ANDHRA PRADESH HIGH COURT

Kodur Thimma Reddi

Vs.

State (Andhra Pradesh)

Referred Trial No. 31 and Criminal Appeals Nos. 289 to 291 of 1956

(Satyanarayana Raju and Kumarayya, JJ.)

22.05.1957

JUDGMENT

Kumarayya, J.

1. Mr. Luther, the Sub-Inspector of Police of Banganapalle who was awakened from slumber at his residence near the police-lines by the appealing cry for police help at his window on the midnight of 17-12-1955 opened the shutter of the window and directed the party concerned to go to the police station nearby when he received gun-shot wounds from near the window as a result of which he reeled back speechless and succumbed to wounds within a few moments. The voice that awakened him was unfamiliar and the figure that fired the shot was unnoticed. The C.I.D. police took up investigation into its hands, and ten persons were arrested and charge-sheeted on 4-1-1956 for having entered into criminal conspiracy and murdered the deceased. Out of these one Bandi Naganna turned approver on 17-1-1956 and was examined as P. W. 7. The learned Sessions Judge, Kurnool Division, acquitted accused 5 to 9 of all the charges but convicted accused 1 to 4 for various offences. All the four accused were convicted under Section 120-B, Indian Penal Code, and sentenced to five years rigorous imprisonment. A-2 was also convicted under Section 302, Indian Penal Code; While A-1 stands convicted under Section 302 read with Section 109, Indian Penal Code. Both of them have been sentenced to death. A-3 and A-4 stand convicted under Section 302 read with Section 114, Indian Penal Code, and sentenced to life-imprisonment. A-4, however, in view of his age and the particular circumstances of the case is recommended to be detained in Borstal School under Section 10-A of the Madras Borstal Schools Act, for a period of three years or until such period as the Government thinks proper. Accused 1 is further convicted under Section 19 (f) of the Indian Arms Act and sentenced to one year's rigorous imprisonment. The learned Sessions Judge submitted the proceedings to this Court for confirmation of the death sentences. The accused have come in appeal against the order of convictions and sentences passed against them. Criminal Appeal No. 289 of 1956 is filed by A-1 and A-4 the father and the son whereas appeals 290 and 291 of 1956 have been preferred by A-2 and A-3 respectively. This judgment will govern all these proceedings.

2. Shortly stated, the prosecution story is that A-1 is the leader of one faction in the village of Enakandla within the jurisdiction of Banaganapalle police station. P. W. 8 is the leader of the

opposite faction in the same village. A-1 had a grouse against the deceased Luther as he not only appeared to favour the opposite faction but also had definitely adopted a hostile attitude against him. Some of the complaints got filed by his party-men were referred to by the deceased as false. Further, it appears that the deceased has suspected that A-1 and A-9 had some hand in the murder or mysterious disappearance of one Gaddamchetty Ramamurthy in connection with which police investigation at Nandyala was in progress. Matters came to a head when the deceased actually humiliated A-1 by chastising him in the presence of the opposite party leader. It is said that A-1 started defying the deceased and planned his murder with the help of his party-men. A-2 was his staunch follower and to him was the work of murder mainly entrusted. According to the prosecution story, A-2 sought to enlist the co-operation of A-3 and P. W. 7 the approver. It is said that on 15-12-1955 A-2 went to Kamalapuram, asked A-3 to accompany him to Yanukandla stating that his brother-in-law was suffering from fever. A-3 took him at his word and followed him. On their way, both of them stopped at Garladini for a day. The next day, A-2 contacted P.W. 7 and told him that his sister-in-law at Yanakandla was ill and that he should follow him. P. W. 7 readily acceded to his request and the three reached, the village of Pasupula where they boarded a bus which reached Banaganapalle at 10-5 a. m. on 16-12-1955. All the three went to A-4's room and stayed there. A-3 and P. W. 7 remained in the room, and A-2 went out only to return the next morning. Meanwhile, A-1 is said to have visited the room and asked A-3 and P.W. 7 to stay there. On the next day after the return of A-2 all the accused gathered at A-4's house and entered into a criminal conspiracy to kill Luther that very right. A-2 readily agreed to carry out this mission. In the night he woke A-3 and P.W. 7 and asked them to follow him. A-3 and P.W. 7 expressed their unwillingness, but he persuaded them saying that they had very little to do in the matter, as he himself will shoot the Sub-Inspector. He further stated to them that A-1 had promised them one bag of corn if Luther is killed. A-3 and P.W. 7 unwillingly accompanied A-2 and A-4. They reached a tree in front of the Sub-Inspector's house. After some time A-4 stood on the road at a distance of one furlong, according to plan. A-3 and P. W. 7 were instructed to wake up the Sub-Inspector by raising cries that in an affray between the females the males sustained injuries. First, they cried at the door of the Sub-Inspector. Thereafter, they went near the window where there was a lantern burning. The Sub-Inspector got up, opened one of the shutters of the window, asked them what the matter was and then instructed them to go to the police station nearby. By this time, A-3 and P. W. 7 went behind the window and A-2 whipped off a pistol with the result that the Sub-Inspector shrieked with pain. His wife rushed at the gun-report, closed the shutter and made the deceased lie on the ground with his head resting on her lap as the blood was flowing from the chest. Shortly thereafter, when the male-nurse reached the spot, he found the Sub-Inspector dead. Thus, according to the prosecution, A-2 is the physical murderer, and the other accused are his abettors.

