

Thommi Anthoni and ors. Vs. Sirkar Prosecutor

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Court : Kerala

Decided On : Aug-26-1949

Reported in : AIR1950Ker41; 1950CriLJ988

Judge : Koshi and; Muricken, JJ.

Appellant : Thommi Anthoni and ors.

Respondent : Sirkar Prosecutor

Judgement :

Koshi, J.

1. These appeals arise out of the convictions and sentences passed by the Additional Sessions Judge, Quilon, on the five accused persons in Sessions case no. 36 of 1123 on the file of the Quilon Sessions Court. Each of them has filed a separate appeal. Thommi Anthoni, accused I has been convicted for the commission of the offence of culpable homicide not amounting to murder under part 2 of s, 303, Travaneore Penal Code, and sentenced to undergo rigorous imprisonment for four years. His appeal is Criminal Appeal NO, 35. Anthoni Vastyan, accused 5 has been convicted of abetting the conviction of the above offence by accused I and he has been sentenced to undergo rigorous imprisonment for two years. He has appealed in criminal Appeal No. 29. Augustine Yohannan, accused a has been convicted for. the commission of the offence of causing hurt with dangerous weapons punishable Under Section 324, Travanoore

Penal Code and sentenced to undergo rigorous imprisonment for 18 months, made up of three consecutive sentences of 6 months each. He is found to have caused hurt to three persons and his appeal is criminal Appeal No. 26. His younger brother Augustine Pelis, accused S has been convicted for the offence of causing hurt with a dangerous weapon and sentenced to undergo rigorous imprisonment for six months. He appeals from his conviction and sentence in criminal Appeal No. 27. Augustine Francis, the elder brother of accused 2 and 3 has been convicted under the same section as accused 2 and 9 and has been sentenced to undergo rigorous imprisonment for 9 months. His appeal is criminal Appeal no, 28. Accused 6, appellant in criminal Appeal No. 29, is the father-in-law of accused 3. Accused I has married a paternal cousin of Accused 2, 5 and 4,

2. The occurrence which formed the subject of the trial took place on 17-2-1122 at Manalil Kadavu, Thekkai Oberi, Tbrikkadavoor Pakuthy and the victims were four in number ; one Joseph, since deceased, and P.Ws. I, 5 and 7 at the sessions trial. Joseph who died as the result of a slab he received at the hands of accused I had married a daughter of P.W. 7. P.W. 2 is another son-in-law of P.W. 7 and P.W. 1 is his (P.W. 7's) son. Accused 2 also received injuries during the course of the occurrence and with respect to that there was a countercharge against P. W8, 1, 2 and 7. That was tried as Sessions am no. 87 of 1198 on the file of the lower court. P, W. I was acquitted, but p. We. 2 and 7 were convicted; p, w. 3 to undergo rigorous imprisonment for six months and P.W. 7 to imprisonment of the same description for three month. Their appeals are Nos. 88 and 39 and they were heard by us immediately after these appeals. The present judgment will govern appeals Nos. 25 to 29 and appeals nos. 38 and 89 will be disposed of by a separate judgment.

3. In Para. 2 of his judgment, the learned Additional Sessions Judge has set out the prosecution case briefly and it is convenient to extract the same here.

Accused 2, 3 and 4 are brothers. Accused 3 has married accused 6's daughter, Accused 1 has married 2 to 4 accused father's elder brother's daughter, On 15-2-1122, accused 2 happened to meet P.W. 2, son-in-law of P.W. 7, in his compound when there was a quarrel between them regarding a scandal about P.W. 4, wife of

