

KERALA HIGH COURT

Mathai Thommen

Vs.

State (Kerala)

Criminal Appeal No. 270 of 1958 and R.T. No. 21 of 1958, Ernakulam in S.C. No. 11 of 1958

(Kumara Pillai and M.S. Menon, JJ.)

17.10.1958

JUDGMENT

Kumara Pillai, J.

1. The accused in Sessions Case No. 11 of 1958 of the Sessions Court of Ernakulam has filed this appeal against his conviction for the offence of murder punishable under Section 302, Indian Penal Code, and the sentence of death therefor passed by the learned Sessions judge. The referred trial is the reference made by the Sessions Judge for confirmation of the sentence.

2. The charge against the accused was that, at about 6 P.M. on the 30th March 1958, he stabbed his younger brother, Varghese, with a penknife on the right side of his neck near the region the cheek joins the neck and thereby caused his death.

3. P.W. 7 is the accused's father. It would appear from the evidence in the case that besides the accused P.W. 7 had at least three sons. In order of seniority, P.W. 7's sons were one Ouseph, the accused, the deceased Varghese, and P.W. 4. P.W. 7 had some properties, and there were quarrels between the accused on the one hand and P.W. 7 and Varghese on the other on account of certain testamentary dispositions made by P.W. 7. These quarrels had resulted in a petition by the deceased Varghese to the Police on the 22nd October 1956 alleging that he apprehended danger to his personal safety from the accused. According to the prosecution, on account of these property disputes and Varghese's conduct in giving the petition to the Police the accused was on inimical terms with Varghese and resolved to kill him and with that intention he went, on the date of the occurrence, to a rubber estate at Edakkattuvayal village where the deceased Varghese and P.Ws. 1 to 3 were playing cards and after watching the game for about three-quarters of an hour he suddenly whipped out a pen-knife and stabbed Varghese on the neck and left the place immediately, drawing back the knife from the wound and leaving it at the scene of occurrence. P.Ws. 1 to 3 also took to their heels immediately. Varghese went to the shop of P.W. 6, about 90

feet from the scene of occurrence, bleeding profusely from the injury caused, by the accused, and there P.Ws. 1 to 3 joined him and P.W. 5 bandaged his wounds. Two persons, Kurian and Kutti, who have not been examined in this case, sent information about the occurrence to Varghese's people through P.W. 9, and on receipt of it P.W. 4 came to P.W. 6's shop and took Varghese on a cot to the hospital. Before they could reach the hospital Varghese died on the way and his body was left on the road near a cupola. On the next morning at about 9 A.M. P.W. 4 appeared at the Tripunithura Cusba Police station and gave the first information statement, Ex. P1. The accused also appeared at the police station on 31-3-1958 and he was then arrested. This, in short, is the prosecution case.

4. The accused's plea in the Sessions Court was one of denial. According to him, he had not gone to the scene of occurrence and he had not stabbed Varghese. Some persons including his elder brother, Ouseph, went to his house on the night of 30th March 1958 and threw stones and broke the tiles and so he went on the next morning to the police station to complain about the incident and then the police arrested him saying that it was he who had caused Varghese's death. It would appear from the judgment of the learned Sessions Judge that it was contended on-behalf of the accused that Varghese must have been done to death by one of the participants of the game of cards, probably by P.W. 3, in the heat of a quarrel during the game itself and that, at any rate, the present prosecution version was totally false. As the accused was too poor to engage a counsel for himself he was defended in the Sessions Court by an advocate engaged by the court under rule 21, Criminal Rules of Practice.

5. The learned Sessions Judge disbelieved the accused's plea and refusing also to accept the contention put forward by his counsel found the prosecution case true and convicted the accused under Section 302, Indian Penal Code, and sentenced him to the extreme penalty.

6. In this court also the case on behalf of the accused was argued by counsel appointed by the court under rule 21 of the Criminal Rules of Practice. The main contention in this court was that the prosecution evidence was totally unreliable and that the accused had in fair chance in the lower court to put forward and prove his case. The suggestion that one of the participants in the Game of cards, probably P.W. 3, might have stabbed Varghese and caused the injury during the course of a quarrel following the game was repeated before us also.

