Vijayan @ Vijayakumar

Vs

State Rep. by Inspector of Police

Criminal Appeal No. 312 of 1991

(K.T. Thomas, D.P. Mahapatra JJ)

22.03.1999

JUDGMENT

K.T. Thomas, J.

1. Out of six persons arraigned before a Sessions Court for the murder of one Natarajan, one alone was convicted and the rest were acquitted. The High Court of Madras confirmed the conviction and sentence (imprisonment for life). His plea of right of private defence was denounced by the trial court as well as the High Court. The said sole convict, Vijayan, is the appellant before us.

2. The 5th Of October, 1984 was an eventful day for the rival factions one of which the appellant belongs to. A series of events took place on that day which ended up with the death of Natarajan at about 2.30 p.m. It gave rise to the present case.

3. Prosecution and the defence were in substantial agreement regarding the narrative of the events till the penultimate stage. But they differed grossly with each other regarding the final stage in which fatal injury was inflicted on the deceased to which he succumbed in a few minutes.

4. The following part of the story is, by and large, undisputed. Natarajan and his brother PW1-Kandaswamy were residents of a place called Edayankattuvalasu in Erode town (Tamil Nadu). Their neighbour was Periyanna. He and his children were residing in adjacent houses. Appellant Vijayan is one of the sons of Pariyanna. At the houses of the above persons were on the southern side of a road (Nasianur road) at Erode town.

5. PW1-Kandaswamy and deceased Natarajan laid stone slabs over a drainage which passed through a private passage leading to the houses of all the above persons. Those stone slabs caused stagnation of water during rainy season and it affected Periyanna's building. So his sons requested the other party to remove the stone slabs. But none of such requests was heeded to.

6. On the morning of 5.10.1984 appellant-Vijayan and his brothers forcibly removed those stone slabs. On coming to know of it PW1-Kandaswamy along with his brother Natarajan and father Kuppuswamy went to the house of Periyanna and questioned their act. It led to an alteration during which one belonging to the appellant's faction slapped twice on the cheek of Kuppuswamy the father of PW1 and deceased. As some neighbours intervened then PW1-Kandaswamy and deceased went back to their house with Kuppuswamy. All those incidents happened before noon hours.

7. The above events are not in dispute, but as to what happened thereafter we have before us two diametrically divergent versions. According to the prosecution, the following incidents happened

thereafter :

8. At about 2.30 p.m. the deceased Natarajan was walking along Nasianpur road towards east. He was followed by PW1 Kandaswamy, who was followed by his father-in-law PW-2 Chenniappan. As the deceased passed the house of Periyanna six assailants emerged out of that house armed with kinves, spear and sickles etc. Sensing danger at the sight of the onrushing assailants Natarajan made a right-about-turn and scampered towards west but the assailants chased him and intercepted him and pushed him down. After he fell he was tabbed by the appellant with a knife on the back and also on the front chest. Appellant's brother Thilakan (second accused in the case) aimed a blow with a spear on Natarajan but it missed the target and fell on the crown of appellant's head who also fell down. Deceased Natarajan who sustained a stab injury on the chest died at the spot.

9. The rival version, presented by the appellant, is the following :

> At about 2.30 p.m. deceased Natarajan and his brother PW1-Kandaswamy accompanied by a gang of others went to the house of Periyanna in retaliation for the forenoon incident. At the front portion of the house they attacked the appellant which was resisted, but still the appellant sustained injuries. It was then that appellant and others acted in self-defence.

10. In support of the prosecution version PW1(Kandaswamy), PW2(Chenniappan) father-in-law of PW1 and PW3 (Poosappan) were examined. They supported the case of the prosecution which they described in the same manner as it has been narrated above. Trial court and the High Court accepted their evidence and found the prosecution story to be true.

11. Post-mortem certificate issued by PW6(Dr. S. Velmurugan) showed that the deceased had two injuries, one of which was a stab would on the left chest which pierced the upper lobe of left lung and the left pulmonary artery was completely cut. The other injury was a stab wound on the left chest, but its depth was only 1 cm. The doctor has rightly opined that the first injury was necessarily fatal and the injured could not have survived for more than a couple of minutes thereafter.