P.W. 2 for having Illicit intimately with one Sanku Nair at Kanjavalii Market, and having entered his shop during day time and P, W. 2 was held up by accused 2 when accused 1 beat P.W. 2 with his band. By way of retaliation, on 17-2-1123 at about 4-30 P. M. when accused 2 was on the shore of the ABhthmudl Lake in the south west compound of Kochuthodiyil house, at Manalil Kadavu, Thekky Cheri, Trikkadayoor Pakuthy near the house of P.W. 7 engaged in fishing, P. We. 2 and 7 approached him and questioned about the occurrence on Istth Kanni. Thereupon an altercation ensued in course of which accused 2 gave a heating to P.W. 2 with his hand and the latter took a coocanut frond () and beat accused 2 in return when accused 2 caught hold of the frond from P.W. 2 and beat P. Wa. 2 and 7. Seeing this the deceased Vasthiyau Joseph rushed to the spot from the house of P.W. 7 with a bamboo stock and beat accused 2 who immediately Snatched off that stick and beat P.Ws. 2, 7 and the deceased Joseph in return causing injuries to all the three people. At this stage accused 3 and 5 appeared on the scene and accused 6 held up the deceased when accused 1 coming from the north stabbed the deceased on his abdomen with a knife. The deceased fell down with his abdomen captured and intestines protruded. P.W. 2 immediately rushed back to his house brought a chopper and oat accused 2 on his head. Accused 2 and 8 seized P.W. 2 and accused 2 wrested the chopper from P.W. %, Accused 4 approached and taking the chopper from accused 2 gave some outs to P.W. 7 with its blunt end. Accused 2 and 3 pushed down P.W. 2 and accused 8 beat P.W. 2 and hit him with stone. On obtaining information about this incident P.W. 1 who was engaged in tailoring in his shop in the neighbouring Kan javally market came to the spot with a paddle. While he was aiming his paddle at accused 3, the latter took hold of the same and beat P. WSection 1, 2 and 7 with It. The paddle was broken. But accused 3 caused further hurt to P.W. 1 by biting and biting him with atone. Then all the accused ran away. The injured persons 1, e., P. Wb. 1, 2, 7 and the deceased Joseph -were-taken to the local police station at about 8--B0 P. M. on that day and as the injuries on the deceased Joseph were very serious he was immediately sent to the local District HopUal for treatment and the Inspector of Police recorded the statement there (Ex. ADI) Vasthiyan Joseph succumbed to the injuries at 11 P. M. on 17-2-1122 Inquest was held by P.W. SI, the Police Inspector on the dead body of Joseph and Ex. AD, body mahasar was also

prepared. P.W. 8 the Resident Medical Officer of the Quilon District Hospital conducted the post-mortem and issued Ex. li post-mortem certificate on the next day. Exhibit scene mahazar was prepared by P.W. 31 on 18-2-1122 and the case was charge-sheeted on 13-3-1122. After the preliminary enquiry by the local Second Class Magistrate the accused have been committed to this Court to stand their trial. The accused plead not guilty.

To the above narration it may be added that P.W. 31, the Inspector of Police had before registering the case against the accused and immediately after recording Ex. ADI also recorded the statements of P.Ws. 2 and 7. Those statements were got signed by them and they have been marked here as exb. b (p.w. S) and (p.w. 7). The case as presented before the Sessions Court of which we have a short resume in the above extract varies from Exs. B and Q in one important detail. According to exs. b and a, P.W. 2 ran back to his house and returned to the scene armed with a chopper before Joseph was stabbed by accused I or even before accused S and 6 had appeared on the scene, At this stage it may also be mentioned that Ex. ADI is silent with regard to the above, viz., the chop, per episode nor does that document state how the occurrence started. Exhibit ADI starts the narration from the stage accused 2 beat back P.W. s with the frond.

4. In cases of this nature where we have a charge and a counter-charge and the main pro. section witnesses in one happen to be the accused in the other, it is always a difficult task for the court to find out the truth. Our task in that regard has been made all the more difficult by a variety of circumstances, the Chief among them being that the learned trial Judge has written a very unsatisfactory judgment in this case. Voluminous oral evidence has been let in by the prosecution and a large part of it has been disbelieved by the learned Judge, perhaps lightly. But when it comes to important witnesses he had without reason or rhyme chosen to believe them in parts and disbelieve the rest of their testimony. We do appreciate it may not always be possible to accept or reject the testimony of a Witness in its entirety, but when a court proceeds to reject a large part and chooses to accept the remaining part alone, it must look for circumstantial or other corroboration for the part that is accepted. No such attempt has been made in this case nor does the learned Judge indicate in so many words what part he accepts or what part he

rejects. In dealing with the evidence of P.W. a, after adverting to the reasons for not accepting all that he says, the discussion is concluded by the words 'I accept his testimony in regard to material particulars.' What those material particulars according to the learned Judge are, we are left to guess. Again with reference to P.W. 9 it is said: 'With all his foibles his evidence has to be accepted in regard to the main acts of the accused.' It is needless to multiply such instances.

5. Further, acts which have been found against in one part of the judgment are relied upon for the purpose of founding the convictions of certain accused. In para 9 (of the judgment) the learned Judge states (discussing p. w 2'b-evidenoe):

The story of his beniyan having been removed by biting by accused 3 appears to be only a mere story. So also cutting on P.W. 7 by accused 4 with blunt end of the chopper does not seem to be likely.

