

In Re: Thackroth Hydross and ors.

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Court : Chennai

Decided On : Mar-06-1923

Reported in : 75Ind.Cas.695

Judge : William Ayling and ;Odgers, JJ.

Appellant : In Re: Thackroth Hydross and ors.

Judgement :

William Ayling, J.

1. The three accused in this case have been convicted of dacoiting the house of one Krishnan Nair of Olavatoor and murdering him by beating him to death. The offence was committed on the night of 24th October 1921 in the course of the Moplah Rebellion. The prosecution evidence tends to show that about nightfall a band of some 25 armed rebels attacked a small hamlet consisting of about five bouses of which, Krishnan Nair's was one. All were looted; the inmates of these houses escaped but Krishnan Nair was caught and beaten twice, the second time with fatal results and his body thrown into a well. The well is said to have subsequently been filled up and the body has not been found, but in the light of the evidence in this case we see no reason whatever to doubt that Krishnan Nair was killed that night in the course of the dacoity. We have the evidence of four of the inhabitants of the hamlet who depose to this occurrence and to having seen the three appellants who were well known to them, beat Krishnan Nair and throw his

body in the morning into the well.

2. Before discussing the merits of the case, I shall deal with two preliminary objections taken to the procedure of the Special Judge. It appears that when the first accused was examined under Section 342, Criminal Procedure Code, he was asked that a plan should be prepared of the scene of the offence. This was not done, but the Special Judge personally visited the scene of offence, 18 miles from his headquarters, with the prosecution witnesses, and observed for himself the relative positions of the huts and the places from which the witnesses claim to have seen the acts deposed to by them. After this, acting under the powers vested in him by Section 540, Criminal Procedure Code, he re-called these prosecution witnesses, or rather three of them, and examined them in such a way as to put on record the most important points which he had observed at his personal inspection. The witnesses were then cross examined by the defence. It is argued that the Special Judge's procedure has been illegal in two particulars and that on that ground the conviction should be set aside. It is contended first that he was not entitled to use the results of his personal inspection to test the truth of the prosecution witnesses' story, and, next, it is contended that it was his duty to again question the accused under Section 342 Criminal Procedure Code, with reference to the evidence which the prosecution witnesses gave, when re called as stated above. As regards the first point we have been referred to several rulings by the learned Counsel for the first accused, the most important of which is *Queen-Empress v. Manikam* 19 M. 263 : 6 M.L.J. 143 : 2 Weir 72 6 Ind. Dec 888. In that case, as I understand it, two learned Judges of this Court laid it down that the accused are entitled to have nothing stated against them in the judgment which was not stated on oath in their presence and which they have had no opportunity of testing by cross-examination and of rebutting. At the same time they say that a Magistrate may make a local inspection for the purpose of enabling him to understand better the evidence which is laid before him; but for no other purpose. The distinction seems to be between enabling a Magistrate to understand such matters as the description of the locality which may be confusing or obscure, and enabling him to test the truth of the witness's statement of a physical fact by the Magistrate's own ocular observation. I think this distinction is also brought out in a Calcutta case *Babbon Shaikh v. Emperor* 5 Ind. Cas. 365 : 37 C. 340 : 14 C.W.N.

422 : 11 Cri. L.J. 121 : 11 C.L.J. 335 but two of the learned judges who dealt with that case, Woodroffe and Chatterjee JJ., seem to have held that it was open to the Court to use its local inspection also to test the sworn testimony on record by the light of its own observation. This is also the effect of the judgment of Sir John Edge, C.J. in In the matter of the petition of Lalji 19 A. 302 : A.W.N. (1897) 52 : 9 Ind. Dec. 198 a very high authority. The learned Public. Prosecutor has referred us to a case reported as In re Davaraja Nayagar 2 Weir 728, in which Sir Arnold White, C.J. of this Court, declined to follow the 19 Madras ruling [Queen-Emperess v. Manikam 19 M. 263 : 6 M.L.J. 143 : 2 Weir 72 6 Ind. Dec 888.] on the ground that it was no longer applicable after the amendment of the Code effected in 1898. Speaking for myself, I should be inclined to agree with the judgment above quoted and to hold that it is open to a Magistrate to use the evidence of his own eyes to test the truth of what the witnesses have deposed to and that in the present case the Special Judge has made no improper use of his local inspection.

