KERALA HIGH COURT

Thazhathethil Hamsa

Vs.

State of Kerala

Criminal Appeal No. 105 of 1965, in S. C. No.12 of 1965

(Anna Chandy and P. Govinda Menon, JJ.)

03.12.1965

JUDGMENT

Anna Chandy, J.

1. This appeal is by the two accused persons in S. C. 12 of 1965 on the file of the Sessions Judge, Palghat. The first accused is convicted under Sections 304, Part I and 328 I. P. C. and sentenced to a concurrent term of rigorous imprisonment for ten years and three months respectively and the second under Sections 323 and 341 I. P. C. and sentenced to a concurrent term of three months and one month.

2. It is alleged that on 14-12-1964 at about 10.30 A. M. the first accused caused the death of Hydru by stabbing him with a knife and caused hurt to Pw. 7 Abdu also by stabbing and the second accused wrongfully restrained Moideen Hajee Pw. 1 and caused hurt to him by beating him with a chappal.

3. The accused, the deceased Hydru and Pws. 1 and 7 all belong to the same village of Vallapuzha. The first accused is the younger brother of the second accused; Pw. 7 is the elder brother of Pw. 1 and the deceased Hydru is the grandson of the uncle of P. Ws. 1 and 7, P. W. 12 is the brother-in-law of Hydru and the nephew of P. Ws. 1 and 7 and the son-in-law of P. W. 1.

4. Pw. 1 Moideen Hajee had a pair of bulls which were with his brother Pw. 7 who was asked to have them sold. On the morning of 14-12-1964 when Pw. 1 went to the tea shop of Kunhappu accused 2 was also there. Pw. 1 agreed to sell the bulls to accused 2 for Rs. 235 in case Pw. 7 did not sell them to anyone else and got Rs. 10 as advance. A little later Pw. 7 went to the tea shop of Pw. 9 and met Pw. 1 and accused 2. Pw. 7 informed Pw. 1 that the bulls were already sold to one Manu C. W. 1 for Rs. 235. When P. W. 1 took the advance amount of Rs. 10 to be given back to accused 2 he would not receive it. P. W. 1 went along the road followed by accused 2. It is alleged that when Pw. 1 reached the road in front of the shop of Kunhappu accused went ahead of Pw. 1 and restrained him from proceeding further. Pw. 1 pushed accused 2 when he beat Pw. 1 with his chappals. Seeing this Pw. 7 came running from the shop of Pw. 9 to the spot. At this juncture accused 1 who was in his charcoal shop ran up and beat Pw. 7 with his chappals. Hydru

ran up and beat the first accused on his face when accused 1 is said to have drawn out his knife and stabbed Hydru first on his abdomen and then near his neck below the ear. When he aimed a third stab. Usufkutty Pw. 12 appeared there and stabbed accused 1 with the folded knife M. O. 7 on his thigh and abdomen. The injured Hydru went to the shop of Kunhi Ahammed and lay down on the verandah and the first accused sat on the roadside. Both were removed in the same car to the Government Hospital, Perinthalmanna at about 1 P. M. Pw. 3 the doctor informed the police and the Sub Magistrate of the arrival of the injured. Pw. 13 the Head Constable attached to the Perinthalmanna station proceeded to the Hospital and recorded the statement of accused 1 as Ext. P-15 and later that of Hydru, (Ext. P-8). In the meanwhile the Magistrate had also recorded the dying declaration of Hydru. Pw. 13 returned to the station, and registered two cases one against the first accused and the other against Hydru. The records were then transferred to Pattambi Police Station as the scene of occurrence was within the limits of that station. Hydru died at 9.15 p.m. on 15-12-1964 and getting information of the death the Sub-Inspector Pw. 15 held the inquest and sent express reports to the Circle Inspector and others concerned. Pw. 16 took up the investigation and after referring the accused's case as false filed the charge-sheet in the murder case on 6-1-1965.

5. Hydru's death due to haemorrhage and shock as a result of the injuries is well proved and not disputed. He sustained one incised oblique penetrating wound on the left side of the anterior abdominal wall and another incised transverse gaping wound skin-deep on the right side of the neck below the right ear. Ext. P-2 certificate issued by Pw. 3 describes the two incised gaping injuries sustained by the first accused one on the left side of the anterior abdominal wall 4" to the left of the umbilicus and running upwards and medially and the other on the back of the left thigh running downwards and outwards. The injury had divided all the muscles along its course. Accused 1 was an inpatient in the hospital for eight or ten days.