In para. 24 it is seen stated:

As regards point Ho. 4 (which is whether the accused are responsible for the injuries on P. WSection 1, 2 and 7) the testimony of P. WSection 1, 2 and 7 and also the statement of the deceased referring to P. Wa. 2 and 7 it is clear that the Injuries on P. Wa. 2 and 7 were mused by accused 2.

Lower down in the same paragraph the learned Judge observes:

P.W. 1 in cross-examination swears that accused 3-snatched the paddle from him and beat him twice or thrice on his head. In the lower Court he attributed the to accused 4.

After making all these statements tending to exculpate accused 8 and accused 4 of the acts attributed to them, towards the concluding portion of para. 24 the learned Judge states:

P.W. 2 in definite that accused 4 cut P.W. 7 on his head with the blunt edge of the chopper. It has become clear that the Injuries on P.Ws. 2 and 7 were caused by accused 2 and 4, that accused 3 also beat P. WSection 1 and 7 with paddle and....

It is useless to comment what assistance such judgment could give to an appellate court. Perhaps had the learned Judge tried to consider the case of each accused separately-a course which in cases of this nature Courts are bound to do-these errors may not have happened,

6. Nor are these errors confined to facts-alone, Though the accused were all tried jointly charges were separately framed against each of them and each one of them is charged not only for the acts done with his own hand, but also for abetment of the acts done by the other accused. The charges seek to make not only accused 1 & but accused 2,3 and 4 also guilty of the offence of abetment of murder. The learned Judge, however, does not record in his judgment that accused 2, 3 and 4 have been acquitted of that charge. No doubt, the implication of the judgment is that, but when specific charges are-framed the court is expected, nay bound, to record its decision on each count in the charge. Likewise no finding is recorded with reference to the other charges of abetment, namely, that each one among the accused abetted the other accused in committing offences Under Sections 823 and 821, further, the finding concerning accused 1 and 5 towards the concluding portion of

Considering all these facts It has become quite clear that accused 1 is guilty Under Section 299, Clause 3, and accused 5 as an abettor under that section read with Section 99, T. P. O. I convict accused 1 Under Section 803, Part 2, and accused 5 under that section read with Section 89, T. P.C.

If it was clear that the act of accused 1 fell within the mischief of Section 299, Clause 3, it is not known how the learned Judge could have proceeded to enter a conviction against that accused, under Section 303, Part II. Apparently this somersault induced our learned brother Habib Moham-mad J. to issue notice to the accused in calendar revision.

7. It may even at this stage be mentioned that we have not in the circumstances of the case thought it necessary to take any action pursuant to that notice, especially as the notice did not specify what action was proposed 'to be taken by the Court suo moto. The learned Government Pleader did not want us to convert that into a proceeding for enhancement of sentence or for quashing the conviction and

sentence with a view to direct a retrial. The Government have also not preferred any appeal against the acquittal of accused 1 of the charge of murder or of the remaining accused of abetment thereof. The case has, therefore, to be finally disposed of here and now on the merits.

8. For all practical purposes, we have to deal With the case as if we have ourselves held the trial. In the argument before us, the learned Government Pleader rested his case wholly and entirely on Exs. adi, b and a and on the testimony of P.Ws. 2 and 7. The so-called independent eye-witnesses have all for the most part been discredited by the learned Judge in the Court below and P.W. 9, whose evidence he thought should be accepted in spite of all its infirmities, has been shown to us to be no witness of truth. He is highly interested in and related to the accused. He has been so shaping and developing his evidence from stage to stage as to suit the purposes of the defence. In these circumstances, we are of opinion that the learned Government Pleader chose the right course in telling us that the case bast to be disposed of on the evidence referred to above. But the one obvious limitation of that course is that we are practically left with Ex. AD I and the testimony of P. WB. 3 and 7. Exhibit AD-1 becomes admissible Under Section 89 (1), Evidence Act, as the state. ment of a person, since deceased, relating to the circumstances of the transaction which resulted in his death : See Azimaddy v. Emperor 38 Cri. L. J. 99 : A.I.R. (14) 1997 Cal. 17, Kapur Singh v. Emperor A. I. R. (17) 1980 Lah. 460 : 31 Cr.L.J. 176 and Gajjan Singh v. Emperor A. I. R. (18) 1931 Lah. 103 : 33 Cr. L. J. 183. Exhibits B and G, however cannot form substantive evidence in the case, Those exhibits can be used only for corroboration or contradiction of the evidence of the respective deponents. The cases now named as also the Madras decision in In re Bankara Linga Thevan 53 Mad. 690 : A.I.R. (17) 1930 Mad. 632 : 31 Cr. L.J. 712 and the Privy Council decision in Brij Bhushan v. Emperor A. I. R. (83) 1946 P.C. 38 : 47 Cr.L.J. 336 lay down the rule very dearly, P.Ws. 3 and 7 are, as noticed, accused in the counter-case and a reading of their deposition would clearly show they have been more anxious to justify their conduct with respect to that case than to give evidence in a straightforward manner. On one important aspect of the case both of them have gone back on their own previous statements in Kxs. B and G and that is as to the stage at which P.W. 2 ran back to his house and came out with the ohopper.

