

Thota Ramakrishnayya and ors. Vs. the State

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Court : Chennai

Decided On : Nov-25-1952

Reported in : AIR1954Mad442; (1953)IIMLJ425

Judge : Ramaswami, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 154 and 162

Appeal No. : Criminal Appeal Nos. 480 and 481 of 1951

Appellant : Thota Ramakrishnayya and ors.

Respondent : The State

Advocate for Def. : State Prosecutor

Advocate for Pet/Ap. : K.S. Jayarama Ayyar, Adv. for ;K. Kannaiah, Adv.

Disposition : Appeals allowed

Judgement :

Ramaswami, J.

1. These are appeals preferred against the convictions and sentences of the learned Sessions Judge of Guntur Division in S.C. No. 30 of 1951.

2. The facts are : in the village of Adigoppula there are two factions headed by the accused 1 Thota Ramakotayya and G. Venkatappayya respectively. There is no dispute that accused 2 to 22 in this case are the partisans of accused 1 and that the Adlgoppula witnesses examined in this case as P. Ws. 1 to 6, 7, 12 and 15 to 18 are the partisans of Venkatappayya. This faction had arisen from the District Board Election held about two years prior to the commission of the offences, forming the subject-matter of this Sessions Case on 18-4-1950. In this District Board Election accused 1 and G. Venkatappayya stood as rival candidates and accused 1 was the successful and Venkatappayya was the defeated candidate.

3. On account of this faction hay-ricks were being burnt on either side and ill-feelings were smouldering. The village Munsif's hay-rick was burnt before and three days prior to occurrence the hay-rick of accused 1 and 2 was burnt. In the dry areas of Guntur District like Adigoppulu the burning of a hay-rick means hamstringing of the ryots because cattle cannot survive without fodder and without cattle agricultural operations will be brought to a standstill.

4. It is common ground that on account of this faction there were several civil, criminal, revenue and District Congress Election Tribunal proceedings and which need not be reset here because they are not disputed and which go to show that there were acute ill-feelings between these two factions on the eve of this occurrence.

5. On 18-4-1950 at about 5 P. M. there was undoubtedly a clash at the outskirts of the village between these two sets of factionists and this resulted in so far as G. Venkatappayya's party was concerned in the death of Narayya, the deceased in the Sessions Case, and the sustaining of injuries by P. Ws. 1 to 6 and in regard to accused 1's faction in the sustaining of injuries by accused 3 to 5, 7 to 9, 12, 15 and 21. Two versions are given regarding this occurrence, viz., the version of G. Venkatappayya's party which is the subject-matter of the Sessions Case and the version given by accused 1's party and which is the subject-matter of a pending criminal case numbered as C.C. 262 of 1950 on the file of the Additional First Class Magistrate's Court. Tenali, and which information is embodied in D. W. 5's dying declaration Ex. D-15, the complaint Ex. P-60 and the sworn statement Ex. P-

61 and accused 3's report Ex. P-35.

6. The version of G. Venkatappayya's party is as follows : On 18-4-1950 at about 5 P. M. P. W. 1 Y. Raghavayya and the deceased Narayya went to bring drinking water from the Gutlapallivari well which is to the west of their house. When they returned back with water pots and came as far as Peertachavadi, accused 1 to 16 came from eastern direction armed with sticks, spears and pounders to kill them. On seeing the accused, they threw away the water pots and ran as far as Hanuman Temple. As they came up to the corner of Kotamma's well, accused 1 to 16 chased them, surrounded them and beat them. Accused 2, 3, 4 and 6 had pounders; two or three accused were having spears and the rest sticks. Accused 2 and 4 beat the deceased on the head with pounders. He fell down. Accused 16 beat the fallen man on the forehead with a stick. Accused 1 beat the fallen man on the left hand with a stick. Accused 10 and 15 beat him on the legs and right hand with sticks. Accused 3 beat P. w. 1 with a pounder on the forehead. Accused 5 beat P. W. 1 with a stick on his right thumb. Accused 14 also beat him with a stick on the left hand above the fingers.

This is the version of the first scene as spoken to by P. W. 1 and the onlookers P. Ws, 7, 12 and 15 to 18. At that time, his uncle Vidayya and China Musalayya (P. Ws. 5 and 2) and his cousins Ramayya' and Vengayya and V. Ramiah (P. Ws 4, 3 and 6) were sitting and chatting on the pial. He informed them of the beating given to him and the deceased. They got up and ran to the lying deceased along with P.W. 1 and they found accused 1 to 16 & 17 to 22 surrounding the fallen, deceased. When P.Ws. 2 to 6 attempted to get at the fallen man, they were also beaten. The second scene consisted in the beating of P.Ws. 2 to 6 by the accused. P.Ws. 2 to 6 and the Onlookers P.Ws. 7, 12 and 15 to 18 speak to the blows received by P.Ws. 2 to 6. All that the onlookers P.Ws. 7, 12 and 15 to 18 did was to raise an uproar saying that the assailants were beating the victims unjustly.

After beating, all the accused went to the house of accused 1 in the northern direction P.W. 1 then went round the fallen people and next proceeded to the acting village munsif Kotayya (P.W. 14) to give a report. The injured persons were

taken on cots to the hospital at Gurzala, which is about 8 miles from the village. In the evening on the day of occurrence, the acting village Munsif P.W. 14 was in the house of the karnam along with the karnam, the Mohated P.W. 9 the Sub-Inspector of Central Excise and others and at 5 P. M. they came to know that the deceased was beaten by Thota people and Peddinedi people. On getting this news P.W. 14 went to his house along with P.W. 9. P.W. 1 came to his house then and gave the report Ex. P-1. Based on Ex. P-1 P.W. 14 sent his reports Exs. P-3 and P-29 to the Police and the Magistrate at about 8-30 P. M. The report Ex. P-3 was taken by the Mohated P.W. 9 and was delivered at the Karempudi Police Station only at 7 A. M. next morning as he was bitten by a scorpion on the way and as he regained consciousness only at 5 A. M. In the morning. Ex. P-4 is the explanation given by him to the Police for the delay. P.W. 21 was the Station-writer of Karempudi Police Station in April 1950. He received the report Ex. P-3 along with Ex. P-1 at 7 A.M. on 19-4-1950 through P.W. 9. He registered it as Crime No. 14 of 1950 under sections 147, 148, 325 and 326 I.P.C. He incorporated the explanation for the delay given by the Mohated in the F.I.R. Ex. p-32 and sent express reports to the authorities.

P.W. 19 was the Station-writer of Gurzala Police Station in April 1950. He received an intimation (Ex. P-30) from the Medical Officer Gurzala at 3 A.M. on 19-4-1950 about the admission of Narayya (deceased) in the Hospital. He went to the Hospital at 3-30 A. M. The Sub-Magistrate also came there. The deceased Narayya was then in an unconscious state and so his dying declaration could not be taken. P.W. 19 again received an intimation (Ex. P-7) at 12 noon that Narayya died at 11-15 A. M. He then registered It as Crime No. 32/50 under section 302 I.P.C. and sent express reports to the authorities. Ex. P-31 is the F.I.R. He deputed the Head Constable (P.W. 20) to hold inquest. The case was then transferred to Karempudi Police Station as the offence related to its jurisdiction. As the Sub-Inspector was not in town, the Head Constable P.W. 20 went to the Hospital and held inquest from 3 to 5-30 P. M. Ex. P-2 is the inquest report. He did not examine any witnesses during the inquest. After inquest, he sent the dead body through P.W. 11 for autopsy. P.W. 23 the then Circle Inspector of Police Gurzala, received information of this case at 10 A.M. on 18-4-1950 from the Station House Officer, Karempudi. He left Ourzala at 10-30 P. M. In a jeep and

reached Karempudi at 11 P. M. There was an entry in the general diary that one K Nagayya gave a report of the occurrence at 9 P. M. as per Ex. P-37. He then proceeded to Adigpppula and on his way ho met at Oppicheria some of the injured persons of the accused party who were being brought to the station. Hence he returned with them to Karempudi and took a report from accused 3 as per Ex. P-35. He came to know that some other injured persons had been taken to Gurzala Hospital. So he left Karempudi at 4 A. M. and reached Gurzala at 4-30 A. M. by jeep. He found the deceased and P.Ws. 1 to 6 in the Hospital. He learnt from P.W. 1 that he had already given a report to the Village Munsif. P.W. 23 could not take any statement from the deceased as he was in an unconscious state. He examined p. Ws. 1 to 6 in the Hospital at that time. At about 7 A. M. he left the Hospital to Nadikudi where there was a big railway collision and he returned from there in the even-Ing. He learnt that the deceased died in the Hospital and that inquest had been held by P.W, 20. He continued investigation on the 20th and examined P.Ws. 7, 12, 15 to 18 and others at Gurzala. On 21st, he went to the scene of offence and prepared the plan Ex. P-36 noting down the index and distances correctly. By then the Sub-Inspector Karempudi P.W. 22 was already there investigating. He directed P.W. 22 to complete the investigation and file the charge sheet. The accused were not available for arrest. All but Accused 1 and 2 were arrested by the Sub-Inspector P.W. 22 on 7-5-1050 at Oppicharla and accused 1 and 2 on 26-5-1950, at Karempudi.

