

Palanisamy and Raju

Vs

State of Tamil Nadu

Criminal Appeal No. 592 of 1983

(V. Khalid, E. S. Venkataramiah JJ)

24.01.1986

JUDGMENT

KHALID, J. -

1. Palanisamy and Raju, second and third accused respectively in Sessions Case No. 36 of 1981 in the Court of Sessions of Periyar Division at Erode are the appellants before us. They were tried along with Subramaniam, who was the first accused, for offences punishable under Sections 436 and 302 read with Section 34 of the Indian Penal Code. The learned Sessions Judge convicted all the three accused for the above offences and sentenced them to death for the offence of murder and to rigorous imprisonment for ten years for the offences under Section 436. All the three accused preferred appeals before the High Court of Judicature at Madras, as Cr. A. Nos. 89, 90, 91 of 1982. The High Court allowed the appeal filed by the first accused and set aside the conviction and sentence against him while the appeals filed by the second and third accused were dismissed. This appeal, by special leave, is directed against the common judgment passed by the High Court confirming the conviction and sentence of the appellants.

2. The facts in brief are as follows :

3. The case involves death of five persons; Muthuswami Gounder, aged about 40 years, his wife Papayi Ammal, aged about 30 years, and their children Chinna Pappai, Mani and Rasu, aged about 8, 5 and 1 years respectively. All of them were sleeping inside their hut (salai). The accused are alleged to have set fire to the hut on the night of July 2, 1980, caused destruction of the said salai and the death of the above five persons. PW 2 is the father of Muthuswami Gounder and PW 3 is his mother. They were also residing in the same hut. PW 2 took his bed on that night outside the hut on a cot in the verandah, while PW 3 was sleeping on the threshing ground keeping watch over the paddy harvested. PW 3 heard the cry raised by a cobbler (Muthan) shouting that the hut was ablaze, got up and rushed towards her hut and found that the fire had engulfed her hut from all the directions. She rushed to the house of PW 1, the father-in-law of deceased Muthuswami. PW 1 and PW 3 ran towards the hut. PW 2 felt the heat and got up and moved towards the plantain garden. PW 1 and others extinguished the fire. PWs 5 and 6 reside in the cobblers colony nearby. They were alleged to have been sleeping on the night of occurrence in the threshing floor situate in the garden land of Channimalai Gounder, keeping a watch over the harvested paddy. They heard the sound of cracking of the rafters at that time. They saw accused 3 with a tin in his hand along with accused 1 and 2 coming from the site of the scene. They asked the accused about the propriety of their action. Accused 1 threatened them and asked them to keep quiet. They got panicky and after waiting for some time left the place and disappeared. On their way, they saw PW 4 coming. When PW 4 asked them, they informed him that the hut of Muthuswami Gounder was on fire.

4. PW 1 gave information to the Village Munsif, PW 7, on July 3 1980, at about 4.30 a.m. PW 16, Inspector of Police reached the scene at about 9 a.m. and took over investigation. He conducted the inquest over the dead bodies and questioned the available witnesses. The first accused was produced on July 11, 1980, by PW 9, the Village Munsif of Unjalur before PW 16 who arrested him on that day. He volunteered a statement, which was reduced to writing and attested by PW 9 and another. On information, PW 16 went to Erode railway station where he arrested accused 2 and 3 on July 12, 1980 at 3 a.m. Both of them voluntarily gave statements in the presence of PW 9 and another. Later on these accused gave confessional statements before the Magistrate.

5. The motive of the offence is said to be the property dispute ending in the finding of two civil cases Nos. O.S. 2123 of 1970 and 1854 of 1978, in the Court of District Munsif, Erode. The immediate motive was a wordy quarrel over the running away of a hen belonging to the family of the deceased to the house of the second accused following a rooster. An independent motive for the first accused had also been put forward, which is not material for our case in this appeal.

6. The case against the appellants before us rests mainly on their confessional statements and the oral evidence of PWs 1 to 3 and 4 to 6. That the salai was burnt and that five persons died is not in dispute. The case of the accused was one of denial. They said that they were involved by the police. According to them, the confessional statements were made as tutored by the police.