6. Accused 1 disputed the occurrence as described by the prosecution. He contended, as he said from the very start in Ext. P-15 statement that he saw from his shop Pw. 1 pushing his elder brother (accused 2). He interfered and told Pw. 1 that it was not fair for a Hajee to change his promise etc., when Hydru asking who he was to speak about a Hajee's sense of fairness beat him on his face. He also beat Hydru. Then Hydru drew out his knife and stabbed him on his abdomen on the left side and on the left thigh when he was compelled to stab Hydru in self-defense. Pw. 12 was not anywhere there and he did not stab him. Accused 2 accepted the version of accused 1 and stated in clear terms that Pw. 12 was nowhere there and he did not stab accused 1. He denied having kept Pw. 1 in restraint or of having beaten him.

7. Pws. 1, 2, 7, 10, 11 and 12 are the alleged witnesses to the occurrence. Of these Pws. 1, 2, 7 and 12 are related to the deceased. Pw. 10 also a relation who was examined in the Magistrate Court was tendered for cross-examination and Pw. 11 the only disinterested and independent witness though he supported the prosecution case to the fullest extent was declared hostile to the prosecution as he was not prepared to fall in line and say that it was Pw. 12 who stabbed accused 1.

8. In this connection we wish to clarify the mistaken impression which the learned Judge seems to have entertained about the propriety of the procedure adopted by the prosecution in tendering eye-witnesses for cross-examination. Pw. 10 who had given evidence in the Committing Court as an eye-witness was tendered for cross-examination in the Sessions Court after he made a bald

statement that he has correctly stated all he knew about the incident in the enquiry Court. The learned Judge has evidently relied on an observation made by the Patna High Court in *Manzurul Haque v. State of Bihar*[1], to find that such a procedure is proper. But it is really not. The very decision relied on by the learned Judge started by enunciating the principle thus :

> "The practice of tendering witnesses leads to considerable confusion and is to be deprecated. A material witness should not be merely tendered but should be sworn and asked to give evidence by the prosecution. Tendering if at all should be confined to witnesses of secondary importance."

The Madras, Calcutta and Punjab High Courts have taken the definite view that tendering a witness for cross-examination is not a practice which should be encouraged. In *Veera Koravan v. Emperor*[2], relying on the decision in *Queen Empress v. Ram Shai Lall*[3] held that :

> "In cases where any witness known to the prosecution is able to swear to facts very material to the case, the proper procedure to follow is to ask him to give evidence on oath as to the several facts known to him, which are relevant to the case, though other witnesses might have spoken to the same facts. "Merely tendering him for cross-examination" is not a practice which should be encouraged especially in murder cases as it would be very unfair to the accused."

The latest decision of the Punjab High Court in *Chhota Singh v. State*[4], has emphatically stated that :

> "There is no meaning in tendering a witness for cross-examination by Public Prosecutor in a Criminal trial for the simple reason that when a witness has not given statement in examination-in-chief, there is nothing in relation to which he is to be cross-examined. Tendering a witness for cross-examination is almost tantamount to giving up a witness. There is nothing in law that justifies such a course." We are in respectful agreement with the above views.

9. Pws. 1, 2 and 7 speak to the prosecution version of the incident from start to finish and Pw. 12 says he ran up to the spot on seeing Hydru being stabbed by the first accused and stabbed accused 1 to prevent him from doing more harm to Hydru. This introduction of an ingenious "modus operandi" to deprive the accused of his right of self-defense does not appeal to us. Like the "deus ex machina" of the old Greek dramas Pw. 12 seems to have dropped down from the skies to save the deceased by stabbing the first accused with a folded knife and then disappear into thin air. Accused 1 was having, according to the prosecution, a dagger-knife M. O. 4 with which he stabbed Hydru and he could not be expected to allow Pw. 12 to escape without even a scratch mark on his body after stabbing him twice. By the first stab