7. The autopsy held by P.W. 10 over the dead body of Narayya on 20-4-1950 and the examinations of P.Ws. 1 to 6 by him on 20-4-1952 showed that the injuries found by the doctor on Narayya and P.Ws. 1 to 6 could have been caused at the time and in the manner alleged by the prosecution. In addition, the clothes of the deceased and P.Ws. 2 to 4 seized by P.W. 22 were found by the Serologist to be stained with human-blood.

8. So far we have dealt with the events as portrayed in the present Sessions Case and we must now switch back to the cross-case forming the subject-matter of C. C. No. 262 of 1950 on the file of the Additional First Class Magistrate, Tenali. On 18-4-1950 at 1 O'clock in the night Thota Ramakrishnayya has given the following statement to the Police.

'For the last about two months hay-ricks of our party and of the party of Gutlapalli Venkatappayya are being burnt on account of factions in the village. We have been giving reports that there is no suspicion on either party. On the night of 15-4-1950 our hay-rick consist ing about Rs. 3000 was burnt There was entirely no fodder for our cattle. As my cattle were starving, I went at about three hours to-day to call Pedinedi Sithayya for Fodder. When I was bringing Sitayya, Y. Videya (and 27 others) all these persons were sitting in a group Jn the verandah of the house of the permanent Munsif. By the time I started along with Sitayya, from the temple of Ranuman, Yaganti Videya (and 7 others) armed with sticks came upon us. There was a gun with Munsif Ramayya. He fired at us. We had drawn back. We raised loud cries.

Hearing our cries Thota Hanumayya (& 7 others) came running. Yaganti Raghaviah stabbed Pedaneti Sitayya with a spear on his leftside. Yaganti Yengiah and Y. Guruyayya and Yeniah beat on the top of the head with stick. China Guruvayya hurled stones on the top of the head. Y. Musayayya beat me on the top of the head with a stick. Yaganti Ramayya stabbed on the back with stone. After I was stabbed I fell down on the ground, when it was said he did not die; second side', he beat with a stick on the right side of the head. All the remaining persons came with sticks and all together beat with stones and sticks Thota Hanumayya (and 8 others) from among our people. All of us fell down on the ground. We were all brought to the Police Station. When this disturbance occurred, my elder brother Thota Ramakotayya & others were present'.

9. On the early morning of the next day one of the injured persons on the opposite side P. Sitayya (D. W. 5) gave his dying declaration to the effect that the persons of the other faction had done injustice to them and that himself and his brothers were stabbed with spears and beaten with sticks by ten persons, that he fell down and that he does not know what happened afterwards. This dying declaration attributed specific parts to three persons in so far as the injuries on this P. Sitayya were concerned.

10. Besides these dramatically opposed versions on 18-4-1950 at about 5 P. M one Kolleru Nagayya a resident of Adigoppulu gave information to the Sub-

Inspector of Police at Karempudi that five persons on one side (names omitted here) and five persons on the other side (names omitted here) of the two factions hurled stones against each other and beat each other with sticks between the temple of Hanuman and Gangavarapuvari well and that he was sent to inform this happening to the police and that he was sent by Thota Ramakotayya and Chirumamilla Anantaramayya. It will be seen how this version of this Nagayya is a compromise and reconciliation of the two versions of these two (actions set out above viz., that what happened was a free fight and secondly, that it took place neither near the Gangavarapuvari well as is the present Sessions case nor near the temple of Hanuman as is the cross-case but between the two.

11. On the foot that the Police were indifferent in investigating and charging the case against the P.Ws. In the present case because one of the partisans of P.Ws. In the Sessions Case had died whereas the injured partisan on the other viz. D. W. 5 survived, a complaint was preferred by D. w. 5 in the Court of the additional First Class Magistrate's Court, Tenali in C.C. No. 262 of 1950. This complaint was apparently prepared with the aid of outside intelligence. The relevant portion of this complaint giving both the preliminary as well as the sequel as to what happened according to the accused in the present Sessions Case is as follows:

'The complainant and accused are residents of the village of Adigoppula, Curzala Taluk. There have been factions in the village for some years. In the month of September or October 1949, elections for the Guntur District Board took place and one Thota Ramakotiah Garu of our village on the one hand and accused 9 on the other consisted of candidates in which accused 9 got defeated in spite of enormous amount spent by him and his party. Ever since the factions became acute. The leaders of the accused party somehow got at the Central Excise Inspector, Macherla, and made a huge effort to file a case against Kongera Budda Kotayya for alleged stocking of contraband tobacco by him.

This attempt however did not fructify. Even since during the last four months prior to the date of offence hay-ricks belonging to both parties were set fire to by some one or other including those of the leaders. On 18-4-1950 also the Central Excise Inspector was again prevailed upon by the accused leaders to search the stocks of

Peddinedi Kondayya, one of the prosecution witnesses just after the midday. The hay-ricks of Thota Ramakotiah having been previously burnt, his brother Thota Ramakrishnayya was collecting hay and straw for their cattle and the complainant was assisting him in collecting the same.

On 18-4-1950 evening, Thota Ramakrishnayya came to his house for taking him for hay collection and tooth were going along the street, in which accused 8's house is situated. Complainant saw all the accused in his verandah in a gayful mood gloating at their achievement of the day. On seeing us accused 1 to 4, 9 and 10 and Yaganti Narayya stood up saying 'where do you go' accused 8 came out with a gun which was owned by his brother-in-law, accused 9 and 2 came with a spear. The rest were armed with sticks. Accused 8 fired the gun at Ramakrishnayya, but luckily Ramakrishnayya avoided the aim and saved himself. We raised alarm. The above persons and accused 7, 12 to 14, 17, 20 and 21 surrounded the complainant and attacked him. Accused 2 speared him on the back. Accused 9 gave him a blow on the head with a stick resulting in a fracture and Yaganti Narayya gave him another blow on the head with a stick.

Accused 20 hurled a dried mud clod while accused 21 hurled a stone. The others fisted and kicked the complainant before falling and after he fell down. Thota Ramakrishnayya was also attacked and he received a number of injuries at the hands of some of the accused. The remaining accused also joined the assembly while we are attacked. On hearing our alarm, Thota Hanumayya, Thota Seetayya, etc. etc. came to the scene and according as they came there, they were all beaten by the accused indiscriminately all of them taking part in the attack. In the course of the rioting, Yaganti Narayya and accused 1 to 5 and accused 22 also received injuries in the attempts of the prosecution witnesses to defend themselves against the aggression of the accused persons....'

12. The Police obviously stampeded by these moves on the part of both the sides and apparently frightened that they would be falsely accused of partisanship if they charged one side only, have charged both the cases with the singular result that in regard to the same rioting at the same place and at the same time, they have put forward two diametrically opposed versions as truthful versions and the Circle

Inspector who was examined as P.W. 23 in this case has unabashedly explained this as follows.

'I thought that the accused were the aggressors and I was consulting my superiors whether the prosecution party should be prosecuted. Finally it was settled that the Court should decide it. Hence the delay in filing the charge-sheet in the counter-case.'