3. During the investigation, the police got recorded the confessional statements of A-3 and P. W. 7 and discovered an empty cartridge, M.O. 7 in consequence of the information given by A-4. Besides as a result of search in the house of A-1 thereafter, they found a country-made pistol, M. O. 2, buried in the manger in the northern portion of the house of A-1. The prosecution story is that this gun and the cartridge belong to A-1 and were used in killing the deceased.
4. The prosecution examined 44 witnesses and produced some documentary evidence besides. The learned Sessions Judge on the retracted confessional statement of A-3 which, in his opinion, was fully corroborated by the other evidence adduced, found the accused guilty of the offences with which they were charged and sentenced them as stated above.

5. The learned counsel, Sri Basireddy appearing on behalf of A-1 and A-4, has advanced a two-fold argument. His main argument is that the learned Sessions Judge has erred in law in treating the confessional statement of A-3 as substantive piece of evidence against his co-accused and the conviction based thereon cannot therefore be sustained. The next argument is that the other evidence brought on record is not at all sufficient to bring home the guilt to the accused.

6. A confession of an accused person, if true and voluntary, no doubt, is one of the most effectual proofs of his guilt in the eye of law, for, there is always a presumption that a rational being will not wantonly make admissions prejudicial to his own interest and safety. But such confessions should naturally bind only the maker of it and not the persons who are jointly tried with him. Strictly speaking, it is not evidence against them within the meaning of Section 3, Evidence Act, as it is hot made on solemn affirmation nor in their presence and they had no opportunity to cross-examine them. That is why the general rule of English Law attaches no importance to such a confession of a co-accused. But, an exception is engrafted or. this general rule by Section 30, of the Indian Evidence Act, according to which the Court may take into consideration such a confession not only against the maker but also such other persons as are being tried jointly with him for the same offence. The ground on which it is based seems to be that when a confessor implicates himself to the same extent as he implicates a co-accused, the fact of self-implication may be taken as a guarantee for the truth of the accusation against the co-accused. Be that what it may, when he resiles from such a confession, evidently that supposed guarantee is wholly lost with the result that such a retracted confession of the co-accused is devoid of any evidentiary value. Even the unretracted confessions, according to the wording of the section, may be merely taken into consideration and cannot be made the basis of a conviction. There seems to have been, however, some misapprehension as regards the expression "may take into consideration" occurring in Section 30 and this was responsible for some divergence of opinion as to the exact extent to which the provisions of Section 30 may be availed of in convicting the co-accused. But, the pronouncement of the Privy Council and the recent judgments of the Supreme Court have removed all doubts. The learned Public Prosecutor has referred to some of the judgments wherein doubt has been expressed whether Section 30 can be interpreted in a manner as to render its provisions superfluous. In *Ugappa v. Emperor*[1], It has been observed that to hold that an accused person ought not to be convicted on the basis of a co-accused's confession corroborated by circumstantial evidence unless the circumstances constituting corroboration would, if believed to exist, themselves support the conviction is to render Section 30, Evidence Act, superfluous. A similar view has been expressed in *Emperor v. Kehri*[2], In a Full Bench decision of the Madras High Court in *In Re : B. K. Rajagopal*[3], this question has been, however,