3. But it is objected that he has failed to observe two precautions which two of the learned Judges in Babbon Shaikh v. Emperor 5 Ind. Cas. 365 : 37 C. 340 : 14 C.W.N. 422 : 11 Cri. L.J. 121 : 11 Cri.L.J. 335 have held to be necessary. One is that the result of the inspection must at once be put on record and laid open to the scrutiny of the parties. Chatterjee, J. says:--'To spring such opinions or inferences upon the accused at the time of pronouncing judgment is an error of procedure that may have materially prejudiced the accused, and they are quite justified in complaining that they have not had a proper trial.' It was further stated by the judgment in Queen-Emperess v. Manikam 19 M. 263 : 6 M.L.J. 143 : 2 Weir 72 6 Ind. Dec 888 that when any inspection is made, the Magistrate should invariably be accompanied by both parties or their representatives. It is stated that this was not done and that the accused were not represented at the inspection in the present case. Sir John Edge in the 19 Allahabad case [In the matter of the petition of Lalji 19 A. 302 : A.W.N. (1897) 52 : 9 Ind. Dec. 198.] on the other hand, is at pains to point out that it is not necessary that the accused or their representatives should invariably be present at a local inspection and he says nothing whatever about the necessity of making a note or record at once of what the Magistrate has seen.

4. In the present case, as I have already stated, the Magistrate has really embodied the results of his inspection in the examination of the prosecution witnesses on re-call and the accused have had a full opportunity of cross-examining them with reference to the facts then elicited.

5. The fact more pressed by the argument that the accused persons were not afforded an opportunity of being represented at the local inspection and before deciding as to the effect of such an omission we deemed it best to call for a special report from the Special Judge as to his procedure. From this it appears that the argument is based on no foundation. Previous intimation of the inspection had been given to both the defence Vakils; and one of them, Mr. T.M. Krishnaswamy Nedungadi, was actually present on behalf of all three appellants. On the whole, I do not think that the Special Judge in this case has used his local inspection illegally or in such a way as to prejudice the accused.

6. As regards the point based on Section 342 it has been held in a recent case, Referred Trial ho. 160 of 1922, in which I was one of the Judges, that Section 342 does not make it legally incumbent on the Magistrate to further question the accused with reference to the evidence elicited from the prosecution witnesses after the framing of the charge when they are re-called by the Magistrate under Section 540, Criminal Procedure Code. It may be highly desirable that he should so question the accused if the evidence contains a new matter of importance, but after carefully scrutinizing the evidence in this case elicited on re-call I do not think it can be classed in that category. The learned Counsel for the appellant has referred us to three passages in the re-call evidence of the most important witness P.W.No. 1. One is 'As there were thicker jungles on Krishnan Nari's side of the paddy field I went there. The jungles on Krishnan Nair's side of the paddy field are thicker than those on ray side. The second is 'The place where P.W. No. 5 hid was only 10--15 feet from where I was, but I never saw him at the time.' The third is, 'I say that the well of the deceased's house is visible from my house. I could also see persons drawing water from that well from my yard.' None of these passages appear to me to contain such a new and important matter that it could be said that the accused were prejudiced because they were not asked what they had to say with respect to them, especially if it is remembered that they were defended in the

lower Court. As regards the latter two points the Special Judge in paragraphs Nos. 17 and 18 of his judgment has recorded that he thinks that P. Ws. Nos. 1 and 5 must have seen each other although they say they did not, and he feels very doubtful whether P.W. No. 1 could have witnessed from his house next morning the dragging of the deceased to the well. As regards the thickness, of the jungle all he says is; 'There is a thick jungle to the south and west of the house. At night time it would be safe enough to hide where the witnesses say they did, and to watch what was happening.' I do not think that any of these points are points on which it was imperatively necessary to further question the accused. I would dismiss both these legal objections for the trial as untenable.