13. The evidence adduced in this case based on the version given in Ex. P-1 consists of the evidence of ill-feelings between two factions, oral and documentary, concerning which there is no dispute and the evidence of the eye-witnesses P.Ws. 1 to 7, 12 and 15 to 18 who are all admittedly partisans of Venkatapayya's faction and the medical testimony concerning the injuries sustained by the deceased Narayya and p. Ws. 1 to 6 and the so called investigation in this case. The defence consisted of an alibi for accused 1 and 2 and the version of the accused given in the complaint of D. W. 5 and the medical testimony concerning the injuries sustained by accused 3 to 5, 7 to 9, 12, 15 and 21.

14. The learned Sessions Judge holding that the prosecution had proved its case convicted accused 1 to 16 under Sections 325 and 323 I.P.C. and accused 17 to 22 under section 323 I.P.C. and sentenced them to varying terms of imprisonment. The convicted persons have preferred these appeals.

15. The points taken by the learned counsel appearing for the accused are four in number viz., (i) that EX. P-1 should not have been treated as the F.I.R.; (ii) that the investigation in this case was perfunctory; (iii) that both the cases should have been tried by the Sessions Court in quick succession with separate assessors and separate recording of evidence and that judgments should have been delivered at their close as enjoined repeatedly by this court and other High Courts as well; and (iv) that the learned Sessions Judge has not properly applied the tests which should be applied in rioting cases of this nature for assessing the truth and adequacy of the evidence. I shall now examine these criticisms point by point.

16. POINT 1. The information that is usually called the first information is the basis upon which an investigation should be, and ordinarily is, commenced by the police under Chapter 14 of the Code of Criminal Procedure. The information given in writing or reduced to writing under Section 154, Criminal Procedure Code, is generally known as the First Information Report, though the word 'first' is not used in the Code; -- 'Mani Mohan v. Emperor' : AIR1931 Cal745 and -- 'Mir Rahman v. Emperor', AIR 1935 Pesh 165 (B). This information constituting the F. I. R. should be in the nature of a complaint or accusation, or at least information of a crime with the setting of the law in motion.

17. This First Information Report is generally proved by the prosecution and the report, is marked as evidence though by itself it is not substantive evidence and can only be used for the limited purposes under section 157 of the Evidence Act for the purpose of corroboration or in a proper case under section 32 of the Evidence Act as a declaration as to the cause of the informant's death or as a part of the informant's conduct under section 8 of the Evidence Act or under section 35 of the Indian Evidence Act without formal proof to show that the implication of the accused was not an after-thought; or as one of 'res gestae'; -- 'Sankaralinga Tevan v. Emperor' : AIR1930 Mad632 (C); -- 'Mohan Singh v. Emperor' : AIR1925 All413 (D);--'Assimaddy v. Emperor' : AIR1927 Cal17 . It may of course be used by the defence under sections 145 and 155(3) of the Evidence Act. These general provisions of the Evidence Act are, however, controlled by the special provisions of section 162, Code of Criminal Procedure, and therefore the first question which has got to be decided is whether the information in Ex. P-1 is really the first information or is hit by the provisions of Section 162, code of Criminal Procedure. If the information is hit by section 162, it has got to be excluded.

Sometimes it happens that the offenders themselves are the first informants and such cases the non-culpatory portion should be admitted and the confessional portion should be excluded. What now and then happens is that persons after committing an offence proceed to the Police Station with the blood-stained instrument and there report the matter to the officer concerned. This information has got to be taken down by the Police Officer as narrated to him and treated as the F. I. R. and a case has got to be registered and it is only when the matter

comes to court and this information embodied in the F. I. R. is sought to be put in evidence as first information, that information has to be scrutinised and when it is found to consist as it does usually of three-parts (i) information of events, motive etc., leading to occurrence; (ii) murder proper and admitting doing it; and (iii) subsequent events, Nos. (i) and (iii) will be admitted and No. (ii) will have, to be excluded; -- 'Dal Singh v. Emperor', AIR 1917 PC 25 (P); -- 'Akal sahu v. Emperor', : AIR1948 Pat62 (G); -- 'Mohammada v. Emperor', AIR 1948 Lah 19 (H); -- 'Legal Remembrancer, Bengal v. Lalit Mohan', : AIR1922 Cal342 (I); and-- 'Bharosa Ramdayal v. Emperor', AIR 1941 Nag 86 (J).

18. The tests which have to be applied to find out whether a particular information of an offence is admissible as first information or is hit by Section 162, Criminal Procedure Code, have been correctly analysed by Mr. Y. H. Rao in his 'Law of Pre-trial Statements and Depositions'. The tests are;

(a) The information on which the Police Officer is expected to act must be authentic. In other words, the information must be capable of being traced to a specific individual who would take the responsibility for the same so that should the information subsequently turn out to be false the informant could be proceeded against. Under this test telegrams and telephone messages have been held to be in no better position than village gossip, in respect of authenticity, since any arrest based upon such unauthenticated information, would be in excess of the police officer's duties. But if the authenticity of the telegram or of the telephone message is subsequently confirmed, they themselves may then amount to authentic information in certain circumstances and come within the purview of section 154, Criminal P. C.-- 'In re Anandayya', AIR 1915 Mad 312 (K); --'Public Prosecutor v. Chidambaram AIR 1928 Mad 791 (L); -- 'Kachi Hazam v. Seraj Khan' : AIR1935 Cal403 and --'Chanan Singh v. Emperor', AIR 1934 Lah 413 (N).

(b) The information must be sufficiently definite* and clear enough to suspect that a cognizable offence had been committed. Therefore, vague information cannot constitute an F. I. R. In -- 'In re, Mylaswarny Chetty', AIR 1939 Mad 66 (O), the Sub-Inspector was merely told that there was a, shooting incident in the house of the deceased. When the Sub-Inspector got into the house of the shooting incident

he saw the corpse of the deceased. He then took the statement of P.W. 1. It was clearly only after recording the statement that the Sub-Inspector could have any real information of the commission of the cognizable offence. While a riot accompanied with arson and looting was going in a village M who happened to pass through that village at once proceeded to the nearest Police Station and gave some vague information about the disturbance in the village, whereupon the Police Superintendent rushed to the village. A statement was then recorded. The latter and not the former was held to be the F. I. R. -- 'Qamrul Hasan v. Emperor', (P).

(c) The information may be merely hearsay, provided the person in possession of the hearsay is required to subscribe his signature to it and mention the source of his information, so that the information may not amount to irresponsible rumour; -- 'Chinna Ramana Gowd v. Emperor', 31 Mad 506 (Q); -- 'In re Krishna Baipadithaya', 11 Cri LJ 286 (Mad) (R) and -- 'In re Sivan Chetty', 32 Mad 258 (S).

(d) Where, though the tests (at (b) and (c) are satisfied the information is given to a police officer who is not in charge of the police station concerned, and where therefore no step was taken in aid of investigation by the concerned station-house officer as a matter of fact, any subsequent information given to the station-house officer himself which actually set the law in motion cannot be treated as one given in the course of investigation : --'Momin Talukdar v. Emperor' : AIR1928 Cal771 and -- 'Mazarall Inayatali v. Emperor', AIR 1933 Bom 266 (U).

19. Where these tests are satisfied, there is no justification for treating any subsequent information as the First Information Report except in exceptional cases. These exceptions are three in number. The first exception is that where owing to wide-spread disturbances the Government Machinery itself is in a state of suspension and no action could therefore be taken on reports of offences made to police-officers, a subsequent report may be treated as the First Information Report -- 'Magan Lal v. Emperor', AIR 1946 Nag 173 (V). Lists of stolen property supplied to the police after the investigation has literally started but still in the preliminary stage, may be treated as parts of the First Information in proper cases-- 'Brij Lal. v. Emperor' : AIR1943 All216 . Where the report presented at the station is cryptic, answers of the informant to questions by the Police Officer in elucidation of the

report, and included in the report, and signed by the informant may form part of the First Information Report; -- 'Kachu Gogal v. The State', AIR 1951 Ass 151 (X). Whether investigation started, is not a question of law but a question of fact which has to be decided on the circumstances of each case.

