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(1947) AIR(PC) 67

PRIVY COUNCIL

(Before : John Beaumont, Uthwattand, Simonds, Lords Wright, JJ.)

PULUKURI KOTTAYA AND OTHERS — Appellant

Vs.

EMPEROR — Respondent

Privy Council Appeal No. 37 of 1946
Decided on : 19-12-1946

Counsel for Appearing Parties

India Office, Crown, Nevill, Barrow Rogers, John Megaw, R.K. Handoo, D.N. Pritt, for the Appearing Parties.

JUDGMENT

Sir John Beaumont, J.

This is an appeal by special leave against the judgment and order of the High Court of Judicature at Madras, dated 22-10-1945, dismissing an appeal against the judgment and order of the Court of Session, Guntur Division, dated 2-8-1945, whereby the appellants, who were accused 1 to 9, and nine others, were found guilty on charges of rioting and murder. Appellants 1, 2, 3, 4, 7 and 8 were sentenced to death, and appellants 3 to 9 were sentenced to transportation for life. There were other lesser concurrent sentences which need not be noticed. At the conclusion of the arguments their Lordships announced the advice which they would humbly tender to His Majesty, and they now give their reasons for that advice.

2 The offence charged was of a type common in many parts of India in which there are factions in a village, and the members of one faction are assaulted by members of the other faction, and, in the prosecution which results, the Crown witnesses belong to the party hostile to the accused; which involves that their evidence requires very careful scrutiny. In the present case the assessors were not prepared to accept the prosecution evidence, but the learned Sessions Judge, whilst taking careful note of the fact that the six eye-witnesses were all hostile to the accused, nevertheless considered that the story which they told was substantially true, and accordingly he convicted the accused. As already noted, this decision was upheld by the High Court in appeal.

3 The grounds upon which leave to appeal to His Majesty in Council was granted were two:

1. The failure of the prosecution to supply the defence at the proper time with copies of statements which had been made by important prosecution witnesses during the course of the preliminary police investigation involving, it is alleged, a breach of the express

provisions of S. 162, Criminal P. C.

2. The alleged wrongful admission and use in evidence of confessions alleged to have been made whilst in police custody by appellants 3 and 6. This point involves an important question as to the construction of S. 27, Evidence Act, upon which the opinions of High Courts in India are in conflict.

4 Their Lordships will deal first with the alleged infringement of S. 162, Criminal P. C. The relevant portions of that section are as follows:

"162. (1) No statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police-diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by S. 145, Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination."

5 The facts material upon this part of the case are these. The offence took place at about 6-30 p. m. on 29-12-1944, and at 7 a. m. on the 30th December, the police Sub-Inspector held an inquest on the body of one of the murdered men. He examined five of the prosecution witnesses, including four of the alleged six eye-witnesses, and wrote down their statements in his note-book. After the conclusion of the inquest the Circle Inspector took over the investigation from the police Sub-Inspector and on the same day, that is 30th December, he examined all the alleged eye-witnesses and others, including all the witnesses who had been examined by the police Sub-Inspector, and their statements were recorded in the case diary prepared by the Circle Inspector. It is the failure to produce the note-book of the police sub-Inspector which constitutes the alleged infringement of the proviso to S. 162, and the facts as to this are stated in an affidavit of Gutlapally Venkata Appayya sworn on 19-10-1945, and are not challenged. Prior to the commencement of the preliminary inquiry before the Magistrate an application was made on behalf of the accused for grant of copies of statements under S. 162, Criminal P. C., recorded by the Sub-Inspector and the Circle Inspector of Police from the prosecution witnesses in the case during investigation. The accused were supplied with copies of statements made by witnesses before the Circle Inspector of Police and were informed that statements made to the sub-Inspector of Police were not available. During the Sessions trial, when prosecution witness

No. 2, who was the principal prosecution witness, was in the witness-box, counsel for the accused represented to the Court that he had not been supplied with copies of statements recorded by the Sub-Inspector at the first inquest, and requested the Court to make those statements available to enable him to cross examine the important prosecution witnesses with reference to the earliest statements. The learned Sessions Judge directed the Public Prosecutor to comply with the request. The Public Prosecutor, after consulting the Sub-Inspector and Circle Inspector, who were present in Court, submitted to the Court that except what was recorded in the inquest report itself, no other statements were recorded by the Sub-Inspector, and the learned Judge directed the defence counsel to proceed.