[1] AIR 1929 Mad 498 [3] AIR 1944 Mad 117

[2] ILR 29 All 434

considered and it has been clearly laid down that the words "taken into consideration" in Section 30 do not mean that the confession is to have the force of sworn evidence, but such a confession is nevertheless evidence in the sense that it is a matter which the Court before whom it is made may take into consideration in order to determine whether the issue of guilt is proved or not. Such a confession is merely to be an element in the consideration of all the facts of the case. Section 30 entitles the Court to take into consideration the confession of the co-accused in deciding whether it is safe to rely on the other evidence adduced. The view of the Calcutta High Court has always been that Section 30, Evidence Act, does not provide that such a confession is evidence and still less does it say that it may be the foundation for the conviction of the co-accused. The obvious intention of the words "may be taken into consideration" seems to be that

when there is evidence tending to the conviction of the co-accused, the truth or completeness of this evidence being the matter in question, the circumstance of such person being implicated by the confession of one of those who are being jointly tried with them should be taken into consideration as bearing upon the truth or sufficiency of such evidence. In *Gunadhardas v. State*[4], it has been held that a confession of a co-accused can be used to corroborate other evidence. It may assist the Court in coming to the conclusion that the other evidence is true and therefore the accused is guilty. The learned Judges made it clear that it is one thing to say that a confession of a co-accused can be used to corroborate other evidence, but it is entirely a different thing to say that the other evidence can be used to corroborate the confession of the accused. The conviction must be based on the other evidence and the confession can be relied upon to help to satisfy the Court that the other evidence is true. In *Kashmira Singh v. State of Madhya Pradesh*[5], this question has been elaborately discussed and in order to remove all mis-conceptions their Lordships laid down the law on the subject in the following words :

> "The proper way to approach a case of this kind is first to marshal the evidence against the accused, excluding the confession altogether from consideration and see whether if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then, of course, it is not necessary to call the confession in aid. But, cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event, the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he will not be prepared to accept."

This view is reiterated in *Nathu v. State of U. P*[7]., where it has been laid down that confessions of co-accused are not evidence as defined in Section 3 and no conviction can be founded thereon. But, if there was other evidence on which a conviction can be based, they can be referred to as lending assurance to that conclusion and for fortifying it. In *V. V. Subbarao v. State of Andhra*[7], a Division Bench of this Court (to which my Lord the Chief Justice was a party) has discussed the point elaborately and the observations made are to the following effect :

[4] AIR 1952 Cal 618 [6] AIR 1956 SC 56
[5] AIR 1952 SC 159 [7]1955 Andh LT (Cri) 99

> "A co-accused's confession can be used not as any substantive evidence but only as an aid to make up the Judge's mind after the other evidence is scrutinised by him. A confession could be used only to lend assurance to the other evidence. Any little doubt that might be in mind of the Judge as regards the acceptability of the evidence may be dispelled by the confession * * -* It is an element that tilts the balance as it were against the accused".

Thus, the law is well-Settled that the confession of a co-accused is not substantive evidence in the sense that conviction on that alone must stand and Section 30 has merely given the Court a discretion to call it in aid in appropriate cases. It can be used only for lending assurance and is to be merely an element in considering the evidence in the case. If there is no other evidence or if the other evidence in the case is insufficient to establish the case against the accused, the confession cannot be taken into consideration against the co-accused. It cannot be called in aid to supplement evidence otherwise insufficient and in no case can it be used to fill up gaps in the

prosecution evidence. The Court below has not considered the material on record from this point of view. It has treated the confessional statement as substantive evidence and invoked the aid of circumstantial evidence for corroboration of the same. Such a course tantamounts to putting the cart before the horse and is likely to lead to erroneous conclusions.

7. So then, the question is whether the other evidence on record is sufficient to sustain a conviction. Before we deal with the same, we should consider the question relating to corpus delicti. That the deceased died on the night of 17-12-1955 of gun-shot wounds admits of no doubt. P. W. 1 his wife deposed that on the cry of "Ayya, Babu :" the deceased got up and opened the shutter. Thereafter, there was gun-report. The deceased reeled back crying with pain with his hands held : to the chest and as soon as he took his hands off, blood gushed out. She made him lie on the ground with the head resting on her lap. She cried out. On hearing the cry her daughter woke up and went to the Circle Inspector's house and brought two orderlies. Before the male-nurse could render any first aid the deceased died. P.Ws. 1 to 5 deposed about the same. The post-mortem examination revealed that there were 165 lacerated wounds each with a circumference of about ¼" distributed all over the chest and some of them were clustered at the centre of the sternum. The rest were scattered all over the right and left pectoral regions. The skin around the wounds is scorched and blackened with smoke and tattooed with unburnt gun powder. The subcutaneous tissues over the area of the above injuries were lacerated. There were internal injuries and some pellets were recovered from the cavity and wall of the left ventricle and the right lung. In the opinion of the doctor, the injuries were due to a gun-shot and the death was due to shock and haemorrhage on account of injuries. Thus, there is clear and unequivocal proof of corpus delicti. There is no doubt that the deceased died an unnatural death on account of gun-shot wounds on the night of 17-12-1955.