20. Therefore applying these tests to the instant case, the information given by K. Nagayya in Ex. P-37 both being vague and of the variety which may be legitimately described as village gossip so far as authenticity goes, cannot certainly be treated as the First Information in this case. On the other hand the First Information Report in this case will be Exs. P-35 and P-1. The Circle Inspector on receiving a vague information from the station House Officer, Karempudi that a rioting had taken place at Adigoppula, left Gurzala in the night of 18-4-1950, saw the entry in the General Diary of the information given by K. Nagayya (Ex. P-37) and proceeded to Adigoppula. On the way he met the injured persons of the accused party at Oppicherla and came back with them to Karempudi and took a report from accused 3 reproduced above and then started investigation. In early morning of the next day the complaint given by the prosecution party (Ex. P-1) to the village Munsif reached the Police Station. It is on the foot of these two First Informations that these two cases had been launched by the Police.

Counter-complaints received even during investigation are not hit by Section 162, Criminal Procedure Code. They are not different from independent and fresh complaints made by others than the accused persons in the course of investigation of a particular offence. Therefore, both Exs. P-35 and P-1 will share the privilege of First Information Reports in this case, though in regard to the uses to which they should be put a vital distinction should be borne in mind. Counter-complaint made by accused persons when sought to be used for or against them when figuring as complainants in their cases attract only the provisions of the law of Evidence to corroboration or contradiction and are no more than former statements of witnesses; yet in so far as nothing precludes their use even in cases against them as accused persons, it should be borne in mind that when so used they attract the provisions as to admissions-and confessions.

21. The criticism of the learned counsel for the appellants under point No. 1 fails.

22. POINT 2.: There can be no doubt that the investigation in this case has been perfunctory. First of all, the Police have not carefully gone into the question of the delay in a receipt of Ex. P-1 on the morning of 19-4-1950 at the Police Station. They have too readily accepted the glib and schoolboy explanation of the village servant P.W. 9 that he was bitten by the scorpion and became unconscious and hence delay. With experience will come as pointed out by Sabonadiere I. C. S. In his. TRIAL OF CRIMINAL CASES and Sir Cecil Walsh's CRIMES IN INDIA recognition of the fact that stock stories are as characteristic of false evidence as of folklore. Each Province of India has its own standard lot of fairytales devised for the entertainment of Courts. There is the soft-hearted witness who was on his way to deliver a message or to get a plough mended or to arrange for his daughter's marriage, but was so shocked and upset by the sound of a wordy quarrel and the sight of a bruised arm that he turned back straight home though he had already gone four fifths of the way to the place to which he was bound to 'ease himself' is a very favourite pretext used by our witnesses in criminal cases to explain their otherwise unexplicable presence in most unexpected places at equally unexpected, and convenient moments and to account for their chance meetings with important witnesses and for their fortuitous opportunities for seeing things about which they would otherwise know nothing.

Similarly eye-witnesses to a brutal murder at night seldom say that they were aroused by the noise of disturbance. But almost always that they rose 'to make water'. It is difficult to resist the conclusion that the little touch about the act of nature which appears again and again in every district comes from the Police who have no doubt, a settled conviction that murderers working by stealth at night will take care not to wake the neighbours. But an eye-witness who is peacefully sleeping must wake somehow and this demand of nature synchronises with the murderous attack with the regularity of an aperiens. To this stock of fairly tales must be added the village servant who never reaches the Police Station 'stung by scorpion' (Circas), disabled by stomach-ache (Tamil Districts) and put out of combat by malaria (Ceded Districts). On the other hand, the circumstances of this case clearly show that the First Information Report was prepared long after the

alleged time shown therein and when the parties could put their heads together and evolve a First Information Report which would implicate-as many people as possible and assign specific parts to them and contain a list of witnesses who would later lend themselves to support this version and which all take time for thinking out things.

The suggestion on behalf of the appellants that this report was prepared the next morning and was sent to the Police Station on a bicycle and that a false explanation was cooked up to account for delay rings true. Secondly the version of these P.Ws. was cooked up later is seen from another significant circumstances viz., that notwithstanding the fact that the injured P.Ws. were in the Hospital and handily available and the Inquest itself was held therein, the Inquest report states that inasmuch as the offence had taken place at a place away from the Hospital and no witnesses had been examined, the names of the offenders suspected to have committed the offence were not known. This returning of an open verdict by the Panchayatdars is only consistent with the suggestions made by the appellants that instructions had been given to the Head Constable who held the Inquest not to commit himself to any version but await the developments of the Inspector's enquiry. 'To my mind the Inquest report is tell-tale and clearly shows that the present version of the P.Ws. has been connected subsequently and that the First Information Report Ex. P-1 does not represent the truthful version of what happened. Thirdly, one of the clinching details mentioned in the counter-complaint Ex. P-35 is that a revolver was used and a shot was fired. This weapon has been seized and yet the Police have not sent it to the Chemical Examiner and the explanation given by the prosecution is that the Circle Inspector is well-versed in firearms and was of the opinion that it had not been fired. If this point had been cleared up in the manner in which it ought to have been done, it would have shown the truthfulness or otherwise of this version. Fourthly, the alibi put forward by accused 1 and 2 and now sought to be supported by some respectable evidence has not been properly enquired into.

It is enjoined on the Police under Police Order No. 583 as follows:

'It is but right that the Police when they are endeavouring to discover the author of a crime should make enquiries of or put questions to any person including the accused from whom they think they can obtain useful information. But when an accused person is arrested he must be informed of the charge against him. It is then open to the investigating officer to put to him such question as he considers necessary for the purpose of enabling him to explain or elucidate any circumstance that may have been ascertained in the course of the investigation. If the accused proceeds to make a defence with the object of explaining his position, further a question may be put to him to elucidate that explanation. But the questioning should not be persistent or take the form of cross-examination nor should the accused be pressed to answer questions or make any statement he is unwilling to do so.'

The object of questioning the accused and the recording of the information given by him in the case-diary and which is insisted upon in this state is that the aim of an investigating officer should be to find out the truth and that the truthful defence which a person accused may have may be investigated and if true the accusation against him may be dropped.

It is quite impossible to believe that these two accused persons who are in fact witnesses in the other case would not have disclosed their alibi. It is quite true that owing to the abuse of this plea of alibi it has come to be looked upon with a great amount of suspicion. There is great danger of even true alibis being disbelieved, though a moment's reflection will show that really innocent men can establish their innocence only by demonstrating that they were somewhere else at the material time. The remedy for this course is unfortunately not in the hands of the Police or Courts but in the hands of the Legislature. The plea of alibi will come to be believed only when we have a Rule in the Criminal Procedure Code, as under the Scotch Criminal Administration of Justice that an accused person who proposes to put forward a plea of alibi should give advance notice to the Prosecutor that he proposes to put forward such and such a plea of alibi and then it will be the duty of the prosecution to investigate into this plea of alibi and accept it or reject it. The evidence in this case shows that this plea of alibi supported by a respectable volume of evidence has been rejected by the learned Sessions Judge for no other

reason than that as the accused persons call the alibi-wolf, alibi-wolf, too many times, even the real one has come to look unreal. Fifthly, there has been no real investigation in this case because all that the prosecution has done is to make the P.Ws. In the one case, the accused in the other, and 'vice-versa' and put forward their versions without any attempt at finding out the truth and which will be dealt with at some greater length when I come to the next point.

I cannot commend to the Police who investigated this case anything better than, if I may say so with respect, the wise admonition of my learned brothers Mack and Somasundaram, JJ. in --'Malla Reddi v. State', 1951 Mad WN 861 (Y),

'The Investigation Police are primarily the guardians of the liberty of innocent persons. A heavy responsibility devolves on them of seeing that innocent persons are not charged on irresponsible and false implications..... There is a duty cast on the investigating Police to scrutinise a first complaint in which a number of persons are implicated with rigorous care and to refrain from building up a case on its basis unless satisfied of its truth.'

