

**State of Kerala Vs. N. Moideenkutty Haji and ors.**

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**Court :** Kerala

**Decided On :** Aug-05-1993

**Reported in :** 1994CriLJ1250

**Judge :** M.M. Pareed Pillay and; L. Manoharan, JJ.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302, 323 and 324

**Appeal No. :** Crl. A. No. 234 of 1990

**Appellant :** State of Kerala

**Respondent :** N. Moideenkutty Haji and ors.

**Advocate for Def. :** T.G. Rajendran, Adv.

**Advocate for Pet/Ap. :** K. Ravikumar, Public Prosecutor

**Disposition :** Appeal dismissed

**Judgement :**

M.M. Pareed Pillay, J.

1. The State has filed this appeal against the judgment in SC 26 of 1985 on the file of the Sessions Judge, Manjeri acquitting the accused 1 to 3 (A1 to A3) who were charged under Sections 323 & 302 r/w Section 34 I.P.C.

2. The prosecution case is that A1 and A3 beat the deceased with hands while A2 stabbed him with M.O. 1 knife causing him fatal injury. The learned Sessions Judge on appreciating the evidence held that the prosecution has not succeeded in establishing its case beyond reasonable doubt.

3. Taxi fare was due from A1 to CW3 Sulaiman. On 2-9-1984 at about 10-30 a.m. there was exchange of words between A1 and CW3. Abdul Rahiman (deceased) intervened and pacified A1 and CW3. On the same day at 5.30 p.m., while the deceased was at Venniyur bazaar, A1 to A3 came there on seeing the deceased, A1 chastised him for having helped driver (CW3). A1 and A3 beat him on his face and back with their hands. The deceased tried to flee away. It was then that A1 drew M.O. 1 dagger from his waist and stabbed the deceased on his abdomen twice. Deceased fell down. He was taken to the Government Hospital, Thirurangadi and from there he was referred to the Medical College Hospital, Kozhikode. While undergoing treatment, he died on 4-9-1984 at 8.45 p.m.

4. On getting intimation from the Medical College Hospital on 3-9-1984, PW 6 the Head Constable proceeded to the hospital and recorded the statement of the deceased, Ext. P2. On its basis, Crime No. 657/84 was registered under Sections 323 and 324 r/w Section 34 I.P.C. First Information Report is Ext P3. First Information Report was transferred to Tirurangadi Police Station. The investigation was conducted by PW 19

Circle Inspector.

5. The learned Public Prosecutor submitted that the Sessions Judge was not justified in acquitting the accused overlooking the evidence of ocular witnesses and particularly Ext. P2 statement of the deceased, which amounted to dying declaration. The learned defence counsel submitted that really valid reasons are stated by the Sessions Judge to reject the prosecution case and so no interference is warranted against that.

6. It cannot be disputed that Ext. P2 statement of the deceased constitutes dying declaration. As the dying declaration is only a untested evidence, the prosecution has the bounden duty to satisfy the court that what has been contained in it is the unalloyed truth and that it is really safe to act upon it. It is true that dying declaration should be considered with utmost care and caution and due importance has to be attached to it. Once the evidence regarding the dying declaration is found lacking credibility it would be hazardous to accept it. Though evidence regarding dying declaration can be placed on a high pedestal, it cannot be allowed to remain there the moment it is found that it cannot inspire confidence.

7. In Ext. P2 statement, the deceased specifically attributed two overt acts of stabbing by A2 against him. This is not supported by the medical evidence in the case. The postmortem certificate shows that the deceased had sustained only One incised injury. The Doctor, PW 10, who conducted autopsy stated that injury numbers 2, 3 and 4 were surgical injuries and number 1 appeared to be the original injury surgically modified and that the internal injuries corresponding to injury No. 1 is sufficient to cause death in the ordinary course of nature. Thus, the medical evidence and the dying declaration are apparently inconsistent.

8. Though PW 1 stated that there was only one stab injury inflicted by A2, he wrongly identified A2 for A1. PW 3 stated that there was only one stab injury and stated in categorical terms that the deceased was not stabbed twice. Ext. P10 being a material contradiction, no reliance can be placed on the testimony of PW 9.

9. In Ext. P2 statement, the deceased stated that immediately after the occurrence, he became unconscious and he regained consciousness only from the hospital. PW 16 has given a contrary version before the court. He stated that the deceased had told him while he was taken in the jeep to the hospital that A2 had stabbed him. The learned Sessions Judge did not place any reliance on Ext. P2 in view of the apparent conflict in the statement of the deceased and the evidence of the eye witnesses. But in the private complaint filed by P.W. 9 before the Committal Court, the allegation is that two stab injuries were inflicted upon the deceased. As the medical evidence shows that the deceased sustained only one stab injury, Ext. P2 statement of the deceased to the effect that he was stabbed twice by A2 cannot be given any credence. Though dying declaration has its own sanctity in the eye of law it cannot obliterate definite medical evidence to the contrary. Obviously the dying declaration mentioning of two stabs by the deceased runs counter to the medical evidence of only one stab injury on the deceased. As the version in the dying declaration is diametrically opposed to the findings in the postmortem certificate it cannot be considered as a trivial matter. It is really a fundamental defect which affects the root of the prosecution case. That by itself is sufficient to view the statement with suspicion. Though dying declaration when found to be true can be accepted even without corroboration, the court cannot do so once it finds that there are circumstances which nullify its sanctity. As Ext. P2 statement of the deceased is opposed to the medical evidence, we are unable to place any reliance upon former.

10. PW-19 admitted that CW3 gave a signed statement on 3-9-84 at the Government Hospital, Tirurangadi. As Ext. P2 statement of the deceased was recorded from the Medical College Hospital, this would be the first in point of time. Prosecution for reasons best known to it has suppressed this from the court. PW-16 admitted that his statement was taken on 2-9-84 by the police. This also is not forthcoming. There is considerable force in the defence contention that that real first information statement has been withheld. In Ext. P3 FIR the assailant's name is not mentioned. In Ext. P8 wound certificate also same is the position. The above circumstances case suspicion on the prosecution case.

11. PW 1's evidence shows that about 50 persons had gathered at the time of the incident and there was mutual exchange of blows. PW 3 stated that there was commotion and beating for about half an hour and

about 50 persons assembled there. Evidence of the eye witnesses has been considered at full length by the Sessions Judge. He found it not acceptable. From the testimony of PWs 1, 2, 3, 5, 9 and 14, it would appear that the incident did not take place in the manner alleged by the prosecution, and the possibility of the deceased sustaining the stab injury in an incident in which about 50 persons including the accused, deceased and others were involved cannot be ruled out. The prosecution also could not explain the injury sustained by A1 and A2, as evidenced by Exts. P7 and P9 wound certificates issued by PW 17 and PW 12 respectively. Findings of the Sessions Judge that prosecution has not succeeded in establishing its case beyond reasonable doubt do not call for interference.

12. The judgment of the court below acquitting the accused is confirmed. Crl. Appeal stands dismissed.

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