7. After hearing the learned Public Prosecutor, who of course, controverted the arguments of the defence counsel, we are convinced that the contention of the defence counsel that the prosecution evidence is unreliable has to be accepted and that the accused has to be acquitted. The evidence mainly relied upon by the Prosecution, and accepted by the learned Sessions Judge, is that of P.Ws. 1 to 8 who are said to be eye witnesses, and the evidence of P.Ws. 5 and 6 that the deceased Varghese had made a dying declaration to the effect that it was the accused who had stabbed him. The evidence of P.Ws. 1 to 3 is that, while Varghese and they were playing a game of cards, known as support and usually played with two packets of cards, the accused came and

stood behind Varghese watching them, that he remained in that position watching the game for about three-quarters of an hour and that then all of a sudden he whipped out a pen-knife and stabbed Varghese. According to P.Ws. 5 and 6, they saw Varghese going to P.W. 6's shop bleeding profusely from an injury on his neck, P.W. 5 went to the road pathway and helped the towering Varghese to go to P.W. 6's shop, and there P.W. 5 bandaged Varghese's wound. P.W. 5 says that Varghese said at that time that his elder brother had stabbed him, and P.W. 6 says that what Varghese said at that time was that Thomman Chettan had stabbed him. No doubt this evidence of P.Ws. 1 to 3, 5 and 6, if true, will support the conviction under Section 302, I.P.C. But there are numerous circumstances throwing considerable suspicion on their evidence and making it totally unacceptable.

8. Ordinarily, it is difficult to believe that a man who had come to the scene of occurrence resolved to cause the death of one of the players, and come also armed for that purpose, would have allowed himself to wait for three-quarters of an hour and taken the risk of losing the opportunity to carry out his intention by watching the game for such a long time. If he had come to the place with the intention of causing Varghese's death the chances are that he would have made the attack almost immediately or shortly after he came to the scene and not waited in the place for such a long time watching the game. According to the Defense, the game of 'support' is a wagering game and passions are likely to be aroused by that game. It was suggested during the cross-examination of P.Ws. 1 to 3 that more persons than four were playing the game that day and that 'support' could not be played by four players alone. P.Ws. 1 to 3, of course, denied the suggestion. But, having regard to the fact that two packets of cards had to be used for the game, we are inclined to accept the defence suggestion that this was a wagering game. Therefore, we are inclined to think that during the course of the game passions might have been aroused and that if the accused was present at the scene while the game was going on it is not unlikely that something might have happened which aroused the passions of one of the sides which were engaged in the game and during the heat of the quarrel a fight might have started which ended in Varghese's death. There was a suggestion that P.Ws. 5 and 3 themselves might have been participants in the game or on lookers thereof and that the present case that they were in P.W. 6's shop was not true. It has come out in the evidence of P.Ws. 1 to 3 that generally there would be a crowd of on-lookers when they played their games. But they would say that on this occasion there was no one besides the four players and the accused. According to P.W. 9, two persons named Kurian and Kutti told him to go to Varghese's people and tell them that Thommen Nanar had stabbed Varghese. Neither of these two persons has been called as a witness by the Prosecution, and no explanation has been given as to how they came to know that Varghese had been stabbed by Thommen. The information which they had asked P.W. 9 to convey to Varghese's people was not that Varghese's elder brother had stabbed Varghese but that Thommen had stabbed him (Nanar is only a term which people of low caste use when they speak of or is Christians). Since both the accused and P.W. 3 bear the name Thommen this information would be consistent with the prosecution case that it was the accused who had stabbed Varghese and with the defense suggestion also that it was P.W. 3 who stabbed Varghese. If, as a matter of fact,

besides P.Ws. 1 to 3, P.Ws. 5 and 6 were also engaged in the game of cards and a quarrel had arisen during the game and Varghese had died at the hands of one or them during the course of the quarrel it is highly likely that all of them would try to shield the real offender who was one of them and to make out that someone else was guilty of the murder. In this connection it is significant that the doctor who conducted the postmortem had at first deposed that, after sustaining the injury which had cut his trachea it would not have been possible for Varghese to speak. P.Ws. 5 and 6, however, stated that Varghese told them who had stabbed him - "elder brother" according to P.W. 5, and "Thommen Chettan" according to P.W. 6. In the light of the doctor's first statement this evidence cannot be true. But as a result of further questioning by the learned Sessions Judge the doctor stated that it might have been possible for Varghese to speak. According to the doctor, Varghese could have shrieked and made himself understood. In the police charge two persons had been cited to prove that they had also helped in carrying the cot on which Varghese was taken, to the hospital. Varghese's wife also was cited as a witness. But the prosecution omitted to, examine these three witnesses, and no explanation has been given for his omission except that the prosecutor chose to give them up. It is contended that the omission to examine these witnesses was due to the apprehension that if they were examined it might come out that Varghese had completely lost his powers of speech when he came or was taken to P.W. 6's shop, if he ever came there at all after he was wounded, and had not made any statement as is now spoken to by P.Ws. 5 and 6. Probably Varghese's wife had come some time after Varghese was taken to P.W. 6's shop, and so no particular significance can be attached to the omission to examine her. But considering the fact that P.Ws. 1 to 3 and Varghese (if not P.Ws. 5 and 6 also) were engaged in a wagering game of cards in open air, which was played with two packets of cards, the probabilities appear to us to be that there must have been several persons present at the time of the game, some participating in it and some watching it, and that the two persons alleged to have been helping in carrying the cot, and Kurian and Kutti must also have been present at the game and scene of occurrence and seen what really took place. The omission to examine them appears to us to be very fatal to the prosecution case.