The investigation in this case was perfunctory and little reliance can be placed upon the evidence so gathered and placed or more appropriately dumped before Court. The measure of this perfunctory investigation is well brought out from the reply given by the Circle Inspector in re-examination alluded to above and the measure of condemnation that statement carries is well brought out by the following observations of Reillys, C. J. and Nageswara Ayyar J. In -- 'Giriyappa, in the case of, 18 Mys LJ 229 (Z)',

'It is improper for the Police to prosecute at the same time two counter-cases in regard to the same occurrence one of which must be false and that it was improper also and disrespectful to the Court for the Public Prosecutor to conduct both cases in the Sessions Court knowing that one must be false. Such counter-cases cannot both be prosecuted honestly either by the Police or the Public Prosecutor. The powers: of investigation given to the Police by the Criminal Procedure Code are given for the purpose of ascertaining the truth not for dressing up cases with any evidence true or false, which may be available.'

23. POINT 3 : The trial of this case is in violation of the injunction of this High Court and other High Courts in a series of decisions and the principle of which is as follows. Where there is a fight between two rival factions which gives rise to the complaint and counter-complaint it is a generally recognised rule that both the cases should be tried by the same Judge in quick succession though with different Assessors and Jurors; the first case should be tried to a conclusion and the verdict of the Jury or the opinion of the Assessors be taken. The Judge should, however, postpone the judgment in that case till he has heard the second case to a conclusion and he Should then pronounce judgments separately in each case. He is bound to confute his judgment in each Case to the evidence let in that particular case and is not at liberty to use the evidence in one case for the purpose of the judgment in the other case and to allow his findings in one case to be influenced in any manner to the prejudice of the accused by the views which he may have formed in the other case.

24. This settled practice enunciated above was laid down by this High Court and has been adopted by other High Courts and can now legitimately be described as an universal practice in India. I shall now briefly indicate the case-law on the subject.

25. The earliest decision of the Madras High Court is. the Bench decision of Waller and Cornish JJ. In -- 'Goriparthi Krishtamma, in re', 1929 2 Mad Cri. C. 238 (Z1). It was held therein that where there was a fight between two parties and the Police charge-sheeted both and the offences against one party were triable by the Magistrate while those against the other were triable by the Sessions, that both cases should have been committed for trial by the Sessions Court on the foot of the following reasoning:

'A case and a counter case arising out of the same affair should always, if practicable be tried by the same Court. Each party represent themselves as having been the innocent victim of the aggression of the other. Neither will, as prosecution witnesses admit that they retaliated on the other, for the obvious reason that they are themselves on trial in the other case. As accused, they do not, as a rule let in any defence evidence, relying on the evidence they have given

in the other case as prosecution witnesses. The result is that no court can grasp the real facts unless it tries both cases.'

In -- 'Krishna Pannadi v. Emperor', AIR 1930 Mad 190 (Z2), Jackson, J. observed: 'There is no clear law as regards the procedure in counter-cases, a defect which the Legislature ought to remedy.

It is a generally recognised rule that such cases should be tried in quick succession by the same Judge, who should not pronounce till the hearing of both cases is finished.

This precludes the danger of an accused being convicted before his whole case is before the Court, and also prevents there being conflicting judgments upon similar facts. But at the same time the rule involves obvious difficulty. It seems to infringe the fundamental principle that the Court must not import any facts into a case which are not to be found on the record. To take an illustration; suppose in the first of the cases, the accused succeeds in showing that the prosecution has failed to prove its charge, and then in the second case, the same accused as complainant goes into the witness-box and breaks down in the cross-examination so as to convince the court that the truth lies with the other side. Can the Court be expected to dismiss this circumstance from its mind, and if it does not do so, what legal justification is there for importing it into the case already heard?

The only way in which such a procedure can be justified is by setting up a fiction that the case and a counter-case are really one, and this fiction should be made a reality by statute. If a court were empowered to link cases, as they link files in a Secretariat, there would also be the incidental advantage of a great saving of time. At present in each case the evidence of every witness must be fully recorded and what P.W. 1 says for the prosecution in one case must all be written out again when he repeats it as D. W. in the other case.

But whether there be a statutory enactment or not, the point remains that for practical purposes a case and its counter are one, and it is this that makes these general observations particularly germane to the present case.'

26. On account of the waste of time involved in recording the statements of the P.W.S., Wallace and Jackson JJ. pointed out in -- 'Krishnayya Naidu V. Emperor', AIR 1930 Mad 505 (Z3), that

'in case the depositions given by two persons as defence witnesses in one case were filed with the consent of both parties when they were examined as prosecution witnesses in the counter-case, such a procedure is neither prohibited nor illegal but saves a good deal of time of the Court. No prejudice can be said to be caused to the accused. This procedure is justified especially when the depositions were filed with the consent of the parties and when the witnesses were examined in the presence of the accused and sworn to the truth of their previous depositions.'

This decision is not binding because as pointed out in this decision itself such a procedure was considered as fatally irregular in a previous Bench decision in -- 'Umar Hajee, in re', AIR 1923 Mad 32 (Z4) and so far as this was concerned these observations were obiter. It would appear from the decision that this procedure which was condemned in -- 'AIR 1923 Mad 32 (Z4) and which was approved in this decision was the one adopted by one of the Judges who was a party to the later decision viz., Jackson J. as Special Sessions Judge. It has now become settled law that such a procedure is not permissible because trials in criminal cases are governed by the provisions of the Criminal Procedure Code and the procedure of treating prosecution evidence in one case as defence in the other and 'vice versa' is not warranted by any provision of the Criminal Procedure Code & the procedure permissible in civil cases cannot be engrafted on criminal trials. The fact that counsel on both sides consented to such a procedure and in fact asked for such a procedure to be adopted cannot make it legal. The Public Prosecutor by assenting to this illegal procedure had given away his legal and necessary right which in a regular trial he would have of cross-examining the witnesses of the defence as he could not cross-examine the witnesses whom he himself produced for the prosecution in both the cases. 'Sarju v. Emperor', AIR 1938 Oudh 249 (Z5).

27. This principle laid down above is further adumbrated by Jackson J. In -- 'Sathakuttia Pillai v. Pichai Cruz', 1931 Mad WN Cri 276 (Z6), in so far as case and counter-case triable by Magistrate only are concerned. It is stated that Court cannot possibly take one case on file and summarily dismiss the other in whole or part. If one case on its face looks stronger, that can be heard first. But at least to the point of framing charge or discharging, the Magistrate must keep his hands free and not commit himself to a decision one way or the other. Similar views have been expressed by Newsam J. In -- 'Periaswami v. Emperor', 1937 Mad WN 998 (Z7), when so called counter-cases were presented a Magistrate must treat them both as defence cases disguised as prosecution cases and dismiss them both at once or if he is unable to come to that conclusion 'prima facie' he must treat both complaints with equal respect until he is in a position to make a simultaneous order in each case. See also for similar observations Burn J. In -- Krishnapannadi v. Buryanarayana Asari', 1933 Mad WN Cri 35 (Z8).

28. in -- 'Lakshminarayana v. Suryanarayana', Am 1932 Mad 502 (Z9), Walsh, J. held as follows :

'In regard to an occurrence, the Police filed a charge-sheet against one party which included a charge of murder. The case was committed to the Sessions. A counter-complaint was made and the Police filed a referred charge sheet on the ground that the injuries on the complainant were due to a right of private defence. Then complainant filed a complaint before the Court in which charge was framed under sections 147 & 323 I.P.C. The accused on being asked to plead wanted to recall the prosecution witnesses. At that stage the court changed its mind and committed this case also to the Sessions. Held that the commitment should be quashed as accused had no opportunity to adduce evidence before committal and as the court did not follow the procedure in Chapter 18, Criminal Procedure code.'

This case is an authority for the proposition that case and counter must be committed to the Sessions. But in that case the commitment had to be quashed for the reasons set out above.

