

Thommen Vs. State of Kerala

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Court : Kerala

Decided On : Aug-20-1957

Reported in : AIR1958Ker74; 1958CriLJ509

Judge : Sankaran and; Raman Nayar, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 288 and 367; [Indian Penal Code \(IPC\), 1860](#) - Sections 96 and 99; [Evidence Act, 1872](#) - Sections 145

Appeal No. : Criminal Appeal Nos. 20 and 51 of 1957

Appellant : Thommen

Respondent : State of Kerala

Advocate for Def. : M.U. Issac, Public Prosecutor

Advocate for Pet/Ap. : Chamakutty Mathew, Adv.

Judgement :

Sankaran, J.

1. The accused in sessions Case No. 21/1956 on the file of the Additional Sessions Judge at Kottayam was tried for the offence of murder punishable under Section 302, Indian Penal Code. The learned Additional Sessions Judge found that the acts attributed to the accused have been proved by the prosecution, but

that such acts which culminated in the death of the victim Augusty Varkey alias Kunjootty, did not constitute the offence of murder. It was further found that the accused was acting in the exercise of his private defence and that in inflicting the several stabs on Kunjootty the accused had exceeded the right of private defence.

Accordingly, the learned Additional Sessions Judge held that the accused was guilty of culpable homicide not amounting to murder and convicted him under the First Part of Section 304 of the Penal Code and sentenced him to undergo rigorous imprisonment for 10 years. Against such conviction and sentence the accused has preferred Criminal Appeal No. 20/1957. The other appeal is by the State, urging that the conviction of the accused should be under Section 302 itself.

2. The accused in this case had married Pw 5 Marry alias Chinna while she was very young and both of them were living in Chinna's Panachikkalparambu House in Bharananganam Muri in Bharananganam Pakuthy. The situation of this house and also of the lane running east to west, a little to the north of this house, is shown in the sketch Ext. P. 16. While the accused and Chinna were living in the house marked B in the sketch, deceased Kunjootty developed an Intimacy with Chinna and very soon thereafter he took up his residence in Panachikkalparambu house after driving away the accused from that house.

Kunjootty was a well-known rowdy of the locality and the accused who had not the courage to resist the unlawful acts of Kunjootty, had to go away from that house to his own mother's house. Kunjootty was thus able to keep Chinna as his concubine and this relationship continued for about 6 or 7 years. Three children were born to Chinna from Kunjootty who had other children born to him through his legally wedded wife. His wife and children were residing in his own house about a mile away from chinna's house. The priests attached to the Parish Church resented the conduct of Kunjootty and they persuaded him to leave Chinna alone and to come away to his own house. As a result of their interference in the matter, Kunjootty went back to his own house taking with him, the first two children born to him in Chinna. This took place just about two weeks prior to the occurrence in this case which was on 6-1-1955.

3. After Kunjootty had thus shifted his residence from Panachikkalparambu House, the accused effected a reconciliation with Chinna and began to stay with her. She was then in a state of advanced pregnancy and she delivered the third child born to her through Kunjootty only 18 days after his death. On the evening of 6-1-1955 Kunjootty again went to Panachikkalparambu House at about 8 P. M. and enquired of Chinna if the accused was visiting her. On getting an affirmative answer from her, he became angry and told her that the accused should not be allowed to come there.

By that time the accused also came there and on seeing him entering the courtyard, Kunjootty called out to him not to come in but to get away from the place. So saying, he rushed up towards the accused and inflicted 3 or 4 blows on him. The prosecution case is that it was in such a situation that the accused took out his knife and inflicted a series of stabs on Kunjootty. After receiving these stabs, Kunjootty moved on to the lane and there fell down at the spot marked A in Ext. P. 16 and died within a short time.

4. There is no dispute about the fact that Kunjootty died at the lane in front of Panachikkalparambu at about 8 p. m. on 6-1-1955 as a result of the series of stab wounds sustained by him. That fact is also conclusively proved by the inquest report Ext. P. 4 and the autopsy certificate Ext. P. 8, supported by the evidence of Pws. 1, 2, 5, 6, 10, 11 and 13. At the inquest the dead body was identified to be that of Kunjootty by his own brother Pw. 1, his nephew Pw. 6 and also by Pw. 5 who was the concubine of Kunjootty. Pws. 2, 10 and 13 are neighbours who knew Kunjootty very well and they too have sworn to the fact of his death as a result of sustaining stab wounds.

The wounds found on his body are described in Ext. P. 8 issued by the Medical Officer Pw. 11 who conducted the autopsy. According to him, all the injuries noted in Ext. P. 8 were ante-mortem injuries. Of these 8 incised wounds, two were on the right arm, two were on the left arm and one was on the right collar bone. Of the remaining wounds, one was on the chest and another on the abdomen. The stab wound on the chest had penetrated into the heart and pericardium, while the stab wound on the abdomen had cut through the liver and the right kidney.