The next day, when the cross-examination of prosecution witness No. 2, was continued counsel for the accused submitted to the Court that he desired to file an application for copies of statements recorded by the Sub-Inspector at the first inquest so that it might be endorsed by the prosecution that no such record of statements existed. Then the public prosecutor stated to the Court that he fully realized his responsibility in making the statements he had made on the previous day, but there was no record of any statement made at the inquest available. On the fourth day of the trial, after the principal prosecution witnesses had been discharged, the police Sub-Inspector gave evidence, and he then produced in the witness-box his note-book containing the statements of the five witnesses he had examined at the inquest, and a copy of such statements was then supplied to the accused. There are some discrepancies between the statements made to the police Sub-Inspector and the statements of the witnesses in the witness box, but it is not suggested that such discrepancies are of a vital nature.

6. It is clear from the facts narrated above that there was a breach of the proviso to S. 162, Criminal P. C., and that the entries in the police Sub-Inspector's note-book were not made available to the accused, as they should have been, for the cross-examination of the witnesses for the Crown. The right given to an accused person by this section is a very valuable one and often provides important material for cross examination of the prosecution witnesses. However slender the material for cross-examination may seem to be, it is difficult to gauge its possible effect. Minor inconsistencies in his several statements may not embarrass a truthful witness, but may cause an untruthful witness to prevaricate, and may lead to the ultimate break-down of the whole of his evidence and in the present case it has to be remembered that the accused's contention was that the prosecution witnesses were false witnesses. Courts in India have always regarded any breach of the proviso to S. 162 as matter of gravity. AIR 1945 Nag 11 where the record of statements made by witnesses had been destroyed, and 53 ALL 458,2 where the Court had refused to supply to the accused copies of statements made by witnesses to the police, afford instances in which failure to comply with the provisions of S. 162 have led to the convictions being quashed. Their Lordships would, however, observe that where, as in those two cases, the statements were never made available to the

accused, an inference, which is almost irresistible, arises of prejudice to the accused. In the present case, the statements of the witnesses were made available though too late to be effective, and their contents are known. This by itself might not be decisive, but as already noted, the Circle Inspector re-examined the witnesses whom the police Sub-Inspector had examined, and did so on the same day. The notes of the examination by the Circle Inspector were made available to the accused at the earliest opportunity, and when the note-book of the police Sub-Inspector was produced towards the end of the prosecution case, counsel for the accused was in a position to ascertain whether there was any inconsistency between the statements made to the police Sub-Inspector and those made later in the day to the Circle Inspector. If any such inconsistency had been discovered, this would have been a strong point for the accused in their appeal, but no such point was taken; indeed, the only complaint upon this subject in the High Court was that the police Sub-Inspector ought to be presumed to have prepared a case diary which he was suppressing. The High Court rejected this contention, rightly as their Lordships think. Nor has any such point been taken before this Board, and the entries from the Circle Inspector's diary are not on record. In the result, their Lordships are satisfied that, in the peculiar circumstances of this case, no prejudice was occasioned to the accused by the failure to produce in proper time the note-book of the police Sub-Inspector.

7. Even on this basis, Mr. Pritt for the accused has argued that a breach of a direct and important provision of the Code of Criminal Procedure cannot be cured, but must lead to the quashing of the conviction. The Crown, on the other hand, contends that the failure to produce the notebook in question amounted merely to an irregularity in the proceedings which can be cured under the provisions of S. 537, Criminal P. C., if the Court is satisfied that such irregularity has not in fact occasioned any failure of justice. There are, no doubt, authorities in India which lend some support to Mr. Pritt's contention, and reference may be made to 49 ALL 475,3 in which the Court expressed the view that S. 537, Criminal P. C., applied only to errors of procedure arising out of mere inadvertence, and not to cases of disregard of, or disobedience to, mandatory provisions of the Code, and to 45 Mad 8204 in which the view was expressed that any failure to examine the accused under S. 342, Criminal P. C., was fatal to the validity of the trial and could not be cured under S. 537. In their Lordships' opinion this argument is based on too narrow a view of the operation of S. 537. When a trial is conducted in a manner different from that prescribed by the Code as in 28 IA 257,5 the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under S. 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. This view finds support in the decision of their Lordships' Board in 5 Rang 53,6 where failure to

comply with S. 360, Criminal P. C., was held to be cured by Ss. 535 and 537. The present case falls under S. 537, and their Lordships hold the trial valid notwithstanding the breach of S. 162.