7. The learned counsel for the appellants tried to make out a strong case in support of his plea about the innocence of the appellants with the following contentions :

8. The motive attributed is too flimsy and remote. The evidence of PWs 5 and 6 is to be totally rejected as unworthy of credence. PW 4 has been introduced in the case as to connect the evidence of PWs 5 and 6 and to make their presence at the scene of occurrence probable. The arrest of the accused in the manner stated by the prosecution and the recovery of various MOs and the confessional statements are all got up for the purpose of the case. The confessions which have been retracted do not get sufficient support from the evidence.

9. We will consider the evidence of PWs 4, 5 and 6 first and then the evidence of PWs 1, 2 and 3 before considering the confessions made by the appellants. If the evidence of PWs 5 and 6 is trustworthy and acceptable, then the conviction has to be maintained de hors the confessions. The evidence of PWs 1, 2 and 3 is only secondary importance in the scheme of things in this case. We will, therefore, discuss their evidence after disposing of the main witnesses PWs 5 and 6. The evidence of PWs 5 and 6 is that they saw the accused coming from the salai of the deceased. Accused 3 had a tin like MO 6 in his hands. The accused are known to PWs 5 and 6 by name. In other words, they are not strangers to these witnesses. They met PW 4 and on the same night. When PW 4 saw them they are reported to have told PW 4, not that they saw accused 1 to 3 coming out of the scene house, but that someone had set fire to the house of Muthuswami Gounder. This is of great significance for the accused. This evidence, if accepted, shows that PWs 5 and 6 did not know the names of the culprits or their identity. These two witnesses are reported to have come back with a large crowd to extinguish the fire. PW 4 also was present in this crowd. We have no evidence in the case to show that PWs 5 and 6 had mentioned to anyone in the said crowd that they saw these accused coming from the scene house after setting fire to the said house. Nor do we have any evidence of PW 4 that he had mentioned to anyone in the crowd that PWs 5 and 6 had told him about the persons who were responsible for setting the fire to the house. We may in passing mention that PWs 1, 2 and 3 do not say anything about the presence of PW 5 and PW 6 at the time. Significantly, these two witnesses were brought on record only on July 6, 1980 when they were

questioned by the police at Palliyoothu. PWs 5 and 6 are from a village adjacent to the scene village. PW 4 has his land on the western side of the canal adjacent site of the first accused. It is really surprising that PWs 5 and 6 did not inform anyone at the scene of occurrence of this dastardly crime even when they knew who the assailants were. It is equally surprising that they did not make themselves available to the police or to any other important person in the locality till July 6, 1980. This dastardly crime must have been the talk of the town. Even so, we find that these two witnesses were absent on July 3, 1980 from 11.30 a.m. to 6.30 p.m. when PW 16 conducted the inquest over the five dead bodies. One would expect, in the normal course of things, these two witnesses to be the natural witnesses at the inquest. Incidentally, we may observe here that PW 4 also was not examined during the inquest. PW 4 was examined on July 4, 1980. The case of the prosecution is that PWs 5 and 6 were traced after PW 4 was questioned. There is no explanation why these two witnesses were not got at either on July 4, 1980 or even on July 5, 1980.

10. The reason given by PWs 5 and 6 for their presence in the scene village is that they were keeping watch over the paddy heaped in the kalam on the northern side of the scene hut. When PW 16 was asked about the existence of a kalam at this place, he stated that there was no kalam at the north of the scene. This again is a circumstances which renders the presence of PWs 5 and 6 at the scene suspicious.