Though in their earlier statements they had both admitted that that incident preceded the arrival of accused 1, 8 and 5 on the scene, they now want to make out that that incident is after deceased Joseph was stabbed by accused 1 and when himself and P.W. 7 stood in danger of being further attacked by the accused. We have no hesitation to hold that the departure is conscious and deliberate. The fact that they are the accused in the counter case is itself sufficient reason that their evidence should be carefully scrutinised before being acted upon. Their readiness to depart from their earlier statements gives a greater reason why we should be very guarded in accepting their testimony against persons charged with serious offences like murder, causing hurt with dangerous weapons, etc. Mention has been made that Ex. AD-1 is silent with regard to the commencement of the fight and also with regard to the chopper episode. Had Ex. AD-1 contained statements concerning the above matters whether they would have been admissible is a matter which may have had to be considered. The fact, however, remains that on these vital matters we have only the interested testimony of two of the accused in the counter case to arrive at our decision. Even when giving the statements Exs. B and G P. Ws 9 and 7 must have foreseen they would themselves have to answer a charge for the injuries caused on accused 2. In fact, the evidence shows he had already appeared at the police station when these witnesses went there alone with deceased Joseph. It is only natural that they should have tried to make accused 1 the aggressor from the start and that is what to find both in their evidence and in Exs. B and G. But an examination of the events that led to the altercation on the 17th, namely, the incidents of the 15th, would easily show the more probable thing was for P.W. 1 or P.W. 7 or for both to attack accused 3 first. On the 16th, P.W. 1 was beaten by accused 1 and that through the active aid and connivance of accused 8, P.W. 7 cannot take that or the scandal spread about his daughter (P.W. 1's wife) lightly. In these circumstances, we are inclined to think that the only safe course for us would be to place reliance only on that part of the testimony of P.Ws. 1 and 7 which is supported or corroborated by Ex. AD-1 and Exs. B and G. With no reliable evidence as to who used force or violence first, or when the chopper was made use of in the fight, it must remain a mystery how and under what circumstances P.W. 2 or P.W. 7 or P.W. 1 or accused 2 sustained injuries that day. Truth has not, in our opinion,

come out with respect to those matters and the result is, accused 2,3 -and 4 who the prosecution say are responsible for the injuries on P.Ws. 1, a and 7, must without more be acquitted and that will be our decision with respect to their appeals.

9. A different conclusion does not appear to be possible even on an analysis of the evidence against these three accused, especially in view of the findings that lie soattered in the judgment of the lower Court concerning the acts attributed to them. The main criminal act attributed to accused 4 is that he beat P.W. 7 with the blunt edge of the chopper. We have seen learned Judge's observation that it is unlikely. At another place in the judgment, the Judge had definitely said that accused a is responsible for the injuries on P.Ws. a and 7. With these statements in the judgment of the Court below before us, we are unable to appreciate how we can hold accused 5 or 4 responsible for the injuries seen on the person of P.W. 2 or of P.W. 7. That means the story of biting or hitting with stones by one or the other among these two accused, the story of accused 8 beating p, ws. 5 and 7 with the paddle and the one that accused 4 beat P.W. 1 with the blunt edge of the chopper have all to be discarded. As for accused 3 beating P.W. 1 with the paddle, what the evidence shows is that when r. w. 1 was aiming a blow with it when the struggle to obtain possession of the chopper was going on between P.W. 2 on the one hand and accused 2, 3 and i on the other, he (accused 8) wrested the paddle from P.W. 1's hands and beat him with it. The version was different in the committing Magistrate's court. In that count, P.W. 1 had attributed that act to accused i. This analysis of the prosecution evidence against accused 8 and accused i does not, therefore, lead us to a conclusion different from the one recorded in the preceding paragraph.