8. Now, we proceed to consider the other evidence on record against the accused. There is no direct evidence in the case. The entire evidence adduced is circumstantial. Circumstantial evidence no doubt is sometimes of great importance in criminal cases as it furnishes links in the chain of facts which go to establish the guilt of the accused and makes inference possible. It is a principle of universal application that in order to justify the inference of guilt in cases dependent upon circumstantial evidence the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. In the Supreme Court case reported in *Hanumant Govind v. State of Madhya Pradesh*[8], their Lordships made observations in this regard in the following terms :

> "In cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused".

9. In the present case, the circumstances relied on may be grouped under the following heads :

(1) Motive.
(2) Recovery of M. O. 2 the alleged country-made pistol and M. O. 7 the empty cartridge.
(3) Expert's evidence.
(4) Conduct of the accused previous and subsequent to the incident.
(5) Confession of A-3.

10. No motive is imputed to any of the accused but to A-1. It is said that A-2 belongs to his party, but there is no direct proof with regard to the same. A-3 and A-4 belong to different villages and evidently, they have no motive for committing the offence against the deceased. All that is said is that they were hired for the purpose. But, according to the prosecution story itself, it was never represented to them when they were brought, that they had to do any such nefarious act. A-3 was made to believe that his brother-in-law was suffering from fever, and P. W. 7 that his sister-in-law was suffering from fever. So much convinced was A-3 of the truth of the statement of A-2 that the prosecution witnesses deposed that he told everybody that he was going to see his brother-in-law. It is, however, stated that the idea of murder was put in their minds on the night of occurrence; but according to the prosecution story itself they expressed their reluctance. Thus, it cannot be said that they had any motive against the deceased.

11. A-4 also is not imputed with any motive. (After discussing the evidence on the subject of motive his Lordship concluded :) Thus, the evidence relating to motive is weak and ineffective. It is significant that from the cross-examination of the abovementioned witnesses it appears that there were many persons who bore grudge against the deceased. The evidence against accused 1 in relation to the motive attributed does not, therefore, assume any particular significance. But, it should be

[8] AIR 1952 SC 343

remembered that motive is not an essential element to prove the guilt in a criminal case. It may strengthen the evidence on record. But adequacy or otherwise of the motive is of no consequence, for most of the grievous crimes are committed out of very flimsy and frivolous considerations. If there is positive evidence, want of motive or inadequacy thereof can have no bearing on the case. So, then, it has to be considered whether the other evidence on record is sufficient to lay guilt at the doors of the accused.

12. The most significant circumstance which connects the accused with the guilt is alleged to have been found in the recovery of M. O. 2, the country-made smooth bore firearm. In this connection, we must also consider M. O. 7 which is said to have been recovered in consequence of the information given by A-4 from a place opposite to the bungalow by the side of the foot-path at the ridge of the field. It is a fired 12 bore "Gevelot Paris" empty cartridge case with the cap punctured. P.Ws. 44 and 22 deposed about the same. A-4 denied the recovery and the suggestion was made both to P.Ws. 22 and 44 that the recovery is fictitious which both the witnesses denied. The recovery is evidently from an open unprotected place near the foot-path. It cannot be said that no other person could have thrown such an empty cartridge there. Much significance therefore cannot be attached to such recovery. Even otherwise, unless it is proved that this cartridge was connected with the gun shot fired at the deceased on the day of occurrence no liability can be attached to the accused. It is not established by any reliable evidence that the