11. The prosecution has attempted to explain away the absence of PWs 5 and 6 till July, 1980 on the tenuous plea that they were afraid of a threat to their life at the hands of the accused. They were cobblers and therefore, they were afraid to risk their lives by getting themselves involved in the investigation in a case in which men of a higher caste was involved. We are not impressed with this explanation. In a case like this, such an explanation is far from convincing. The witnesses have admitted in evidence that they gave the names of the assailants only to the police for the first time when they were examined on July 6, 1980. This is how the High Court approaches this part of the case :

The explanation now offered by these two witnesses that they did not reveal the name of any one of the assailants because they were under the grip of fear and terror created in their minds by the assailants, is far from satisfactory; however, it creates a doubt in the mind of the court as to whether they really saw the assailants or not or whether they did not reveal the names of the assailants out of fear. This doubt entertained by the court has necessarily to go to the benefit of the accused. Notwithstanding the fact that their evidence of their having seen the accused in the scene place is not free doubt, the fact that these two persons were in the scene place is fortified by various impelling circumstances, viz., that the names of these two persons are mentioned by accused 2 in Ex. P-31 that during the course of the cross-examination of PWs 5 and 6, not even a suggestion has been made to them by the defence counsel, despite a lengthy cross-examination, that they were not even present there except suggesting that they were giving evidence due to threat by the police and that PW 4, who has no axe to grind the accused and against whom no motive has been suggested, asserts that he saw PWs 5 and 6 on the very night of the occurrence near the scene place rushing towards north saying that they were going to the village to bring the villagers to extinguish the fire. To this witness PW 4 also, no suggestion has been addressed that his evidence that he saw PWs 5 and 6 is untrue and false.

The portion extracted above shows that the High Court itself had doubts about the truth of the evidence of PWs 5 and 6. The High Court doubted their presence at the scene of crime, but tried to

get out of this reasonable doubt with the plea that no suggestion was put to PWs 5 and 6 or PW 4 challenging their presence at the scene of occurrence on that night.

12. It was further contended that there was considerable doubt as to whether PW 4 himself was a true witness and the date on which he was questioned itself was open to doubt. PW 16 did not say on which date PW 4 was examined. An attempt appears to have been made before High Court that PW 4 had not been questioned at all by PW 16. The High Court has observed that though it was unfortunate that PW 16 did not give the date on which PW 4 was questioned, the mere non-mention of this date should not be utilised by the defence to demolish "the entire edifice of the prosecution," by saying that PW 4 had not been examined by PW 16. To ascertain the real facts, the High Court went through the case diary and found that PW 4 was examined on July 4, 1980. However, the evidence of PW 4 regarding the date on which he was questioned is not consistent. He himself gave one or two versions about this. PW 4 is an important witness. It is to him that PWs 5 and 6 reported about their having seen the incident. That being so, greater care should have been taken to question him and to bring out the details as to the date and time when he was questioned. Though we do not rest our decision on this aspect of the case wholly, we would like to say that the evidence of PW 4 and the attendant circumstances regarding his role, cause justifiable doubt in our minds about the veracity of his evidence. It is useful to note that PW 4 deposed in court that he was also rounded up by the police during investigation; that he saw the accused conversing with each other after the fire was extinguished; that the first accused spoke to PW 4 and that he threatened PW 4 also. In short, he is an important witness in this case. But his evidence does not inspire confidence in us, when his evidence is closely scrutinised along the evidence of PWs 5 and 6.

13. PWs 4, 5 and 6 have an important role to play in the scheme of the prosecution's case. The High Court has to say this, after discussing the evidence of these witnesses :

From the discussions made above, we are of the view that even holding that the conduct of PWs 5 and 6 in not revealing the name of any one of the assailants immediately after the occurrence, is not free from all reasonable doubt and to the benefit of which doubt the accused are entitled, the fact that PWs 5 and 6 who had no enmity towards the accused, were present in the vicinity of the scene on the night of occurrence, is well established. It might be that accused 2 had seen these two witnesses in the kalam without the accused being seen by these witnesses, because these witnesses got up only after hearing the noise of the rafters and other materials cracking in the fire.