7. Passing to the merits of the case, I may observe that the important question is whether the statements of P. Ws. Nos. 1, 3, 5 and 7 that they observed the three appellants either among the dacoits or taking part in the actual murder of Krishnan Nair and disposing of his body can be accepted. One of the witnesses, P.W. No. 1, is said to have made a statement to the Deputy Superintendent of Police at Calicut five days after the offence, in which he gave an account of what occurred and named six persons including the three appellants as among the Moplahs who looted the houses and murdered Krishnan Nair. It has been objected that this statement, Exhibit a, is not admissible in evidence. The Deputy Superintendent of Police is an officer legally competent to investigate the facts of the murder and dacoity within the meaning of Section 157 of the Indian Evidence Act--vide Section 551, Criminal Procedure Code. The requirements of Section 157 are, therefore, complied with, and I cannot accept the contention that Exhibit A which records the statement taken down by the officer is inadmissible because it was not recorded as required by Section 154, Criminal Procedure Code. At the time when it was made the Rebellion was in full progress, and it was impossible to fulfill the requirements of Section 154. The statement in question was undoubtedly the First Information given to the Police of the commission of this crime and it is not affected by any such provision of law as is contained in Section 162, Criminal Procedure Code, which renders statements of witnesses to a Police Officer in the course of an investigation inadmissible in evidence. It is admitted that it would have been open to the Deputy Superintendent to give oral evidence of what P.W. No. 1 told him and even to refresh his memory by a reference to Exhibit A, and, in the absence of

a specific legal prohibition, I am prepared to hold that it was open to the Court to take in evidence his written record of what P.W. No. 1 actually said to him. The inclusion of the names of these appellants' in a statement made so early after the crime (having regard to the conditions of the country) seems to be an important piece of corroboration of the identification of the appellants by witnesses in the Special Court.

8. I feel, however, considerable doubt as to whether we can accept the evidence of P. Ws. Nos. 5 and 7 as to the second beating of Krishnan Nair by the appellant which is said to have caused his death. The Special Judge himself seems to entertain some doubts as to whether the witnesses have not to some extent added to what they saw, and it is curious that all the four witnesses with one accord ascribe to these three appellants before us all the actions leading up to or connected with the death of Krishnan Nair. It is these three men and one other absent man, named Aiduman, who are said to have beaten him when they first came to his house, to have dragged him out at midnight and beaten him again and caused his death and lastly to have dragged his body to the well in the morning. It would seem as if none of the other 22 rebels took any part in any of this. I doubt very much whether the midnight beating was watched by any of the neighbours and I cannot agree with the Special Judge that it is likely that P.W. No. 7 would have ventured to come down out of the jungle and penetrate into the compound of Krishnan Nair to see the final act of the murder. The preliminary beating clearly did not cause the man's death, and it cannot be said that, because the appellants dragged the body to the well in the morning it must be taken that it was they who beat him to death at midnight especially in view of the number of the gang. Nor do I think it can be said that the murder of Krishnan Nair is shown to be part of the common intention of the dacoits so that all the members of the dacoit gang could be convicted of the murder.

9. I think that the conviction for murder must be set aside. As regards the conviction for dacoity, I see no reason whatever for doubting that these appellants took part in the dacoity and were recognised by the witnesses. The allegation of enmity and the alibi evidence adduced for the defence have been dealt with by the Special Judge. I would set aside the convictions for murder, confirming those for

dacoity, and in place of the sentence of death, sentence each of the three appellants to transportation, for life.