pellets, discharged from the gun-shot at the place of occurrence, did form part of this cartridge. The expert's opinion is inconclusive and the cartridge was at a sufficient distance from the place of occurrence. It has been urged that this cartridge was fired by M. O. 2 which has been recovered, as a result of house search, found buried in the manger in the northern portion of A-1's house. It is not the case of the prosecution that this recovery is in consequence of any information given by any of the accused, so that it may be relevant evidence under Section 27 of the Evidence Act. However, if it is secreted by the accused and recovered from his conscious possession and is found to be an incriminating object, its relevancy under the provisions of Section 8 or Section 11 (2), Evidence Act, cannot be disputed. The question, therefore, is whether this object was in the conscious or voluntary possession of A-1 and is connected with the offence alleged. Since A-1 is also charged with the offence under Section 19 (f), Arms Act, the matter has to be considered under the provisions of both the Indian Penal Code and the Indian Arms Act. According to the depositions of the witnesses, the recovery was made as a result of house search and M. O. 2 was found buried in the manger i.e., the place specified for the fodder of the cattle. It is evident from the testimony of P.W. 37 that A-1 has two yokes of bulls and a number of other cattle and has farm-servants also. P.W. 33 in the cross-examination deposed that one Nandivargam Venkata Reddy is residing in the house of accused-1 for the last about ten years. Thus it is clear that the house is inhabited not only by A-1 who is the 'karta' of the joint Hindu family but also another person, Nandivargam Venkata Reddy. It is further clear that the recovery was not made from the residential portion but from the place where cattle are tied and the fodder is kept. The object was admittedly hidden from human gaze. The accused has farm-servants. It cannot be presumed that the place is not accessible to these farm-servants especially when it is a place for tying cattle. The exact location and its distance from the gate are not clear from the record. Under these circumstances, it cannot be held that the thing hidden at a place accessible to others in a house inhabited not only by A-1 but also by another was in the conscious or voluntary possession of accused-1. It was the duty of the prosecution to prove against the accused that M.O. 2 belonged to him, that he had secreted it or that he was in actual possession of the thing recovered. Mere physical presence of the accused in proximity or in close proximity to the object cannot by itself be an incriminating circumstance unless it can be held that he was in conscious and intelligent possession of that object. Merely because he is the head of the joint family or the owner of the house, he cannot be credited with constructive knowledge of a hidden thing. Possession must imply knowledge and there would be no possession when there is no knowledge. It requires no elaborate argument to state that possession without knowledge lacks the element of mens rea or criminal intention which is essential for an offence. It cannot also be said that the weapon was under the control of the accused within the meaning of the Arms Act. "Control" under the Arms Act means that the accused must have power over the weapon so that he can direct its custody, production, use or disposal in some manner. Thus, in the instant case, it cannot be held that the said country-made smooth bore fire-arm which was lying buried in the manger at a place accessible to others was in the conscious or voluntary possession and control of the 1st accused. The offence under Section 19 (f), Arms Act, is not, therefore, made out against him.

13. Now, turning to the question of penal offence with which the accused is charged, it is evident that such possession which is not exclusive and which is not conscious cannot saddle the accused with any criminal liability. Besides, in order to attach penal liability, it must further be proved that this object is in any manner connected with the offence of murder.

14. The prosecution has relied on the report of the Chemical Examiner and the expert evidence of P.W. 38. The report of the Chemical Examiner is to the effect that the barrel washings of the pistol (M. O. 2) were examined and the combustion products of the smokeless powder in them were detected, though the time of firing could not be stated. The Chemical Examiner has further stated that he examined the margins of the rents of item X and the scrapings from item XIII for products of combustion of gun-powder but he did not detect the products of combustion of gun-powder in either of them. His conclusions after an examination of various items with the assistance of the Fire Arms Expert of the Crime Branch C.I.D., Madras are that :

(i) Item XII (M. O. 2) is a country-made pistol capable of firing a 12 bore cartridge and is in working order.
(ii) M. O. 7 was fired from M. O. 2.
(iii) M. Os. 8 to 10 could have formed part of 6 size 12 bore cartridge like M. O. 7 and could have been discharged from the same; and that
(iv) The pellets recovered are of No. 6 size and the pistol was discharged from a distance of 6 feet which can be concluded, having regard to the injuries described in the post-mortem certificate.

15. P.W. 38 in his deposition states that he fired a test cartridge with M. O. 2 and compared the pin-mark on M. O. 7 with the aid of a comparison microscope and he found agreement in shape and other finer striations and therefore he was of opinion that M. O. 7 was fired from M. O. 2. As regards M. Os. 8, 9 and 10, he states that they could have formed part of M. O. 7 and could have been discharged from it. He further states that the barrel washing of M. O. 2 was taken and the combustion products of smokeless powder were found, but the exact time of firing could not be stated. In cross-examination he says he did not take any photos of the pin-points etc.; that a similar cartridge like M. O. 7 could be fired in a revolver of the same barrel like M. O. 2 and that every pistol even if hand-made will have its own individual characteristics, in casting the pin-marks.