29. Then we come to the very important case decided by Reilly and Pandalar JJ. -- 'In re Jaggu Kaldu 1932 5 Mad Cri. C. 235 (Z 10)', following extracts may be

usefully made as they have a material bearing on the present case: 'That two cases really 'Counter' to each other in the sense that they put forward two versions of the same incident, one of which must be false, should be sent to the Sessions Court at or about the same time for trial ought to be extremely rare. Such counter cases sometimes come before a Magistrate though it should be impossible that both should be prosecuted by any public authority. It sometimes happens however that in cases of rioting in which two groups of persons are concerned the Police put in a charge-sheet against one party and members of that party prefer a private complaint against their opponents. And counter cases of that sort may arise in connection with other offences. It is generally the duty of one 'Magistrate to hear both cases and though the Magistrate can never legally use in one case evidence which is on record only in the other case, it is sometime convenient that he should hear all the evidence in both cases before he pronounces judgment in either in order that if any relevant evidence comes to his notice in one case which would be of use in the other he may have it brought on record in the other case also.

The Magistrate must be trusted not to allow himself to be confused between the two cases nor to base his judgment in either on evidence not legally admitted in that case. And it has sometimes been said that when the Magistrate finds it necessary to commit the accused in one of such cases to the Sessions court for trial it is desirable that he should commit the accused in the counter case also instead of disposing of it himself. There may be cases in which that procedure is appropriate, though a Magistrate can never be justified in exposing any person to the anxiety and expense of a trial in the Sessions court, merely because he is the complainant or one of the prosecution party in a counter case in which the accused is committed to session for trial.

'Preliminary inquiries under Chapter 18 Criminal Procedure Code, are intended to be a real protection to parties from unnecessary harassment by committal to the Sessions Court as well as a means of preventing waste of public time and money.

But occasionally two counter cases relating to the same incident, one of which must be false, are sent to the Sessions Court for trial either by the same Magistrate or by different Magistrates. According to the procedure which it has

been understood has been prescribed by Jackson J. In --'AIR 1930 Mad 190 (Z2)', though I must repeat that I have greatest difficulty in believing that he really meant this--both cases must be heard in full by the same Judge and assessors or by the same Judge and Jury before the assessors express any opinion or the jury gives any verdict in either.

Let us see how this affects the Public Prosecutor and it must be remembered that in every trial in Sessions Court the prosecution must be conducted by a public Prosecutor. Let us suppose-that the two cases relate to the murder of 'X', in the one case Ramaswami Goundan being the accused, in the other Palaniyappa Naidu. If it be thought that this is an extreme instance to take, I can only say that I have known of two such counter cases of murder and have been invited to use the revisional powers of this court to order that the man charged by the Police with murder and a man charged by the accused person with the murder of the same victim be tried at a combined trial in the Sessions Court in accordance with the procedure supposed to have been prescribed by Jackson J.

How is the Public Prosecutor to conduct himself in such circumstances? According to --'AIR 1930 Mad 190 (Z2)', it is not proper for him to-suggest to the Sessions Judge that the case which appears to him to be true should be tried first; the two cases must be tried first; the two-cases must be heard one after the other in a combined trial before the assessors express any opinion or the Jury gives any verdict is the Public Prosecutor to conduct each case wholeheartedly as if against a man whom he has reason to believe to be guilty? is he to prosecute the case against Ramaswami Goundan in the ordinary way and then open the case against Palaniappa Naidu in some such way as this:

For the last two days I have been endeavouring to prove to you that this murder was committed by Ramaswami Goundan, and I trust that of that I have completely satisfied you. It is now my duty to demonstrate that the story is entirely false and that the murderer was not Ramasami Goundan but Palainappa Natdu. And of that too I trust that I shall convince you to your entire satisfaction.'

Or is he to adopt the attitude that he knows who was the murderer of the victim but that he is not going to let the Judge or the assessors or the Jury into the secret;

they must find it out for themselves? Or, is he to represent himself as entirely in the dark about the whole matter? Is he to say something of this sort:

'That a murder was committed, I think I shall have no difficulty in convincing you. The question is whether that murder was committed by Ramaswami Goundan or Palaniappa Naidu. All the resources of the Crown have been devoted to the investigation of that very serious question. But I regret to have to tell you that after months of patient labour we are still in the dark. We have no idea whatever which was the murderer. So we have decided to lay the whole facts before you and leave you to make your choice.' Whichever method he adopts, it is likely that the proceedings will be reduced to a disgraceful and wicked farce. The Public Prosecutor will be required to run with the hare and hunt with the hounds, to appear alternatively in the same proceedings for the prosecution and for the defence and to be in the counsels of both, to ride two horses at once in a scandalous competition. If those were the duties of the Public Prosecutor, no honourable member of the profession would demean himself by accepting the office. Nor could these difficulties really be escaped by appointing two Public Prosecutors for the occasion one to conduct the prosecution of each man. Would it be less scandalous that two counsel should appear for the Crown in the same proceedings, each making out that the other's case was false?

In this country every prosecution in a Sessions Court must be conducted by a Public Prosecutor as a representative of the Crown; and those who represent the Crown betray their trust if they prosecute a case which they have not reason to believe to be true. The great majority of cases which come before a Sessions Court for trial have been investigated by the Police. The object of that investigation is not to collect evidence to make out a case but to sift true cases from false. In preliminary enquiries made by a Magistrate under Chapter 18 Criminal Procedure Code, again the case is to be tested and the evidence sifted and only where there is a good 'prima facie' case against the accused, the accused should be committed to the Sessions Court for trial. But every case in which a person is committed for trial to the Sessions Court is not to be tried. The Public Prosecutor is not a machine or a slave to prosecute every case in which there has been a committal. To the Public Prosecutor is entrusted discretion to withdraw from the

prosecution with the consent of the Court and his withdrawal puts an end to the case. The law gives him a real discretion in the matter. It may often be proper for him to consult the District Magistrate or other authorities before exercising that discretion. But in the eye of the law and of the Court the discretion is his alone subject to the consent of the Court.

The Public Prosecutor holds a very honourable and responsible office. To suggest that if unfortunately' two counter-cases, one of which must be false, are sent to the Sessions Court, he cannot properly indicate to the Court which case he has reason to believe to be true and undertake the prosecution of that case first, is to my mind quite unreasonable. On the contrary it is his right and his duty to select the case which appears to him to be true. It is possible -- indeed it has sometimes happened --that, after the first case has failed, the Public Prosecutor may have reason to change his mind and to believe the second case to -be true either on account of something which has come to light later or something which has been disclosed in the course of the first trial. In such circumstances he may honestly and honourably prosecute the second case. But how can he ever be required to jumble up the false and the true by prosecuting both cases at once? There is not a word in the Code to suggest a procedure so likely to bring courts of justice into contempt.

And the Public Prosecutor is not the only person to be considered. Are the assessors or the jury to be confused by the Crown putting before them two contradictory cases? What are they to think of that Public Prosecutor arguing for the prosecution to-day and for the defence tomorrow, taking up inconsistent positions, demolishing his own arguments, examining witnesses of truth and cross-examining them tomorrow to show that they are liars? Can Jurors or assessors who have to watch such a performance be expected to take their duties seriously? It is probable that self-respecting Jurors or assessors would show their disgust at such proceedings by refusing to find any one guilty in either case. And I think is a simple test which will show that in cases tried by Jury the postponement of the verdict of the Jury in the first of two cases tried in succession until they have heard the evidence in the second case, whether the two cases are counter-cases in the sense that one must be false or are merely connected cases, is

unquestionably illegal.

If the Judge at the end of the first case does not take the verdict of the Jury but requires them to listen to the evidence in the Second case before they give any verdict what is he inviting them to do? He is inviting them to take the evidence in the second case into consideration before they give their verdict in the first case. There can be no other object in requiring them to hear the evidence in the second case before they give a verdict in the first. The Judge who does that is inviting the Jury to break their oath which they have taken in the first case that they will give a true verdict according to the evidence in that case. Assessors are not bound by any oath; but it is clear that it is the intention of the Code that they shall give their opinions as required by Section 309, at the conclusion of each case on the evidence in that alone.