10. The acts attributed to accused 2 may also be examined, It has already been mentioned that on the evidence it is difficult to find whose blow marked the beginning of the occurrence. In Ex, Ad-I, the first blow mentioned is that of accused 2 beating P.W. a, with the frond, but that according to the prosecution was not the initial blow struck in the day's occurrence, On the prosecution's own showing, the weapons alleged to have been used by accused 2 viz., the frond, the bamboo stick and the chopper were all wrested from P.W. 2, or the deceased

Joseph when they were using those weapons against him. The evidence is even conflicting as to whether accused 2 ever used the ohopper, for one version is accused i got it from P.W. 2's hands and used it against P.W. 7. In this state of the evidence, we cannot find our way to convict him even if we are not to rest our derision on broader grounds,

11. We are now left with accused I and 5 and their appeals. The materials we have before us now consists of Ex, AD.1, ex, b, Ex. g and the evidence of p.ws. 2 and 7. We have already stated we propose to accept the testimony of p. wa, a and 7 only to the extent it is corroborated by Ex. AD-1 and their own previous statements, Exs. B and G. All accounts we have in them agree that when accused S and 5 arrived on the scene of occurrence and accused 5 caught hold of deceased Joseph, the latter had already been disarmed. The weapon which he brought and with which he gave a blow to accused 2 had already been wrested from his hands by accused s and the latter was using it against P.Ws. s and 7, if not against Joseph also. Apparently the blow on his head which caused it to bleed was dealt immediately after the bomboo stick was wrested from him. P.W. 7, was unarmed and whether P.W. 2 had the ohopper with him at that moment is problematic. Whether accused s's act in catching hold of Joseph and keeping him within his grip can be justified on the ground of removing a potential source of danger to accused a or not. accused I's act in stabbing Joseph while he was under accused S's grip can on no account be justified. Joseph was already under control. He was without freedom to use force or even to move about. To stab such a man there can be no pretence even of any right of private defence. We have, therefore, no hesitation to agree with the lower court that his act should be visited with due penal consequences. The lower court has only erred on the side of leni-enjoy, but at this distance of time and for reasons explained earlier, we do not propose to take any further action in the matter. We confirm the conviction and sentence on accused 1 and his appeal no. 26 will stand dismissed,

12. The a conviction and sentence of accused 5 are for the abetment of the aforesaid act of accused 1, On behalf of accused 8 his learned advocate strenuously contended that; granting Joseph was within the grip of accused fi when the fatal stab was made accused s cannot be said to have intentionally

aided accused I's act. The argument is that (here is no evidence accused S saw accused I coming or even the dealing of the blow before it actually fell on Joseph, It may well be that when accused S caught hold of Joseph he had no idea that accused I would come and stab the latter while in his grip. But the prosecution evidence we have chosen to act upon or any other material on the record does not lend any support to the suggestion that accused 6 may not have noticed accused I's approach towards Joseph or his aiming the stab which eventually proved fatal to the latter. The sequence of events and the surrounding circumstances make it difficult for us to accept the suggestion that Accused 5 must have been taken by surprise when accused 1 stabbed Joseph. The occurrence took place in an open ground and between 4-30 and 6 in the evening there was nothing preventing accused G noticing accused I's approach towards Joseph with an open pen-knife. Explanation 2 to Section 97 may, in this connection be read-It reads:

Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

Any facility afforded to the doing of an act is according to the explanation equivalent to the aiding of the doing of the things. In appreciating the evidence or the argument raised, it is relevant to take into account that accused 6 has not chosen to state that he did not notice accused I's approach or the latter aiming the blow at Joseph. Even the cross-examination does not suggest the possibility of the event happening as now urged. No doubt, the prosecution has to establish the positive fact of accused 5's complicity. But it need not necessarily be by direct testimony. It also be by circumstantial evidence. In evaluating such evidence accused silence on the matter is a relevant factor to be taken into account. To us his act or conduct in keeping Joseph within his grip while the stab is dealt is irreconcilable with any other hypothesis than that of his guilt. We are unable, therefore, to hold that no criminal responsibility can be fastened on accused 5 with respect to accused I's conduct in fatally stabbing Joseph, We accordingly confirm his (accused 5's) conviction and sentence and his appeal (no. 29) will also stand dismissed.

13. In the result appeals 36,27 and 38 succeed and appeals SS and 39 fail. Accused 3, 3 and 4 are acquitted and their bail bonds will stand cancelled. Accused 1 and s will surrender to their bonds. No action is called for in calendar revision. Order accordingly.

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