9. In paragraphs 8 to 9 of his judgment, the learned Sessions Judge refers to the evidence of P.Ws. 5 and 6 : and it would appear from those paragraphs that he was relying very strongly upon the so called dying declaration said to have been made by Varghese as soon as he came to P.W. 6's shop. In paragraph 9 the learned Judge says :

"There is evidence, that when the deceased came to the shop of P.W. 6 he declared, that this elder brother had stabbed him. The statement was not as was supposed by the learned counsel for the defense, that Thommen had stabbed him, upon which assumption, an argument was advanced that the reference might as well be to P.W. 3 who also goes by the same name. This statement as to his assailant made by the deceased, amounts to a dying declaration."

The learned Judge was wholly wrong in the statement he has made in this paragraph. The actual

statement by the deceased, according to P.W. 6, was that "Thommen Chettan" had stabbed him. And yet the learned Judge would have it that there is no statement that Thommen had stabbed him. "Thommen Chettan" of course might refer to the accused or P.W. 3. But the learned Judge was not justified in saying that there was no such statement. P.Ws. 1 to 3, who claim to have come to the shop of P.W. 6 immediately after Varghese reached there, do not say that the deceased had made such a statement. Some reliance has been placed by the learned Judge on the fact that the accused had left the spot immediately after the assault without rendering any aid to Varghese. From this the learned Judge argues that the injury must have been caused by the accused and not by any other person as suggested by the defence. Why he did not extend the same reasoning to the conduct of P.Ws. 1 to 3 also in running away from the place without rendering any aid to their companion passes understanding.

The learned Judge would have it that they might have run away because they did not want to get involved in a criminal case. But the explanation which P.Ws. 1 to 3 themselves have given is that they grew terrified at the sight of blood and so they ran away. This fear did not prevent them from going to the shop of P.W. 6 especially when the deceased was lying there in pools of blood. We use the words 'pools of blood' not because we are convinced that there were pools of blood at the shop but because the witnesses say that Varghese was bleeding profusely at that time and that there were pools of blood. On the other hand, the scene mahazar does not show that there was any blood in the shop or in its front yard. The evidence of P.Ws. 5 and 6 is that P.W. 5 helped Varghese who was bleeding profusely at that time to go to the shop and that they made him lie down there. The scene mahazar does not also show any marks of blood on the pathway leading from the rubber estate to P.W. 6's shop. But there was some blood about 14 feet away from the shop. How blood came to be there has not been explained by the Prosecution. A doubt arises here whether the game was not being played at this spot, and whether it was not here that the actual occurrence took place. No doubt, the scene mahazar shows that there was blood at the scene of occurrence also. That might be true or not. But no explanation has been given for the blood found 14 feet away from the shop.

10. Yet another circumstance which strongly discounts the present prosecution case is the medical evidence. The doctor's evidence regarding Varghese's ability to speak has already been referred to. From his evidence there are reasons to think that the injury which resulted in Varghese's death could not have been caused by M.O. 2 knife that probably was why the learned Sessions Judge did not place any reliance upon the alleged recovery of M.O. 2 from the scene of occurrence. The blade of M.O. 2 is only 4½" long. The injury is 6" long. There is no suggestion that the hilt of M.O. 2 had gone into the wound. It is, of course, possible that in some cases an injury longer than the blade could be caused by the tearing of the skin and flesh on account of the force of the stab. But in such cases a part of the wound caused by the tearing would not have been clean-cut and that part would have been a lacerated wound with frayed edges. There is no suggestion that the injury sustained by Varghese was anything but a clean-cut wound. This difficulty the learned Judge got over by discrediting the doctor's evidence. He says :

"I am not also quite sure whether the surgeon ascertained the exact depth by measurement".