And what of the accused persons, who are in turn in the dock? The Public Prosecutor is their champion today and their opponent tomorrow. How can they be open with him when he is on their side without exposing to him the weak points in their armour, through which he can wound them, when he in turn attacks them? And, when all the evidence in the first case has been given, the accused in that case are entitled to know that they have nothing more to meet. But how can they prevent new evidence being elicited in the second case to fill gaps in the case against them? Worse still, if they are made, as they must often be made witnesses for the prosecution in the second case, they will be exposed to cross-examination. In this country no accused person, can be cross-examined. Where the prosecution evidence has been given, the Judge must question the accused for the purpose of enabling him to explain the evidence against him. But the Judge must be very careful to avoid any question in the nature of cross-examination; he must never lead the accused to convict himself out of his own mouth; he must never elicit anything to discredit the accused, he must never trip him up. But, when the accused is produced as a prosecution witness in the counter-case, all these things will be within the province and duty of cross-examining counsel.

An accused person cannot be punished for any false answer which he gives while in the dock; but the moment he is transferred to the witness-box as a prosecution

witness he will be liable to punishment for perjury. Even in England an accused person cannot be compelled to give evidence against his will. In the strange jumble of trials we are contemplating the accused will have no choice but go into the witness-box in his turn, when the Public Prosecutor requires him to do so, and in many instances it will be the duty of the Public Prosecutor to put him there.'

In other words, in these cases and counter cases, five parties are placed in an embarrassing position as evident from the liberal extracts which I have made above. Firstly, we have to consider the position of the investigating Police who have put forward before court two diametrically opposite versions of the same transactions as truthful versions. Secondly, we have the Public Prosecutor who has to conduct both the cases running with the hare and hunting with the hounds and thereby bringing his own honourable office into disrepute. Thirdly, the assessors and the Jurors if the same assessors and Jurors are empanelled for both. Fourthly, the embarrassment of the Judge who has to hear both the versions and to allow himself to come to independent conclusion in both cases without the evidence in one prejudicing his mind in regard to the other. Fifthly, we have the accused who has to double his role as a prosecution witness in the one and an accused in the other.

30. So far as the investigating Police are concerned, the solution is clear viz., the answer given by Reilly and Pandalai, JJ. In -- '1932 5 Mad Cri C 235 (Z10) and by Reilly, C. J. and Nageswara Iyer J. In -- '18 Mys LJ 229 (Z). It is unthinkable that any self-respecting police would put forward two diametrically opposed versions before court taking a completely abbreviated view of their own functions and treating so disrespectfully courts of law. It is enough to point out that such a contingency would be undreamt of in an English Criminal Court from which system of criminal jurisprudence we borrow ours.

31. Turning to the position of the Public Prosecutor, the solution in ordinary practice has always been to appoint separate Public Prosecutors for the conduct of case and counter-case. I have myself as sessions Judge for nearly twenty years tried important cases and counter with different Prosecutors.

32. Turning to the embarrassment caused to the Jurors and assessors and the Judge the solution has been found in the Full Bench decision of --"Mounagurusami Naicker in re', AIR 1933 Mad 367 (Z11), to which reference will be made presently.

33. in so far as the accused is concerned, If the police charge both versions of the same transaction under two cross-cases, then this would be a case of compelling an accused to criminate himself, which is forbidden not only under the provisions of the Indian Evidence Act but also by the Fundamental Rights assured by the Constitution. In fact Newsam J. feeling this difficulty went to the following extent in -- 'Sanna Basva in re', 1937 Mad Cri C 338 (Z12). The learned Judge held:

'The Prosecution witnesses in this case were mostly accused in the other case. Their statements do not amount to evidence because they are the statements of persons who were themselves accused of the same offence in this very affray or free fight and also because they have admittedly not stated the whole truth.'

This dictum, if I may say so respectfully, was clearly held to be wrong by a Bench of this Court in -- Rahiman Khan, in re', AIR 1938 Mad 403 (Z13). The learned Judge remarked :

'It will be disastrous if the lower courts proceed to act upon the principle that the statements of witnesses are not evidence merely because they happen to be the statements of persons who are accused in a counter-case.'

But this would not be the case viz., that the accused be compelled to criminate himself as P.W. if both the cross-cases are not charged by the Police and one of them happened to be a private complaint and in such a case it will be certainly open to the accused notwithstanding his being an accused in the police case where he wont be compelled to criminate himself, to voluntarily give evidence in regard to his own version. This analysis of the position of the accused 'vis-a-vis as a prosecution witness in the counter-case under the provisions of the Indian Evidence Act and the Fundamental Rights assured by the Constitution, makes it clear that the Police cannot charge both the cross-cases and must either find out the truth and charge that version which is true or if they are unable to do so to throw out both the cases or charge one version leaving it open to the aggrieved

party to resort to his own remedies.

34. in -- 'AIR 1933 Mad 367 (Z11)', decided by Sir Owen Beasley O. J. and Stone and Burn, JJ., it was laid down after reviewing the previous decisions as follows :

'Where a case and counter-case are tried by a Sessions Judge no hard and fast rule can be laid down in regard to the procedure to be adopted. The trials must be separate, i.e., before different assessors and different judgments delivered. The conclusions in each case must be founded on and only on the evidence in each case.'

It has to be noted that this Full Bench had the advantage of the 'amici curici' arguments of Messrs Nugent Grant and L.H. Bewes (Public Prosecutor) with unrivalled experience.

35. The principles laid down in these Madras decisions have been adopted by the other High Courts and has now become a settled practice throughout India; -- 'Banappa Kallappa v. Emperor', AIR 1944 Bom 146 (Z14); -- Khair Mohammad v. Emperor', AIR 1940 Lab. 466 (Z15); -- 'Kshitish Chandra v. Nanuram' : AIR1935 Cal548 , -- 'Heta Singh v. Emperor', AIR 1935 Pat 494 (Z17); -- 'Beni Madho v. Emperor', AIR 1941 Oudh 20 (Z18); -- 'Ganga Singh v. Emperor' : AIR1935 All647 ; -- 'Ibrahim v. Emperor', AIR 1938 Pesh 10 (Z20); -- 'Pushkar Narain v. The Crown', 1948 3 Dom LR (Am) 1.

36. The principles which can be evolved from these decisions can be compendiously set out as follows. If complaints of the offence of rioting be given by both the parties during investigation, the investigating officer should enquire into both of them and adopt one or the other of the two sources, viz., to charge the case where the accused were the aggressors or to refer both the cases if he should find them untrue in material particulars. If he finds that the choice of either course is difficult, he should seek the opinion of the Public Prosecutor of the District and act accordingly. A Magistrate before whom such a case is charged by the Police and a private complaint from the party whose case was referred, should hear both the cases together and commit both the cases to the Sessions even if only one of them is exclusively triable by a court of Session. If, however, the

Magistrate feels that there is no acceptable evidence in both the cases, he should discharge the accused. If, however, in one case a more serious offence like Section 148 I.P.C. is made out then in the interest of justice, both the cases should be sent to the First Class Magistrate for disposal, and he may commit both the cases, or discharge the committal case and himself try the other or if he finds the committal case after recording evidence one triable by himself proceed to enquire into both and convict or discharge or acquit, the accused in both the cases. The Sessions Judge should if both the cases had been committed hear them in succession with different assessors and come to independent conclusions keeping as far as possible the evidence in the one case distinct from the other. If in respect of an occurrence, there is a variation in time, or place, or other circumstances warranting a reasonable inference that they are not parts of the same transaction, but that the earlier occurrence may even be a motive for the later one, then the two cases may be tried separately and the aforesaid rules of procedure need not be applied. If in respect of a single incident, two different versions are offered, and they are substantially divergent from one another, then it is the duty of the investigating officer to find out which version is true and charge that case only leaving the other version to be prosecuted if so advised after a referred charge-sheet being served on the complainant and in such cases also the rules for enquiry and trial as in case and counter should be followed.