[1] AIR 1958 Pat 422 [3](1885) ILR 10 Cal 1070
[2] AIR 1929 Mad 906 [4] AIR 1964 Pun120

accused 1 must know and see who was stabbing him. The simple injury (as the doctor opines) sustained by him could not have so incapacitated accused 1 that he became unable to stab Pw. 12. There is a definite attempt to make out that the deceased had no knife with him but it looks as if Pw. 2 blurted the truth when he said that Pw. 8 snatched the knife from the deceased

and gave it to Kunhappu - (Original in Telgu - Omitted) Pw. 11 is treated as hostile and cross-examined by the prosecution. Injury No. 2 in Ext. P-2 is 2 3/4 in depth and the doctor Pw. 3 is of the view that normally the knife should have been in an open condition to cause such an injury though he could not rule out the possibility of it being caused with M. O. 7 if it was folded. Pw. 12 is the son-in-law of Pw. 1 and the brother-in-law of Hydru. He has nothing to lose by the admission but everything to gain. The procedure adopted by the police regarding him appears to be rather novel. The accused complained to the Head Constable that Hydru stabbed him with a knife and a case under Section 324 I. P. C. was registered. Section 324 is cognizable offence. If the accusation against Hydru was not proved and Pw. 12 a self-confessed offender was there, it is rather strange that the police referred the case as false and left Pw. 12 free to give evidence against the accused.

10. It is not necessary for the purpose of this case to go into the narration of the incident in detail given by the eye-witnesses or to refer to the contradictions and developments in their evidence in view of the fact that we are rejecting their evidence because of the fundamental defects and inherent improbabilities in the story they give. It is easy to secure relations to repeat parrot like an incident if they were so inclined. The learned Judge has failed to scrutinise and test their evidence in the background of the broad probabilities that have been already referred to. The learned Judge has called in aid an observation made by the Supreme Court that "ordinarily a close relative would be the last person to screen the real culprit and falsely implicate an innocent person and hence the mere fact of relationship far from being the foundation for criticism of evidence is often a sure guarantee of truth" to buttress the interested evidence of these relations. The observations are not applicable to a case like the one in hand where we are not concerned with the identity of the assailant of the deceased, but the identity of the accused's assailant and to admit that the deceased himself was responsible for the accused's injuries would mean complete exoneration of the accused. Anyhow it is rather a strange feature of this case that though the incident took place in a bazaar at a most busy hour not a single disinterested witness would come forward to swear to the prosecution case and the only independent witness Pw. 11 failed to support it.

11. As for the defense version Dw. 1 a competent, respectable and independent witness faithfully supports it. Dw. 1 is the owner of a two-storeyed building in the bazaar just opposite to the tea shop of Kunhappu. The ground floor of the building is rented to Kunhimohammed and the witness is occupying the upstairs. He describes the incident in a natural and credible manner. He saw accused 1 beating Hydru and Hydru beating in return after which Hydru stabbed the first accused twice and the first accused stabbed Hydru in return. He did not see Pw. 12 stabbing the accused nor did he see Pw. 12 anywhere near the scene. He is worth about a lakh of rupees. By a curious process of reasoning the evidence of this rich and respectable witness under whose very nose the incident took place, is got over by the learned Judge. A perusal of the witness's evidence leaves the impression that he was discredited for the sole reason that he gave evidence as a defense witness. This discrimination against a defense witness I am afraid has no legal sanction behind it and is not to be approved of. In the lengthy cross-examination by the prosecutor not a word is asked why this rich and respectable person should perjure. There is no whisper of any animus towards the deceased person or Pws. 1 and 7 or any member of the deceased's party or partisanship to the accused. When the witness says he pays Rs. 40 land tax, he is taken to task for not paying income-tax or agricultural tax. He was not asked whether he makes income out of agricultural operations or by any trade or profession. In a case like this where two definite

contradictory versions about the incident are given, it is the duty of the police to have questioned the nearest neighbours and if they fail to do so up-country people whose civic consciousness is not so far advanced as to volunteer evidence in murder cases should not be taken to task and discredited by the Court on that ground. We prefer to accept the evidence of Dw. 1 to that of the prosecution witnesses.

12. The significant omission made by the deceased to refer to Pw. 12 or the part played by him in the two dying declarations on the one hand and the spontaneous and bold assertion made by the accused from the very start that he stabbed the deceased when the deceased stabbed him, on the other, coupled with the inherent improbabilities in the prosecution case sponsored by interested and partisan witnesses as against the probable defense case which is proved by disinterested evidence, leaves the Court no other alternative but to acquit the accused. The same set of witnesses implicate the second accused and as such the charge against him also should fail for want of acceptable evidence. The conviction and sentence against both the accused are set aside and they are acquitted. Their bail bonds are cancelled.
Conviction set aside.