16. In scientific criminology the main principle of forensic ballistics is to establish whether a given bullet or cartridge was used in a particular weapon. The scientific knowledge during the past thirty years in this regard has advanced considerably. It is now possible not only to tally the cartridge fired with the gun used but a number of other important facts can be decided though with varying degrees of probability. Among these are the distance from which a shot was fired, the approximate time when the weapon was last fired and other questions of similar nature. These are all the questions that require solution in the present case. As pointed out above, the cartridge was not found at the place of occurrence. But, it was at altogether a different place.
It is necessary that it should be first connected with the pellets that were ejected and then with the weapon that discharged the same. This is possible if not only the time of firing M. O. 2 tallies with the time of the incident but also the thumb-prints of the gun on the cap and base of the cartridge tally with those found on the disputed cartridge and further the pellets are traced to the firearm in question. The conclusions of the Fire Arms Expert and the Chemical Examiner in this particular case do not take us far in the matter. So far as the pellets are concerned, the results arrived at by the Fire Arms Expert do not appear to be conclusive. They only seem to bear the impress of a mere probability though with regard to the pin strike and finer striations on the base

or the cap of the cartridge the opinion expressed seems to be definite and conclusive. But, unfortunately, he has not produced the test cartridge for comparison purposes. The learned advocate on that account has argued that unless the data be supplied or the enlarged photos be produced so that the opinion of the expert may be verified by the Court, the Court ought not to accept the opinion of the expert without satisfying itself of the correctness of the same. Reliance has been placed on *In re: Balija Pullayya*[9], *Harendranath Sen v. Emperor*[10], and *Fakir Mohomed v. Emperor*[11], We agree with the learned counsel that the Court should consider the data and be convinced of the correctness of the expert opinion. We feel that the test cartridge ought to have been sent to the Court so that the Court could be satisfied of the identity of the thumb-print of the gun on the breech face of both the cartridges. As we have observed above, forensic ballistics concern with investigation of fire-arms and ammunition and of problems arising from their use for purposes of legal evidence. The fire-arms can be broadly divided into two main classes : (1) smooth bore arms; and (2) rifle arms. In the first come the shot guns or the fire-arms like M. O. 2. M. O. 2 cannot be confused with an automatic or self-loading pistol which ejects the empty cartridge at the spot nor with a revolver which has a rotating magazine called cylinder. Whatever its size, M. O. 2 is only a smoothbore country-made firearm. The rifles, revolvers, automatic and self-1oading pistols and machine guns fall under the

[9] AIR 1941 Mad 88 [11] AIR 1936 Bom 151

[10] AIR 1931 Cal 441

above-mentioned second class. The barrel of the second class being furnished with spiral grooves imparts spin to the bullet, thereby giving not only accuracy and penetrating power but also the markings and the other characteristics of the barrel which carry individual peculiarities. But, shots discharged from a smooth bore firearm scatter over an area that increases roughly according to the distance of the target from the gun, and besides these missilies do not bear the individual characteristics of the barrel so effectively as in the rifle arm. That is the reason why the pellets from a shot-gun, though can be measured, weighed and subjected to chemical analysis, cannot establish the identity of the gun that fired them though in the case of bullets from a rifle arm the identification of bullets is possible with the help of a microscope and expert's services. Lemoyne Snyder in his book on 'Homicide Investigation' at page 100 discussing the bullets from a rifle arm states as follows :-

> "When a lead bullet is fired through this barrel, these characteristics of the gun barrel will be transferred to the sides of the bullet so that bullet's fired from a certain barrel will have characteristics which are peculiar to that particular firearm and to no other. In like manner other machine parts of the mechanism, such as the firing pin, extractor pins, the breech facing will likewise impart marks to the primer or shell which are characteristics of that particular weapon and to no other.