12. PW6-Dr. S. Velmurugan, a Civil Assistant Surgeon of Government Hospital, Erode, had deposed that appellant Vijayan met him at 3 p.m. on 5.10.1984 with a lacerated injury (2 x 1/2 x 1/2") over the mid parietal region of the scalp, and some abrasions over the right knee, right index finger and on the dorsum of the foot.

13. The details of those injuries were written in Ex.P5 - Accident Register. But the more important aspect of the evidence of PW6-doctor is this : Appellant told him then that he received those injuries at 2.45 p.m. "at his own residence when three assailants assaulted him with pitchuva and a screw driver."

14. On the defence side one Dr. Muruges (Radiologist in the Government Hospital), Erode) was examined as DW1. But his evidence is not of much use because he said that the X-Ray did not reveal any fracture for the appellant. Two more witnesses were examined for the defence, one among them was a lady (DW2-Devaki) who said that she and PW3-Poosappan were at Salem on 5.10.1984 afternoon for execution of some documents in connection with a lorry transaction. She proved Ex. D2, a sale receipt bearing the signature of PW3-Poosappan dated 5.10.1984.

15. In fact, PW3-Poosappan was examined he was asked about the said lorry transaction. Though he admitted having sold the lorry mentioned in that receipt to DW2-Devaki he denied having gone to

Salem on 5.10.1984 for that lorry deal.

16. If PW3-Poosappan was present at Salem at 4.00 p.m. there is no doubt that he could not have been present at Erode at 2.30 p.m. The trial court and the High Court did not place reliance on Ex. D2-receipt nor on the testimony of DW2-Devaki. Regarding that evidence High Court has observed that "it is also likely that the signature of PW3-Poosappan was obtained in Ex.D2 much earlier with blank date and the document was got up on that occasion." The reason for so holding is that PW3-Poosappan was recorded as present at the scene of occurrence when the inquest was held by PW16-Investigating Officer (The Inquest Report says that it was prepared between 5.00 p.m. and 8.00 p.m. on 5.10.1984).

17. The above reasoning of the High Court was strongly assailed by Shri N. Natarajan, learned Senior Counsel who argued for the appellant which he dubbed as putting the cart before the horse because the very object of examining DW2-Devaki was to show that PW3-Poosappan was not present at the scene of occurrence. It is contended that if it could be inferred that PW3 would not have been present at Salem on the premise that he was shown in the Inquest Report as present during the inquest, it could as well be inferred from Ex.D2 receipt that PW3 would not have been present at the scene of occurrence during the time of execution of Ex.D2. Inference, if could be made this way, it could be the other way around as well, contended the learned counsel.

18. For considering the evidence of DW2-Devaki, we have first to address ourselves whether such an item of evidence is legally admissible.

19. Section 153 of the Evidence Act is titled as "Exclusion of evidence to contradict answers to questions testing veracity". the main body of the Section reads thus :

> "When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but, if he answers falsely, he may afterwards be charged with giving false evidence."

20. Section 153 is based on the decision rendered by Poolock CB in *Attorney General v. Hitchock, 1847(1) Ex. 91* in which the learned Judge observed that "a witness may be contradicted as to anything he denies having said provided it be connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which, if answered in a particular way, would contradict a part of the witness's testimony, and if it is neither the one nor the other of these, it is collateral to though in some sense it may be considered as connected with, the subject of enquiry." The rule limiting the right to call evidence to contradict a witness on collateral issues excludes all evidence of facts which are incapable of affording any reasonable presumption or inference as to the principal matter in dispute.

21. But the above rule of prohibition has exceptions which can be discerned from the Section itself. Among the four illustrations enumerated in the Section one of them (illustration `C') is relevant in this context which is extracted below :

> "A affirms that on a certain day he saw B at Lahore. A is asked whether he himself was not on that day at Calcutta. He denies it. Evidence is offered to show that A was on that day at Calcutta. The evidence is admissible, not as contradicting A on a fact which affects his credit, but as contradicting the alleged fact that B was seen on the

day in question in Lahore."

22. Thus when the issue is whether PW3-Poosappan was present at the scene of occurrence evidence can be offered to show that at the very time he was at a different place. Evidence of that type is not aimed at shaking the credit of the witness by injuring his character. It affects the veracity of the testimony irrespective of his character.

23. Looking at the evidence of DW2-Devaki from the above perspective, it is admissible in evidence and hence the next question is whether it is a reliable item of evidence. The High Court felt that it is not reliable mainly because of the fact that PW3-Poosappan is recorded as present at the inquest which is shown to have been held at 5.00 p.m.