Odgers, J.

10. In this case two preliminary points have been taken on behalf of the accused, either of which, it is said, amount to an illegality and would, therefore, vitiate the trial. The first is that the Special Judge made an inspection of the locality where the crime is said to have been committed and, further, that he tested the statements of certain of the prosecution witnesses by his personal observation of the spot. The second point is that he failed to examine the accused under Section 342, Criminal Procedure Code.

11. To deal with the first point, the trial of the case began on the 9th of September 1922. The inspection by the Special Judge is said to have taken place during the trial. Section 556, Criminal Procedure Code. Explanation, lays down that a Judge or Magistrate shall not be deemed to be a party or personally interested, within the meaning of the section 'by reason only that he has viewed the place in which an offence is said to have been committed * * * * and made an enquiry in connection with the case.' There are certain authorities which have been cited to us in support of the contention taken for the accused. The most important, from our point of view, is that contained in Queen-Empress v. Manickam 19 M. 263 : 6 M.L.J. 143 : 2 Weir 72 6 Ind. Dec 888 where it was held that a Magistrate's view of the locus in quo was what influenced him in finding that the complaint of actual damage being caused was true and that the defence that no damage was caused was false. The learned Judges there 'say: 'We are satisfied that such inspection should only be made for the purpose of enabling the Magistrate to understand the better the evidence which is laid before him, and it must be strictly confined to that. To this we would add that where any inspection is made with the object stated, the Magistrate should invariably be accompanied by both parties or their representatives.' This view finds support in Sudhama Upadhyaya v. Queen-Empress 23 C. 328 : 12 Ind. Dec. 219, where the investigations of the Police preliminary to a trial had been directed to a considerable degree by a Magistrate. That was held to disqualify the Magistrate from trying the case. Babbon Shaikh v. Emperor 5 Ind.

Cas. 365 : 37 C. 340 : 14 C.W.N. 422 : 11 Cr. L.J. 121 : 11 Cri.L.J. 335 where the two learned Judges who originally heard the the petition differed, Stephen, J., was of opinion that the Magistrate may visit the scene of an alleged offence in order to test the evidence he has heard on a question of fact. Woodroffe, J., on the other hand, held that, as it was a matter of speculation how far the Magistrate was influenced by what he saw, as distinguished from what was deposed to, the trial was vitiated. The third Judge Chatterjee, J., agreed with Woodroffe, J., on the ground that the Magistrate had done more than merely view the place for the purpose of following and understanding the evidence and testing it. The Magistrate had imported into his judgment matters of opinion and that was an error or procedure, that might have prejudicially affected the accused. In *Alia Rai v. Jhingur Tewari* 13 Ind. Cas. 844 : 39 C. 476 : 16 C.W.N. 426 :15 Cri.L.J. 403 : 13 Cri. L.J. 156, where the question was somewhat different, namely, the effect of the failure of the Judge to place on record the results of a local investigation, the learned Judges held that a Magistrate may view the place of occurrence in order to follow or understand the evidence. On the contrary, there is the opinion of an Ex-Chief Justice of this Court, Sir Arnold White, in *In re Davaraja Nayagar* 2 Weir 728 where he was of opinion that the amendment to the Explanation of Section 556, Criminal Procedure Code, was apparently made to meet the decision in *Queen-Empress v. Manikam* 19 M. 263 : 6 M.L.J. 143 : 2 Weir 72 6 Ind. Dec 888 and that the judgment of a Magistrate is not vitiated by the fact that he inspected the locus in quo and stated in his judgment what he saw there.