Thus, it is possible, when a bullet is found, in a dead body or any empty shell near where a gun is fired, to tell whether that bullet or shell was fired in any particular weapon which may be suspected of having fired the fatal shot." C. J. Poison in "The Essentials of Forensic Medicine" at page 166 with regard to shot-gun missiles states that "the pellets from a shot-gun can be measured, weighed and subjected to chemical analysis, although the results have a relatively limited value". Thus, in this particular case where the pellets have been discharged from a smooth bore barrel firearm the expert's opinion cannot take us far. The pellets unlike the bullets do not bear the impress or the characteristic marks of the barrel of a particular weapon which

distinguish them from those of the barrel of any other like weapon. The size of the pellets alone is not a dependable test nor when their actual number is not correctly ascertained can they be in any manner-connected with M. O. 7 to any degree of probability or certainty. It must be remembered that even in cases of bullet evidence, the expert evidence should come before the Court by means of photo-micrographs. Nigel Morland in "An Outline of Scientific Criminology" at page 96 under the caption "Court and Bullet Evidence" states :

> "Expert evidence of the highly technical kind with which forensic ballistics deals, is usually presented to the court by means of photo-micrographs that show the various significant points of agreement. The preparation of these demands a high degree of skill if all the relevant points are to be brought out and the possibility of error excluded. It is a tribute to the way in which such work has been handled that, new though forensic ballistics is as compared with other sciences, Courts today readily accept its evidence."

Thus, it is evident that the evidence with regard to identity of pellets not only labours under inherent want of precision but also is most unsatisfactory. The case of the prosecution that the missiles at the scene of occurrence were discharged from M. O. 2 must therefore fail. No doubt, the thumb-print of the gun on the cartridge plays an important part in establishing the identity of the gun provided the suspected cartridge can be connected with the incident, but in this regard too there is no material on record that the trial shots conducted have given the thumb-print of the gun in perfect unison with that on the suspected cartridge. M. O. 7. Lemoyne Syndar on 'Homicide Investigation' at page 100 while describing figures 32 explains the fired shell in the following manner :

> "When a cartridge is fired, the explosion not only forces the bullet out of the barrel, but with equal force it drives the shell back against the breech of the gun. The primer, being made of soft metal, will pick up any scratches or tool marks on the breech facing and these markings on the primer will be characteristic of that particular firearm and none other."

Nigel Morland in his book on Scientific Criminology at page 91 characterizes these markings as thumb-print of the gun and describes them as below –

> "When a firearm of any kind is discharged, the gases generated by the combustion of the charge have two effects; they eject the bullet from the muzzle with considerable velocity, and they drive back the cartridge against the breech face of the weapon. The pressure with which the latter occurs is sufficient to cause the cap and base of the cartridge, which are of comparatively soft metal, to take an imprint of the breech face, in much the same way as a piece of wax pressed on to a seal takes an impression of the design. It is this imprint which enables cartridges to be identified as to having been fired from a particular gun."

While describing the method of examining cartridges, at page 92 he states as follows :

> "Broadly, therefore, the method of determining whether a cartridge has been fired from a

given gun - often an important factor in crime investigation - is as follows : Several trial shots are fired from the gun it is desired to test. The markings made on the cartridges are compared with those on the suspected cartridge.

By a process of comparison and minute examination according to a fixed plan, identity can be established or disproved with a probability of error so remote as to be entirely outside practical consideration. To put the problem simply, it may be stated thus : the trial shots give the thumb-print of the gun. Has the suspected cartridge the same thumb-print? If it has, identity is established; if not, it is certain that the gun and the cartridge do not 'marry'. In practice, as would be expected, the matter is not so simple as this, and many difficulties and complications arise. To start with, not only the marks already mentioned on the base of the cartridge and on the cap, but those on the body, of tumular part, have to be considered. There are others that provide clues, such as the indentation made by the firing-pin and by the mechanism for ejecting the spent cartridge. The pressure of the gases formed by the explosion also plays a part in determining the nature of the thumb-print, since, owing to slight differences in the charge as between cartridge and cartridge, certain marks may appear on one cartridge, and not on another." This makes it clear that even the examination of cartridges requires minute care and thorough satisfaction for correct conclusions. The Court drawing an inference from the opinion of the expert therefore should be satisfied of all these."

17. This is possible only when the requisite material is brought before it. Evidently but for M. O. 7 which is said to be a suspected cartridge, no; test shot cartridge has been produced before the Court so that the identity of the marks on the suspect may be established with the test shot cartridge. Indubitably, the evidence on record is scanty and does not connect M. O. 2 either with M. O. 7 or with the pellets that were discharged at the place of occurrence. As we have pointed out above, the expert has expressed his inability to determine even approximately the time at which the gun must have been last fired. The Chemical Examiner's conclusion with regard to the range of firing too based wholly on the injuries described in the post mortem certificate is not much dependable. The diameter of the area in which the pellets lay is not ascertained nor any estimate based on tests with the suspected weapon is arrived at. The overshot chord or wad may also be a determining factor. But evidently that has not been made the basis for his conclusion. We think it unnecessary to enter into a detailed discussion in this behalf. It is, however, clear that the evidence of the expert or the Chemical Examiner in this case is of no help in establishing the identity of the pellets with the gun, M. O. 2. Neither M. O. 2 nor M. O. 7 can therefore be said to be an incriminating object in relation to the murder of the deceased. Thus, it is neither proved that A-4 or A-1 had owned or possessed M. O. 2 and M. O. 7 nor is it established that these were used for the murder of the deceased.