According to Pw. 11, both these stabs were fatal and the victim could not have survived for more than 15 minutes. Such being the nature of the evidence on record, there can be no doubt that Kunjootty's death was the direct result of the stab wounds which he had sustained on his chest and on his abdomen at about 8 p. m. on 6-1-1955.

5. The more important question for consideration is whether the wounds found on the body of Kunjootty were inflicted by the accused in the manner alleged by the prosecution. In this case the accused has not admitted that it was he who inflicted these injuries on the victim. On the other hand, the plea of the accused is one of denial and according to him he saw Kunjootty lying dead in the lane while he was coming to Chinna's residence in Panachikkalparambu at about 8 p. m. on 6-1-1955.

It is not a plea of private defence after admitting the act and hence the prosecution could succeed only by adducing satisfactory and convincing evidence to make out conclusively that the stab wounds on Kunjootty were inflicted by the accused himself in the situation as alleged by the prosecution. No doubt the defence has tried to take advantage of the prosecution evidence as it stands and to argue that even if such evidence is accepted as reliable, it would sustain a plea of private defence in respect of the acts attributed to the accused.

To do so is within the right of the accused and the failure to set up an express plea of private defence cannot preclude him from making out such a defence on the basis of the prosecution evidence itself. But that does not mean that the prosecution case can succeed even if the evidence adduced is insufficient to prove the case as put forward by the prosecution. Pws. 2, 3 and 5 are the three witnesses examined to prove the exact situation in which the accused inflicted the several stab wounds on Kunjootty. But every one of them has denied having seen the infliction of the stabs by the accused and the Prosecutor therefore chose to treat them as hostile to the prosecution and to cross-examine them after obtaining the necessary permission from the Court. Such cross-examination, however, did not yield the desired result. Certain statements made by these witnesses in the course of their examination in the committing Court, were utilised by the Public

Prosecutor for contradicting the version given by them at the trial in the Sessions Court.

For that purpose, their depositions in the committing court were also got marked as Exts. P2, P3 and P5. This was done in compliance with the requirements of Section 145 of the Evidence Act. Under that section, any particular statement given by the witness in writing or reduced into writing could be marked and used only for the purpose of contradicting a different version given by him at a subsequent stage. But if such prior statements have to be used as substantive evidence, the procedure laid down by Section 288 of the Code of Criminal Procedure has to be strictly complied with. That section states:

'The evidence of a witness duly recorded in the presence of the accused under Chapter XVIII may, in the discretion of the Presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act'.

For invoking this section it is essential that the prior evidence duly recorded must be formally proved and marked. Such a procedure was not resorted to in the marking of Exts. P2, P3 and P5. The marking of these exhibits appears to have been done without even asking the witnesses concerned whether the depositions marked are those given by them in the committing court. All that was done was to draw their attention to particular portions in the depositions given by them in the committing court. It is also seen that the Public Prosecutor did not want to rely on the whole of the evidence given by these witnesses in the committing court.

While getting these depositions marked, he is seen to have expressly stated that the particular portion to which the attention of the witness was drawn is alone proposed to be relied on as substantive evidence. It is also seen that the court did not pass any order permitting these prior depositions to be used as substantive evidence under Section 288. They were merely marked as exhibits. The result of adopting such a strange procedure has been the denial of an opportunity to the witness to explain the other statements occurring in his deposition in the committing court, which may not be quite consistent with the statements given in the Sessions Court.

In view of the restricted use proposed to be made by the Public Prosecutor of the evidence given by the witness in the committing court, the accused was also not called upon to cross-examine the witness on the other statements occurring in such evidence. Under these circumstances it cannot be said that the conditions required by Section 288 of the Code of Criminal Procedure have been satisfied in the present case so as to entitle the court to treat the evidence furnished by Exts. P. 2, P. 3 & 5 as substantive evidence. The necessity of strict compliance of these conditions has been explained by the Supreme Court in *Tara Singh v. The State*, 1951-2 SCR 729 at P. 745: (AIR 1951 SC 441 at pp. 446-447) (A), in the following words :

'Of course the witness can be cross-examined about the previous statement and that cross-examination can be used to destroy his testimony in the Sessions Court. If that serves the purpose of the prosecution, then nothing more is required, but if the prosecution wishes to go further and use the previous testimony as substantive evidence, then it must in my opinion, confront the witness with those parts of it which are to be used for the purpose of contradicting him. Then only can the matter be brought in as substantive evidence under Section 288.'