If in trials not exclusively triable by a Court of Session, a Magistrate has to hear and dispose of the cases himself and he frames charges in one case and does not frame any charges at all in the other, it cannot be considered that the Magistrate had made up his mind in the other case by not framing the charges and some kind of reasonable apprehension cannot be said to be created in the minds of the accused in respect of the other case where charges had been framed and transfer asked for on that ground. The fact that in a similar case the Magistrate came to a particular conclusion on the evidence in that case is no ground for a transfer : -- 'Rajani Kanta v. Emperor', 36 Cal 904 (Z21). Interest or bias should not be inferred from the opinions formed by the Magistrates on evidence judicially recorded -- 'Ghulamali v. Emperor', AIR 1935 Sind 72 (Z32) and -- 'Walidad v. Nizam-ud-din', AIR 1929 Lab 48 (Z23).

The principle maintained universally by all High Courts is that the accused has no reasonable ground for apprehension that he will not have a fair trial merely because the Judge in attendance in that case as to which of the two versions ancillary proceeding arising out of a counter-case has expressed certain views upon the evidence is correct. The basis of the ruling is that Judges are presumed to be upright men who will approach each case from the point of view of that case alone and not permit their minds to be affected in any way by anything that has gone before that case. It cannot be believed that Judges are so easily prejudiced that because one incidental part of the case before them has been decided in a previous case, they will shut their eyes entirely to anything that may be alleged in favour of the accused in a subsequent trial : -- 'Amrit Mandal v. Emperor', AIR 1916 Pat 33 (Z24).

37. Therefore the procedure adopted by the Sessions Judge in this case was wholly incorrect and has resulted in his not grasping the facts of the entire transactions which took place that day and this has materially prejudiced the accused. I do not mean to imply that the counter case is true. Obviously the counter case is a counterblast and bears on its face very many indicia of untruths. The motive put forward in that complaint does not explain the occurrence as it took place. The eye-witnesses mentioned therein are all the partisans of the complainant in that case. That complaint does not show how the extensive injuries to the P.Ws. in this case and the death of Narayya were caused. In fact in this case contrary to his own dying declaration, complaint, and sworn statement, D.W. 5 has taken upon himself the role of the assailant of Narayya and the infliction of the injuries in the right of private defence. I have already mentioned how the gun which is introduced by the other side was found by the Circle Inspector to be a padding. That case itself has been charge-sheeted by the Police as mentioned by the Circle Inspector not because he considered it to be true but because his superiors found it politic to do so. It is enough for our purpose to point out that by not observing the procedure laid down by the High Courts the trial of this case has become a lopsided affair and the learned Sessions Judge has disabled himself from grasping the entire facts of the case and which has resulted in material prejudice to the accused.

38. POINT 4: The general criticism generally being levelled by the learned counsel for the accused in these rioting cases, and levelled also in the instant case is that the evidence of these prosecution witnesses is partisan evidence. It is our experience that in these factious areas it will be impossible to secure evidence of independent non-partisan witnesses because it stands to commonsense that such persons take care not to get mixed up in these gangster fights. As the old Latin proverb has it 'If a murder happens in a brothel, generally we can have only strumpets as witnesses'. In very many cases when the fire-works start and the riotous crowd starts pelting stones to scare off people, as has happened in the instant case person unconnected with the faction either shut themselves up or watch what happens from a safe distance and behind cover. Therefore, the fact that the prosecution witnesses are partisans is not a ground for rejecting their testimony out of hand but to scrutinise them with care. That is why we have to accept their testimony only subject to the tests which will be mentioned and if found resultantly satisfactory. To hold otherwise would be to confer a character of immunity upon gangsters. On the other hand there is no reason whatsoever why even in such a case these witnesses should implicate persons who did not really injure them & let off persons who actually injured them and who must necessarily be of the opposite side and faction.

39. Therefore, the following four tests have been laid down by all the High Courts in innumerable cases to fix the culpability of the accused viz., whether they had a motive to share the common object and be present at the unlawful assembly and participate in the acts of violence therein; secondly, whether they committed the acts proved by well corroborated evidence and which would establish affirmatively their common object, presence and participation; thirdly, whether the names of these persons have been mentioned at the earliest instance; and finally the exonerating pleas of these persons and how far they can be acted upon.

It is quite true that in this case the accused are all the partisans of Thota Ramakotayya and have made themselves further obnoxious to the P.Ws. by individual acts of hostility towards the P.Ws. In addition, accused 3 is the brother of accused 1; accused 4 and 5 are related to accused 1; accused 6 and 7 and their father gave evidence against G. Venkatappayya and gave statements before

the Revenue Inspector on the purchase of service inams; accused 8 and 9 are brothers and accused 8 gave evidence against the opposite side in the service inam matter; accused 10 and 11 are brothers against whom the maternal grandfather of Venkatappayya filed a suit and which was pending on the date of the offence; accused 12 to 15, 18, 21 and 22 are found to have helped accused 1 in the election; accused 16 has been suspected of an intrigue with P.W. 1's wife and accused 17, 19 and 20 seem to have had civil disputes with the members of opposite party. This motive, however, is a double-edged weapon and if these accused had a motive to join the rioting by the same token there was every motive on the part of the opposite side to implicate them all falsely in this rioting case. Therefore, we have to look to the other circumstances to find out whether the prosecution case is true.

The complaint on behalf of the accused has been filed, charged and is pending enquiry. The complaint in this case has undoubtedly been given before the complaint Ex. P-1 was given. Therefore, this assortment of accused in this case might be due to retaliation and nothing more. In other words, when what took place was a mere clash between few persons on each side as narrated by 'K. Nagayya in Ex. P-37 both the factionists must have thought this a golden opportunity to implicate as many of their enemies as possible and when the accused persons set the example, the P.Ws. have done nothing more than follow that and convert the P.Ws. in that case into accused person in their complaint. The inclusion of these accused persons seems to be based not on the fact that they were present but that for exigencies of faction they should be made to be present.

Turning to the evidence of eye-witnesses there are two circumstances showing that the evidence must be false. The first circumstance is that at the inquest none of the p. Ws. had been examined and so in regard to the overt acts, excepting that accused 3 and 5 beat P.W. 1, we have no other details in Ex. P. 1. Therefore there was ample time for these witnesses to arrange the details in such a way as to capitalise every trivial injury and to attribute a specific act to every individual accused. Then, when coming into the box these witnesses have given such meticulous details regarding not only the injuries to themselves but also in regard to every other injured P.W., that it cannot be truthful evidence. It is quite true that

as Jackson J. remarked

'Apart from the witnesses' general credibility I do not consider that anything turns on the fact that the witnesses may not have given photographically correct account of the exact details. For some reason best known to himself, an Indian villager never says that there was a general kicking and beating, but works out an analysis of fists and feet and right sides and left sides which is shown to be ridiculous but which does not necessarily prove him to be telling lies. It is merely his habit of thought and speech. The medical evidence may not reveal a mark for every blow. But that is not important.'

But in this case on the other hand the P.Ws. have given the evidence the other way round viz., they capitalise every trivial injury found on them & recorded in the wound certificate, they have given pretended photographically correct account of the exact details of the injuries inflicted upon all the injured P.Ws. by all the accused. Obviously, it is due to pre-fabrication. This receives corroboration from the fact that notwithstanding the extensive and rambling cross-examination, no discrepancy worth mentioning has been elicited and this stream-lined testimony is only consistent with the tutored untruthfulness of these witnesses.

The subsequent investigation has not in any way attempted to sift the truth from the falsehood because all that has happened is, as already pointed out, the dumping of the information given by the P.Ws. In this case and the proposed dumping of the information given by the present accused in the other cases. In such circumstances the only weapon at the disposal of the court for finding out the truth was the cross-examination of these witnesses and which weapon was of no use in this case because the P.Ws. who are the accused in the other case would not incriminate themselves and throw any light as to how the injuries were caused to the accused persons and the accused persons could not put forward their case effectively because their case is still pending. The net result of this analysis is that the prosecution evidence in this case for bringing home the offence to the accused consists of partisan evidence unsifted by investigation, lopsided in its presentation in court and incapable of being properly tested by reason of not committing to the sessions court both the case and the counter.

40. In these circumstances it cannot be legitimately held that the prosecution has brought home the offences to the accused persons with which they stood charged and for which they have been convicted. The accused are entitled to the benefit of the reasonable doubt arising from the aforesaid factors & their convictions and sentences are set aside and they are acquitted and these appeals are allowed.

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