18. The other evidence adduced relates to the association of A-2 with A-3 and P. W. 7 and the movements and conduct of A-3 and P. W. 7 before and after the incident. (After discussing the evidence and taking into consideration the confessional statement of A-3 which had been retracted even at the earliest opportunity before the committing Magistrate, his Lordship concluded that the evidence did not carry conviction to his mind.) Lastly, it is contended that a retracted confession cannot form the basis of his conviction especially when he was neither seen at or near the scene of occurrence, nor was any incriminating object recovered from him.

19. There is no doubt that the statement, Ex. P. 13, is a confessional statement and unless it is proved that it is involuntary or unlawfully induced it must have its legal effect. Though it is alleged that the accused was in police custody for sufficient time before he was produced before the magistrate for confession, the record does not show that till he was produced on 31-12-1955 he was in police custody. On the contrary it appears that he was remanded on 30th itself. The certificate of the Magistrate and his deposition clearly point out that due warning was given and every care was taken in recording the confessional statement. Thus, apparently, it cannot be said that the statement is the product of police coercion or that it is involuntary.
Of course, the accused has retracted his statement at the earliest possible opportunity and this coupled with other circumstances gives occasion to some suspicion, but the mere fact that the accused has retracted does not render his confessional statement ineffective. A confession even when retracted is admissible. There is no difference between a retracted and an unretracted confession so far as admissibility is concerned. The difference, if any, is as to its being acted upon. As against the maker, even a retracted confession may form the basis of a legal conviction but only if the confession is believed to be true and voluntary. It is the duty of the Court to satisfy itself fully from all material facts and circumstances that the confession cannot but be true. The rule of prudence which has got all the reverence of law dictates that it is not safe to act upon such a retracted confession unless there is independent corroboration in material particulars. So, the Courts have even gone to the extent of holding that a conviction on the basis of a retracted confession uncorroborated in material particulars is opposed to law. The question, therefore is whether the retracted confession of the accused finds sufficient corroboration from the circumstances of the case. The corroboration must, of course, be on some material particular connecting the accused with the offence. There should be some circumstance on record which implicates or tends to implicate the accused so as to impress the court that the confession is true. Recovery of an incriminating object or similar other circumstance which tends to connect the accused, though by itself may not be sufficient for conviction, certainly shall afford corroboration sufficient for the purpose. But, a circumstance which has no criminal significance and which is susceptible to an innocent explanation cannot constitute sufficient corroboration required for conviction. As pointed out above, but for the fact that A-2, A-3 and P. W. 7 were seen together up to Banganapalle, a fact which by itself neither excites suspicion nor stamps their movements with any criminal impress, there is no evidence to connect any of these accused with the offence. Even this evidence is weak and discrepant and does not carry conviction to our mind. In this state of evidence, we think it unsafe to convict A-3 merely on the basis of his retracted confession.

20. Now, the last point that remains for consideration is whether there is any proof of criminal conspiracy for which all the accused have been convicted. In a criminal conspiracy, what is to be proved is agreement and common design. It is true that this proof need not be by direct evidence and that existence of a conspiracy may even be a matter of inference deduced from criminal acts done in pursuance of a common criminal purpose. But, unless a detailed and specific proof against each of the accused that they participated in a particular design to do a particular thing has been established, there can be no conviction under Section 120-B. In the present case, there is no evidence either direct or circumstantial of agreement and common design. It was, no doubt, sought to be established that in A-4's room all the conspirators gathered together and made up their mind to kill the deceased. But, P. W. 20 who has deposed about the association of all the accused except A-3 and A-8 in A-4's room has been disbelieved by the Court below. Except this there is nothing on record to establish the offence of criminal conspiracy under Section 120-B, Indian Penal Code. Under these circumstances, there can be no warrant for conviction of the

accused under Section 120-B.

21. The result is, all the accused are entitled to acquittal and their appeals must be allowed. We, therefore, set aside the order of convictions and sentences passed against the appellants, acquit all of them, and direct that they be set at liberty.
Convictions set aside.