The question once again came up for the consideration of the Supreme Court in *Bhagwan Singh v. The State of Punjab*, 1952-3 SCR 812: (AIR 1952 SC 214) (B), and there the practice of merely putting in the prior deposition of the witness without giving him an opportunity of explaining the statements which are proposed to be treated as substantive evidence, was condemned. In dealing with this matter, it was observed as follows at p. 822 (of SCR); (at p. 218 of AIR):--

'There can be no hard and fast rule. All that is required is that the witness must be treated fairly and be afforded a reasonable opportunity of explaining the contradictions after his attention has been drawn to them in a fair and reasonable manner.'

Viewed in the light of these principles also, the attempt of the prosecution to treat Exts P. 2, P. 3 and P. 5 as substantive evidence has to be discountenanced.

6. AS already stated, the evidence given by Pws. 2, 3 and 5 in the Sessions Court is that they have not seen the accused inflicting any stabwounds on Kunjootty. Pw. 3 is the son of Pw. 2 and their house is only a few furlongs away to the north-west of Chinna's house. The version given by Pw. 2 is that when Kunjootty came to Chinna's house at about 8 p. m. on 6-8-1955, he was renting on the front verandah of his house after taking supper. According to him he was able to see from this verandah Kunjootty going to the house of Chinna and his turning against the accused and asking him to get away from that place and also giving a few blows to him.

He says that he got terrified at this incident and got into his room and so he could not witness what transpired thereafter. His son Pw. 3, Who was also in that house at that time, states that he only saw Kunjootty lying dead in the lane in front of Chinna's house and that he did not see how Kunjootty sustained the wounds found on his body. In his cross-examination he has admitted that the houses of himself and Chinna are both facing the northern lane. Naturally, therefore, the front verandahs of these houses must be on the northern side. If Pw. 2 was sitting on the northern verandah of his house, it is obvious that he could not see anything taking place in the front verandah of Chinna's house or in the adjoining courtyard.

Pw. 3 has admitted that from the southern verandah of his house it is not possible to witness anything taking place in the courtyard in front of Chinna's house. It is therefore very doubtful whether PW. 2 is speaking the truth when he says that from the verandah of his house he saw Kunjootty assaulting the accused. He himself has contradicted that version in another portion of his deposition. In his cross-examination he has admitted that at the time of the occurrence he was taking his supper inside the room. He has added that he has stated so even in Ext. P. 2 the deposition given by him in the committing court.

This version gains support from the deposition given by his wife who has been examined as Pw. 7. She has stated that herself and Pws. 2 and 3 were inside their house when they heard some altercation from the house of Chinna and that she did not feel anything unusual about it. She is definite that when such alteration was going on in Chinna's house, Pws. 2 and 3 were having their supper inside the

room, and that the accused was seen going towards the north along the courtyard of their house just when these people got out after finishing the supper.

The prosecution does not appear to have made any attempt to challenge these categorical statements made by Pw. 7 which have therefore to be accepted as correct. The legitimate inference is that Pws. 2, 3 and 7 could not have witnessed the situation in which Kunjootty sustained the stab wounds. Then there is Pw. 5 Chinna who was present at the scene of occurrence, and who admits having tried her best to prevent Kunjootty attacking the accused. Naturally she must have witnessed how and from whom Kunjootty sustained the stab wounds. But she has refrained from disclosing this part of the occurrence.

The Public Prosecutor treated this witness as a hostile witness and cross-examined her. Nothing useful could be elicited from her by such cross-examination. In the committing court also her attitude was the same and there also she was treated as hostile to the prosecution and cross-examined with no better result. Thus her evidence also has not been helpful to the prosecution in bringing to light the exact manner in which the occurrence took place. The best that can be said of the prosecution evidence as it stands is that it might sustain an inference that the stab wounds on Kunjootty must have been inflicted by the accused.

Even then, it is clear from the evidence of Pw. 5 to the extent it goes, that the occurrence must have taken place on the verandah of her house and not in the courtyard as alleged by the prosecution. She has stated that on seeing the accused coming to her house, Kunjootty ordered him to get out and also rushed towards him to attack him. For a moment Pw. 5 was able to keep back Kunjootty by holding him and appealing to him not to molest the accused. Then there was a dull for a while and the accused and Kunjootty took their stand on either end of the verandah. Kunjootty again rushed towards the accused saying 'let me see if this fellow can besent away from the place.'

He caught hold of the thorthu that the accused was wearing round his neck. Apprehending danger to the accused, Pw. 5 caught hold of one end of the thorthu and appealed to Kunjootty to release his hold. She succeeded in snatching away the thorthu from his Hold. At this stage she was pushed out into the courtyard.