24. Learned counsel for the appellant highlighted the fact that the name of PW3-Poosappan was not mentioned anywhere in the First Information Statement lodged PW1-Kandaswamy. According to the learned counsel PW3 was a later addition to the case. The FIR reached the magistrate concerned on the same night at 9.00 p.m. But the Inquest Report was not sent along with it, perhaps it was not then ready for despatch. But it was sent to the magistrate on the next day at 9.00 p.m. Why it was sent to the magistrate at such an odd time ? That document is not like the FIR about which utmost promptitude is a request of law for dispatching to the magistrate. Learned counsel contended that despatching the Inquest Report to the magistrate on the next day at 9.00 p.m. would, in the circumstances, only lead to the inference that it would not have come into existence on the night of 5.10.1984.

25. Whether the said contention can be accepted as correct or not, we are of the view that authenticity of D2-sale receipt should not stand solely on the premise that PW3-Poosappan was noted as present in the Inquest Report.

26. In this context a vital circumstance, which the accused has brought on record, has to be adverted to. DW3-photographer said that he was engaged by someone in the house of Periyanna to take photographs from different angles. Ex. D3 and D4 series are those photographs. He said in evidence that he then saw blood stains in the front portion of the house and in the portico also. Ex. D5-Cash Bill dated 5.10.1984 marked through him shows the amount collected by the witness for the work done. The Public Prosecutor who cross-examined the witness suggested to him that what he saw on the floor of the house was not blood marks but it could have been some chemical substance. The said suggestion indicates that even the Public Prosecutor did not dispute the fact that the photographer had taken the photos on 5.10.1984. However, the suggestion that what he saw was only some chemical element seems to be too baseless for countenance.

27. While considering the right of private defence advanced by the appellant, the defence version that deceased and his party had tress-passed into Periyanna's house and made a retaliatory attack for the forenoon incident has to be looked at. That version of the appellant had come on official record at 3.00 p.m. when appellant told like that to PW6-Doctor. We do not think that appellant would have had sufficient time to concoct a false story to tell the doctor so soon after the incident.

28. When the Investigating Officer came to know of such a version of the appellant one would except him to check up the house of Periyanna to see whether the said versions of the appellant was true. But PW16 did not produce any document whatsoever to convince the Court that he did make such examination of the place of occurrence as mentioned by the appellant at the earliest. Though PW16-Investigating Officer made a bid to say that he inspected the house while conducting a search

on the same evening it cannot be believed for a moment because no search memorandum was made, no search-list was drawn up and no witness was collected to be present then. It is only the *ipsi dixit* of PW16-Investigating Officer unsupported by even a scrap of paper that he inspected the house of the accused.

29. That apart, the injuries sustained by the appellant (extracted supra) were sought to be explained by the prosecution in a very clumsy manner (in the FIR there is no reference to the fact that the appellant sustained any such injury during the incident). While giving evidence in the Court PW1 and other prosecution witnesses for the occurrence said that appellant sustained those injuries when second accused Thilakan aimed to inflict a stab injury on the fallen deceased but it miss-struck on the crown of the head of appellant. Even assuming that second accused Thilakan would have been a bad striker it is difficult to conceive that such an aim fumbling whacking would have landed on the crown of another man's head.

30. A polgnant circumstances, which it is impossible to ignore, is the normal human reaction for the forenoon incident. If father of the deceased was slapped then craving for vengeance would definitely have been on the injured party of the forenoon episode. When that circumstance is taken along with the other broad circumstances adverted to above, the case of appellant that deceased and PW1 together with their henchmen had tresspassed into the house of the appellant for a retalitory onslaught, appears to be a probable story. Hence, we are disposed to believe the defence version that deceased was the aggressor.

31. Though a contention has been advanced on behalf of the respondent that even in such a situation appellant had exceeded his right of private defence, we reject the contention because in the broad spectrum of the case it is not possible to precisely measure the frontier up to which the right of private defence could have been stretched.

32. We are, therefore, inclined to give judicial imprimatur to the plea of right of private defence advanced by the appellant and hold him not guilty of the offence of murder. In the result we allow this appeal and set aside the conviction and sentence passed on the appellant and acquit him. The bail-bond will stand cancelled.