12. Sitting as a Single Judge, Sir John Edge, C.J., in *In the matter of the petition of Lalji* 19 A. 302 : A.W.N. (1897) 52 : 9 Ind. Dec. (N.S.) 198 said: It is highly convenient that a Magistrate should go and see the locality for himself if the evidence is conflicting or if the guilt or innocence of the party. depends upon local peculiarities of situation which cannot be understood except by the Magistrate seeing the place himself.' The judgment is illustrated with special reference to a dacoity, which is also the subject of the present case before us. There seem to me strong grounds for the opinion that the amendment of the Explanation to Section 556, Criminal Procedure Code, was devised mainly to overcome the rulings referred to above in *Queen-Empress v. Manikam* 19 M. 263 : 6 M.L.J. 143 : 2 Weir 72 6& Dec 888 and *Sudhama Upadhyaya v. Queen-Empress* 23 C. 328 : 12 Ind.

Dec. (N.S.) 219 and that, if this is so, the authority of Queen-Empress v. Manikam 19 M. 263 : 6 M.L.J. 143 : 2 Weir 72 6 Ind. Dec 888 must be taken to have been shaken. Holding then, as I do, that the learned Judge did not disqualify himself from trying the case by reason of his having held an inspection of the spot, the question arises whether any material prejudice has arisen sufficient to say that a failure of justice has occurred.

13. We have called for a report from the Special Judge as to whether or not the Vakils for the defence were present at his local enquiry and the answer is in the affirmative and the Special Judge also reports that he gave previous notice to the Vakils for the defence of his intention to inspect the locus in quo. Again the learned Judge did not 'spring any opinion of his own' nor any facts observed by him in his local investigation upon the accused, who, as stated, were defended, for the first time in his judgment, for he re-called as Court witnesses the prosecution witnesses, who had previously described the hiding places they took up and from which they alleged they witnessed the stages of the crime. These witnesses on recall by the Court were further cross-examined by the defence, so that any opinion that the Judge had formed from the local inspection came through the prosecution witnesses as Court witnesses. From these considerations I am unable to say either that the Judge acted illegally or that any material irregularity resulted to the prejudice of the accused.

14. The second point under Section 342, Criminal Procedure Code, can be very shortly dealt with. In my opinion, this case does not fall within the Full Bench judgment recently delivered by this Court in Criminal Revision Case No. 384 of 1922 [In re Varisai Rowther 73 Ind. Cas. 163 : 44 M.L.J. 567 : 17 L. 722 : 32 M.L.T. 385 : 46 M. 449 : (1923) M.W.N. 477 : a.i.r (1923) (M.) 609 : 24 Cri. L.J. 547] There the learned Chief Justice says: 'In my judgment the words 'after the prosecution witnesses have been examined' (citing the words of Section 342) 'mean 'after the prosecution has finished calling evidence.' If fresh evidence is called by the prosecution after the charge has been framed, then on the termination of that evidence the accused must be examined under the section The short answer to the objection really is that the prosecution here called no fresh evidence, the prosecution witnesses, as stated above, having been recalled by the

Court and re-cross-examined by the defence. On the same question of prejudice to the accused, it is pointed out that there are three important points on which the Court should have questioned the accused. They are all contained in the re-examination of P.W. No. 1 by the Court. They are as follows: (1) 'As there were thicker jungles on Krishnan Nair's side of the paddy field I went there.' (2) 'when the Court inspected the place, P.W. No. 5 showed the Court where he hid. That place was only 10 to 15 feet from where I was but I never saw him at the time.' (3) 'I say that the well of the deceased's house is visible from my house.' As before stated, the Witnesses were re-cross-examined by the Vakil for the defence and it cannot, in my opinion, be said that the interests of the accused in any way suffered by the accused not being re-examined under Section 343, Criminal Procedure Code. This disposes of the preliminary objections.

15. With regard to the merits, I do not propose to say more than that I have had the advantage of reading the judgment of my learned brother and I agree with him as to the view he takes of Exhibit A and of the rest of the evidence adduced in this case. On the whole, I think it would be unsafe to act on the testimony of the prosecution witnesses as to the identification of the actual murderers of the deceased. I agree with the conviction and sentence proposed.

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