According to the witness she did not know who did so. But it is obvious that it could have been done only by Kunjootty and not by the accused whom she was trying to shield against the attacks of Kunjootty. Pw. 5 had fallen down on the courtyard and from there she got up and moved a little away, and kept on wailing on what had happened.

The probability appears to be that after pushing down Pw. 5 into the courtyard Kunjootty must have had a free hand in continuing his attacks on the accused and that the accused must have been forced to resort to use of his knife to ensure his safety from the dangerous attacks of Kunjootty. The description of the scene or occurrence as contained in the inquest report Ext. P.. 4 affords strong indication that the stabbing incident took place while Kunjootty was on the verandah itself. The report states that at the eastern end of the verandah blood marks were seen at several spots.

A pen-knife, a match box, a few beedies, and a small photograph--all belonging to Kunjootty -- were also seen lying scattered at this portion of the verandah. There was also a trail, of blood from the verandah right up to the spot in the lane where Kunjootty's dead body was lying. These facts go to strengthen the inference that Kunjootty was engaged in a tussle with the accused at, the verandah, that the stabbing took place in the course of such tussle and it was after sustaining the stabs that Kunjootty got out of the verandah and went up to the northern lane where he fell down and died.

Thus even if an inference is drawn merely on the strength of the circumstantial evidence in the case that it was the accused who inflicted the stab wounds on Kunjootty, it is not possible to hold that the accused was not doing so in the exercise of his right of private defence.

7. Even according to the case as put forward by the prosecution, Kunjootty was the aggressor and the accused used his knife against the aggressor only after the attack on him had commenced. The accused as the lawful husband of Chinna had every right to be at that house. Kunjootty was only a paramour of Chinna and even that relationship had already been terminated as a result of the intervention of the Church authorities some days prior to the date of the occurrence. Thus on the date

of the occurrence Kunjootty had no right to attack the accused while he was in Chinna's house and to try to oust him from that house by using force against him.

There is the evidence of Pw. 4 who is a respectable and independent witness that Kunjootty was very much stronger and stouter than the accused. This witness has also stated that Kunjootty was a rowdy of the locality. The accused must have naturally been afraid of Kunjootty, That Kunjootty was a terror in the locality is obvious from the fact that there was none to question his conduct in driving away the accused from Chinna's house and keeping her as his own concubine during a period of 6 or 7 years. Even after the accused had come back to Chinna's house, Kunjootty appears to have thought that he could once again drive away the accused from that place. That he had gone to Chinna's house on the date of the occurrence with such an object in view, is clear from his talk with Chinna and also from his attitude towards the accused.

There is also the evidence in the case to show that Kunjootty had come fully drunk. Ext. P. 8 shows that even at the time of the autopsy there was toddy in the stomach of Kunjootty. It was against the deliberate and determined attacks of such an individual that the accused had to defend himself. At the earlier stages of the attack the accused did not even attempt to retaliate, as is clear from the evidence of Pw. 5. What dangerous turn such attacks took after Pw. 5, who was trying to pacify Kunjootty, was pushed out into the courtyard, is not clear from the evidence on record. But it will not be too much to infer that the accused must have been facing danger at the hands of Kunjootty, the drunken rowdy, of a stronger physique.

At any rate, the prosecution evidence does not rule out such a possible situation creating in the mind of the accused a reasonable apprehension of death or grievous hurt at the hands of the assailant. The benefit of such a possible situation should undoubtedly go to the accused, particularly when there is no evidence on the prosecution side to show that the occurrence had actually taken place in the manner alleged by the prosecution. The accused had not gone prepared for a fight or even with the knowledge that he may have to face an attack from Kunjootty.

The knife that the accused had with him was an ordinary knife and that was the only weapon available to him to defend his person against the attacks of Kunjootty. Ext. P. 8 shows that 4 of the injuries sustained by Kunjootty were on his arms, while another injury was on his collar bone. This would indicate that the accused must have been trying to ward off the attacks from Kunjootty. It is quite possible that the infliction of such minor injuries proved ineffective and that the other injuries on the vital parts of the body happened to be inflicted when the accused was in a state of utter despair.

Viewed in the light of all these aspects, we are clearly of opinion that in the nature of the evidence on record it is not possible to hold that in inflicting the injuries which resulted in the death of Kunjootty, the accused had exceeded his right of private defence. Thus, in any view of the case, the accused is entitled to an acquittal.

8. In the result Criminal Appeal No. 20/1957 is allowed and the conviction entered against the accused & the sentence awarded to him by the learned Additional Sessions Judge are quashed. The accused is acquitted of the offence charged against him and he is directed to be set at liberty forthwith. Criminal Appeal No. 51/1957 preferred by the State is dismissed.