With respect, we find it difficult to agree with the High Court. After concluding that there are circumstances in the case which render the evidence of PWs 5 and 6 not free from reasonable doubt, the High Court was in error in not extending the said benefit to the accused in the absence of other acceptable evidence to enter a conviction. We may also observe that we are not impressed about the manner in which the accused in this case are reported to have been arrested by PW 16. PW 9, the Village Munsif of Unjalur, is seen to be omnibus witness evidencing several things in this case. He brings the first accused on July 11, 1980 at about 2 p.m. before PW 16, after obtaining from him a statement. PW 16 is said to have arrested accused 2 and 3 at 3 p.m. on the morning of July 12, 1980 at Erode railway station where also PW 9 was present. One Natarajan also was present who has not been examined in this case. Both the accused are alleged to have voluntarily given the statements in the presence of PW 9, on being interrogated. PW 9 has attested one or two other mahazars prepared in this case. Though there is nothing unusual about the attestation made in the manner indicated above, the background afforded by the evidence of PWs 4, 5 and 6, and the absence of the names of

these accused till July 6, 1980 make the prosecution case, of the arrest in the presence of PW 9 little suspect. We are fortified in this observation of ours, for some other materials available in the records. There was some submission made before the High Court and faintly before us also that in fact accused 1 to 3 were taken into police custody even on July 3, 1980 and that they were kept in police lock up, beaten and tortured. It was faintly submitted that at least ten persons were suspected as having been responsible for the offence. Two bail applications appear to have been filed in respect of ten persons inclusive of the appellants before us. These applications are Cr. M.P. No. 602 of 1980 dated July 5, 1980 and 618 of 1980 filed subsequently. The first application was in respect of three persons who were neither the accused nor the witnesses in this case. This application was dismissed. The second application was in respect of seven persons including the three accused. This application was also dismissed. Though these documents were not marked, the High Court has referred to them. We thought it necessary to make mention about this in passing, only to reinforce our doubt about the arrest of the accused as the prosecution put forward.

14. PWs 1, 2 and 3 belong to the second group of witnesses. Their evidence, in the context of the evidence given by PWs 5 and 6, is not very serviceable to advance the case of the prosecution. They are, of course, natural witnesses in the case. Their presence cannot be disputed, but they have not been able to speak anything either about the accused or about PWs 5 and 6. PWs 5 and 6 also do not speak about their having seen PWs 1, 2 and 3. That being so, a detailed discussion of their evidence is not necessary.

15. What now remains is the confessional statements Exs. P-31 and P-25 made by the appellants on July 16, 1980. These confessions have been retracted. There is no independent corroboration to persuade us to act on these confessions to find the appellants guilty. It is true that the names of PWs 5 and 6 have been mentioned by the appellants in the confessions. But we have found that the presence of PWs 5 and 6 cannot be accepted. This conclusion of ours renders the confessions also tainted. We, therefore, do not propose to act on these confessions, in the circumstances of the case, to hold the appellants guilty of the offence.

16. We have not been able to appreciate the reason that made the Inspector of Police (PW 16) and the other police officers to reach the scene of occurrence late. We are told on the material available in the case that the police station is only 5 kms away. Information about the occurrence was conveyed to PW 7 who gave the report to PW 16 at 4.30 a.m. on July 3, 1980. In a case like this, we would expect the investigation to start with utmost expedition. We are also not in a position to understand why the natural witnesses, who have figured in this case, were not examined at the inquest and no steps were taken to get PWs 5 and 6 till July 6, 1980. All that we wish to say is that the investigation in this case leaves much to be desired.

17. We have given our anxious consideration to the evidence in the case. We find that the High Court itself felt considerable uneasiness about the evidence of PWs 4, 5 and 6, but got over the uneasiness with an explanation which does not impress us as acceptable to convict the accused. There are several circumstances in the case which raise reasonable doubt in our minds about the complicity of the appellants. We do not think that it will be safe to rely upon the evidence of PWs 4, 5 and 6 and the retracted confession to confirm the conviction entered by the High Court against the appellants. In our judgment, the appellants are entitled to the benefit of doubt and therefore, we set aside the conviction and sentence passed against them. We allow this appeal and direct that the appellants be set at liberty forthwith.

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