During the examination of the doctor by the Public Prosecutor or his cross-examination either by the defence counsel or the Sessions Judge, it was never suggested to him that he had not measured the wound. We fail to see why the Sessions Judge should have assumed that the medical officer had failed in his duty especially when there was no suggestion to that effect at the time of his examination.

11. Considering all the above circumstances we are not satisfied about the truth of the prosecution case. It may be that Varghese died at the hands of the accused or of P.W. 3 or of someone else; and if he died at the hands of the accused it may be that the accused's act would fall under one of the exceptions of Section 302 or it may also be that his act might have been a pure exercise of the right of private defence. We are not satisfied with the truth of the evidence of P.Ws. 1 to 3, 5 and 6 and are unable to determine how the occurrence happened. Numerous discrepancies in the evidence of P.Ws. 1 to 3 were pointed out to us by the accused's counsel, and about thirteen of them have been detailed in a petition which the accused has sent up from the jail. In view of the broad probabilities of the case we do not propose to go in detail into those discrepancies.

12. Because of the wholly unsatisfactory character of the prosecution evidence in respect of the occurrence, we have referred to that evidence first in this judgment. The evidence as regards motive is equally worthless. No doubt, there was some ill-feeling between P.W. 7 and Varghese on the one hand and the accused on the other. But that was long before the occurrence. The petition which Varghese sent to the Police was dated 22-10-1956, and this occurrence took place on 30-3-1958. There is no evidence to show that any step was taken against the accused as a result of this petition. It is the sort of petition which people in the rural areas usually send against their neighbors or relatives when they feel annoyed. Subsequently there was criminal case between the parties. But the complainant in that case was not P.W. 7 or Varghese but the accused. It was he who had reasons to feel afraid of them, and that complaint also was not pressed but was compromised and withdrawn some six months before the occurrence. Nothing had transpired after that, and there is no particular reason why the accused should have made up his mind all of a sudden on 30-3-1958 to murder his brother.

13. For the reasons stated above, we hold that the Prosecution has not proved the case against the accused. We, therefore, quash the conviction and the sentence passed upon the accused by the Sessions Judge and direct him to be set at liberty forthwith.

14. Before we part with this case, we shall be failing in our duty if we do not refer to one or two circumstances appearing from it which show that there is a tendency on the part of some of the lower Courts to make short-cuts in the rules of practice and procedure in the interests of what

they consider to be speedy disposals of cases. In the present case the proceedings paper shows that the records of the case reached the Sessions Court on 4-7-1958 and that the Sessions Judge passed orders on the next day for the posting of case for trial on 4-8-1958. Nevertheless, he engaged a counsel to defend the accused, under rule 21 of the Criminal Rules of Practice, only on 2-8-1958, allowing barely more than a day for that counsel to get prepared and obtain instructions from the accused who was locked up in the jail. It need hardly be said that in a case of this nature in which the accused ran the risk of being sentenced to the extreme penalty of law - and that sentence was actually passed on him by the Sessions Judge - the time allowed to the counsel to prepare the case and obtain instructions was totally insufficient. The learned Judge could have appointed a counsel immediately after the receipt of the records or at least some 10 to 15 days in advance of the trial. The practice in the High Court, we understand, is to appoint counsel about 10 to 15 days before the hearing. In a case which was recently remanded by another Bench of this Court (Referred Trial No. 15 of 1958 arising out of a Sessions Case No. 44 of 1956 of the Kottayam Sessions Court) the engagement under rule 21 of the Criminal Rules of Practice was given on the very day of the trial in the Sessions Court and in both that case and the present, case, instead of allowing counsel some little opportunity to prepare their cases and obtain instructions, the Sessions Judges proceeded with the trials on the dates to which they had posted the cases originally.

Practices like this would reduce to a farce the engagement of counsel under rule 21 of the Criminal Rules of Practice which has been made for the purpose of effectively carrying out the duty cast on courts of law to see that no one is deprived of life and liberty without a fair and reasonable opportunity being afforded to him to prove his innocence. We consider that in cases like this counsel should be engaged at least some 10 to 15 days before the trial and should also be furnished with copies of the records. No doubt, the office of the Advocate General or the Public Prosecutor now supplies the records sometimes when counsel demands for it. That is done as a matter of courtesy and not because of any obligation. It must be made the duty of either the court or the Public Prosecutor to supply copies of the records when the court engages a counsel to defend the accused. This rule regarding supply of records can in our opinion, be conveniently adopted in the High Court also, for we are told at the hearing of this case by the appellant's counsel that the practice in the High Court is to supply only a copy of the lower court's judgment and not copies of other records. He had not even seen a copy of the appeal memorandum in this case, which appeared to us have been carefully prepared, and we had to draw his attention during the hearing to several of the grounds taken in it.