8 The second question, which involves the construction of S. 27, Evidence Act, will now be considered. That section and the two preceding sections, with which it must be read, are in these terms :

"25. No confession made to a Police officer, shall be proved as against a person accused of any offence.

26. No confession made by any person whilst he is in the custody of a Police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

9 The explanation to the section is not relevant.

"27. Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a Police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

10. Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to

the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to S. 26, added by S. 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed a" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

11 High Courts in India have generally taken the view as to the meaning of S. 27 which appeals to their Lordships, and reference may be made particularly to 10 Lah 2837 and 56 Bom 1728 on which the appellants rely, and with which their Lordships are in agreement. A contrary view has, however, been taken by the Madras High Court, and the question was discussed at length in a Full Bench decision of that Court in ILR (1937) Mad 6959 where the cases were referred to. The Court, whilst admitting that the weight of Indian authority was against them, nevertheless took the view that any information which served to connect the object discovered with the offence charged was admissible under S. 27. In that case the Court had to deal with a confession of murder made by a person in police custody, and the Court admitted the confession because in the last sentence (readily separable from the rest) there was an offer to produce two bottles, a rope, and a cloth gag, which, according to the confession had been used in, or were connected with, the commission of the murder, and the objects were in fact produced. The Court was impressed with the consideration that as the objects produced were not in themselves of an incriminating nature their production would be irrelevant unless they were shown to be connected with the murder, and there was no evidence so to connect them apart from the confession. Their Lordships are unable to accept this reasoning. The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into S. 27 something which is not there, and admitting in evidence a confession barred by S. 26. Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law.

12 In their Lordships' opinion ILR (1937) Mad. 6959 was wrongly decided, and it no doubt influenced the decision now under appeal.

13 The statements to which exception is taken in this case are first a statement by accused No. 6 which he made to the police sub-Inspector and which was reduced into writing, and is Exhibit "p." It is in these terms:

"The mediatornama written at 9 a. m. on 12-1-1945, in front of Maddinoni Verrayya's choultry and in the presence of the undersigned mediators. Statement made by the accused Inala Sydayya on being arrested. About 14 days ago, I Kotayya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We, all beat Beddupati China Sivayya and Subayya, to death. The remaining persons, Pullayya, Kotayya and Narayana ran away. Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of Pulukuri Kotayya."

(Signed) Potla China Mattayya.

( ) Kotta Krishnayya.

12th January, 1945. (Sgd.) G. Bapaiah,

Sub-Inspector of Police.

14 The whole of that statement except the passage "I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come" is inadmissible. In the evidence of the witness Potla China Mattayya proving the document the statement that accused 6 said "I Mattayya and others went to the corner of the tank-land. We killed Sivayya and Subayya" must be omitted.

15 A confession of accused 3 was deposed to by the police Sub-Inspector, who said that accused 3 said to him :

"I stabbed Sivayya with a spear, I hid the spear in a yard in my village. I will show you the place."

The first sentence must be omitted. This was followed by a Mediatornama, ex. Q. I, which is unobjectionable except for a sentence in the middle, "He said that it was with that spear that he had stabbed Boddapati Sivayya," which must be omitted.

16. The position therefore is that in this case evidence has been admitted which ought not to have been admitted, and the duty of the Court in such circumstances is stated in S. 167, Evidence Act, which provides:

"The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

It was therefore the duty of the High Court in appeal to apply its mind to the question whether, after discarding the evidence

improperly admitted, there was left sufficient to justify the convictions. The Judges of the High Court did not apply their minds to this question because they considered that the evidence was properly admitted, and their Lordships propose therefore to remit the case to the High Court of Madras, with directions to consider this question. If the Court is satisfied that there is sufficient admissible evidence to justify the convictions they will uphold them. If, on the other hand, they consider that the admissible evidence is not sufficient to justify the convictions, they will take such course, whether by discharging the accused or by ordering a new trial, as may be open to them.

17 Their Lordships have, therefore, humbly advised His Majesty that this appeal be allowed and that the case be remitted to the High Court of Madras, with directions to consider whether the evidence on record apart from the confessional statements of accused No. 3 and accused No. 6 which their Lordships have held to be inadmissible, is sufficient to justify the convictions and to make such order in the matter as may be right having regard to their decision upon the question remitted to them.