nature of the stabbing weapon. The F.I.R. was lodged almost spontaneously within 20 minutes of the occurrence. The informant had no time to concoct a false story. The F.I.R. furnished valuable corroboration.

23. For these reasons, we are satisfied that the High Court was right in holding that the evidence furnished by the dying declaration and the eyewitnesses was sufficient to establish beyond all manner of doubt that it was the appellant, Jayaraj, who had stabbed the deceased with a 'bichchua' in the manner alleged by the prosecution.

24. The only question that remains to be considered is about the nature of the offence committed by him. The learned Judges of the High Court have held that the act of the accused fell under clause 'Thirdly' of Section 300, Penal Code and as such, the offence committed, was nothing short of murder.

25. Mr. Krishnamoorthy, appearing for the appellant submits that, in any event, the offence committed by the appellant was culpable homicide not amounting to murder, falling under the second part of Section 304, Penal Code. Stress has been laid on the circumstance that the stabbing weapon was a mere 'bichchua' (which we are told is a small dagger-like knife) and the injury was not caused either with the intention of causing death or with the intention of causing such bodily injury as was sufficient to cause death in the ordinary course of nature. It is maintained that, at the most, the accused had, while giving the stab blow, knowledge that his act was likely to cause death. Reference in this connection has been made to the evidence of the medical witness (PW 7) who stated in cross-examination that the injury was likely to cause death. It is further argued that the immediate cause of death could be improper treatment or mistreatment of the injury in the hospital which resulted in peritonitus and consequent death.

26. Mr. Rangam, Counsel for the respondent, however, submits that the act of the appellant would be covered by clause Firstly or failing that by clause Thirdly of Section 300, Penal Code. In support of his contention he has referred to Virsa Singh v. State of Punjab (1958 SCR 1495 : AIR 1958 SC 465 : 1958 Cri LJ 818) and also to some decisions of Patna and Lahore High Courts.

27. There are certain features of this case which appear to have impelled the High Court to confine itself to clause Thirdly of Section 300, Penal Code. These features Are : There was no enmity between the appellant and the deceased. The occurrence was a sudden affair; something which has not been completely unraveled, might have sparked off this incident. Only one blow was given by the appellant with a small knife to the deceased who died more than nine days after the receipt of the injury in the hospital. In these circumstances it had not been clearly established that the intention of the assailant was to cause death of the deceased. That is why the High Court did not apply clause

Firstly of Section 300, Penal Code.

28. It is to be seen further whether the case would fall under clause 'Thirdly' of Section 300, Penal code. This clause came up for interpretation in the well known case of Virsa Singh v. State of Punjab. In that case, the accused had thrust a spear into the abdomen of the deceased. As a result, the victim died on the following day. In the opinion of the doctor, the injury was sufficient to cause death in the ordinary course of nature. The Sessions Judge found that the accused intended to cause grievous hurt only. In his opinion, however, the third clause of Section 300, Penal Code applied. He accordingly convicted an sentenced the accused under Section 302, Penal Code. The High Court upheld the conviction. It was argued before this Court that the third clause of Section 300, did not apply as it was not proved that the accused intended to inflict a bodily injury that was sufficient to cause death in the ordinary course of nature, as Section 300, Penal Code, third clause states :

> If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

Repelling the contention, this Court held that the prosecution must prove the following before it can bring a case under Section 300, Indian Penal Code, third clause :

> (1) It must establish, quite objectively, that a bodily injury is present;
>
> (2) The nature of the injury must be proved, these are purely objective investigations.
>
> (3) It must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was not intended.
>
> (4) It must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

29. In the case before us, the fourth element has not been objectively and clearly established. Although in the examination-in-chief, Dr. Poovalingam, who conducted the autopsy stated that the external injury on the abdomen which was linked with the internal grievous injury, was necessarily fatal, yet in cross-examination, he stated in unmistakable terms that this abdominal injury found on the deceased was only likely to cause death. No attempt was made in re-examination to get this apparent conflict reconciled. As a matter of fact it was incumbent on the prosecution to question the medical witness specifically as to whether all or any of the injuries found on the deceased was sufficient to cause death in the ordinary course of nature. But this was not done.

30. Again this opinion of the doctor was to be appraised in the light of the circumstance that the death occurred nine or ten days after the receipt of the injury, and during this period he had been operated upon in the hospital. There is therefore no escape from the conclusion that the prosecution had failed to prove beyond all manner of doubt that this injury on the abdomen of the deceased, was sufficient to cause death in the ordinary course of nature. The act of the appellant did not amount to murder, the nature of the offence committed would be culpable homicide not amounting to murder.

31. Here again, we have to enquire further whether the case would fall under the first or second part

of Section 304, Penal Code.

32. For this purpose we have to go to Section 299 which define "culpable homicide". This offence consists in the doing of an act

(a) with the intention of causing death, or

(b) with the intention of causing such bodily injury as is likely to cause death, or

(c) with the knowledge that the act is likely to cause death.

33. As was pointed out by this Court in Anda v. State of Rajasthan (AIR 1966 SC 148 : 1966 Cri LJ 171), "intent" and "knowledge" in the ingredients of Section 299 postulate the existence of positive mental attitude and this mental condition is the special mens rea necessary for the offence. The guilty intention in the first two conditions contemplates the intended death of the person harmed or the intentional causing of an injury likely to cause his death. The knowledge in the third condition contemplates knowledge of the likelihood of the death of the person.

34. The first clause of Section 300, reproduces the first part of Section 299. Therefore, ordinarily if the case comes within clause (a) of Section 299, it would amount to murder. However, if one of the special exceptions in Section 300 applies, the offence would be culpable homicide not amounting to murder. Such is not the case before us.

35. If the act of the accused falls under clause (b) of Section 299, that is to say, if the intended bodily injury is likely to cause death as distinguished from one which is sufficient to cause death in the ordinary course of nature, clause Thirdly of Section 300 would not apply. Exactly this is the situation in the present case. The offence committed by the appellant would therefore fall under the first part of Section 304, Penal Code. Accordingly, we partly allow this appeal, alter the conviction of the appellant from one under Section 302 to that under Section 304, Part I, Penal Code and reduce his sentence to 8 years' rigorous imprisonment.

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