15. One of the complaints which the accused had in the appeal memorandum sent up by him from the jail was that no reasonable facilities had been afforded to him to understand the evidence of the doctor or to cross-examine him and some other witness. The doctor was examined in English which the accused does not know at all. The record does not show that the doctor's evidence was interpreted to the accused. The learned Public Prosecutor contended that as the accused was defended by counsel in the Sessions Court it was not necessary to interpret the doctor's evidence to him. Apart from the fact that the counsel who was defending the accused

was one engaged for him by the court just two days before the trial and that he could not have had obtained the necessary facilities and instructions for cross-examining the doctor within that short time, the reply to this contention of the Public prosecutor will be met by the following extract from the judgment of Jackson, J., in *Errappa v. Emperor*¹,

"The Sub-Divisional Magistrate in my opinion was right in holding that the code lays down that such translation should be made and with all respect I do not agree with the ruling in *Hari Narayan Chandra v. Emperor*² that paras 1 and 2, Section 361 are mutually exclusive. An accused person is often in a much better position than his pleader to follow the drift of the evidence and it is obvious that he ought to be kept informed of what is being said."

S. 361, clauses (1) and (2), of the Code of Criminal Procedure read as follows :

"361(1) Whenever any evidence is given in a language not understood by the accused and he is present in person, it shall be interpreted to him in open court in a language understood by him.

¹ AIR 1930 Mad186

² AIR 1928 Cal 27

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader it shall be interpreted to such pleader in that language."

Even if it is considered that Jackson, J., had gone too far in the above case and that clauses (1) and (2) of Section 361 of the Code of Criminal Procedure are mutually exclusive in the sense that, when the pleader by whom the accused appears knows English and understands the evidence, the evidence given in English need not be interpreted to the accused, we do not think that this is a case in which the duty cast by clause (1) of Section 361 could be avoided, for the pleader who is referred to in clause (2) as the pleader by whom the accused appears must be one who has been engaged by him and is competent to represent him and not a pleader who has been engaged by the court under rule 21 of the Criminal Rules of Practice. There can be no nexus between the accused and the pleader engaged by the court for the purpose of preventing a possible miscarriage of justice. Often the pleader engaged by the court acts, at least in this State, without sufficient instructions. It was also contended by the Public Prosecutor that the omission to interpret the doctor's evidence, in this case, would not be a material irregularity vitiating the trial unless the accused was actually prejudiced by it. Whether the accused has been prejudiced or not must depend upon the facts and circumstances of each case. Speaking generally, the omission to interpret the evidence of a technical witness, like the doctor, might not amount to a material irregularity if the accused was defended by a counsel and the counsel was in a position to understand his evidence and cross-examine him. But, as pointed out by Jackson, J., it cannot be denied that the accused would be in a better position to follow the drift of the evidence than his pleader. In the present case the doctor's evidence, in parts, was highly damaging to the

prosecution case and it was got over practically by a cross-examination by the Sessions Judge himself. If the accused was in a position to know what the Judge was asking the doctor and what the doctor was saying in reply to those questions he could have easily given instructions to his counsel, if the occurrence had taken place in circumstances which would give him the benefit of any exception to Section 302 or of a plea of self-defense, about the nature of the weapon, the position from which the injury was inflicted, etc., for further cross-examining the doctor. In this case, one of the questions which the learned Sessions Judge asked the doctor on the suggestion of the defense counsel was, whether Varghese could have said anything, after sustaining the injury, which could have been heard by a person standing at a distance of 90 feet. The doctor replied he could have done this and could have shrieked out what he wanted to say. There was no case that anyone standing at a distance of 90 feet had heard Varghese shrieking or making the dying declaration, and it is obvious that if the accused had understood what was taking place in court he would not have requested the judge to put the question on his behalf. We are not therefore satisfied that the contention of the learned Public Prosecutor can be accepted in this case and are of the opinion that prejudice has been caused to the accused by the omission to interpret the doctor's evidence. It is always safe to interpret to the accused the evidence given by the witnesses in languages further than the court language or a language understood by him (accused,). But for the fact that we are convinced that the evidence of P.Ws. 1 to 3, 5 and 6 regarding the occurrence itself is not reliable we would have sent back the care to the Sessions Court for a re-examination of the doctor. As we have found that the prosecution case regarding the occurrence has not been proved and are acquitting the accused, we are not doing that.

Accused acquitted.