

**In Re: Onthan**

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**Court :** Chennai

**Decided On :** Apr-23-1975

**Reported in :** (1975)2MLJ318

**Appellant :** In Re: Onthan

**Judgement :**

P.S. Kailasam, J.

1. The first accused in Sessions Case No. 22 of 1974 on the file of the Sessions Judge, East Thanjavuv, who was found guilty of an offence punishable under Section 302 of the Indian Penal Code, and sentenced to imprisonment for life, is the appellant before us.

2. Before the learned Sessions Judge, fourteen accused were charged for various offences, the main charge being against accused 1 to 3 for an offence under Section 302, Indian Penal Code, for committing the murder of one Baluswami, the first accused stabbing him with a sulukki and the second and the third accused cutting him with aruvals, at about 3 p.m. on 9th October, 1973 at Palavanakudi Village. There were other charges against the accused persons under Sections 147, 148, 323, 324, 325 and 435 read with Section 149, Indian Penal Code. The several accused were also charged individually for injuries caused to the various prosecution witnesses. As all the accused have been acquitted of all the charges, except the first accused who has been convicted of the offence under Section 302, Indian Penal Code, as stated above, we refrain from referring to the details of the other charges framed against the several accused.

3. The accused's party as well as the prosecution party were residents of Palavankaudi Village in Nagapattinam taluk. All of them originally belonged to Dravida Kazhagam, but the prosecution party became members of the Right Communist party in 1968. Consequently, there were keen rivalry and misunderstandings between the two groups. Security proceedings were initiated against the accused's party and the prosecution party. The proceedings ended in discharge of both parties, but still the enmity persisted.

4. On 9th October, 1973, at about 3 p.m. P.W. 11 Jagannathan, an agricultural labourer belonging to the Right Communist Party, was proceeding from his house for work in the fields. While he was passing the house of the 9th accused in Kochakudi road, two women by name Valliammal and Alamelu who belonged to the Dravida Kazhagam made disparaging remarks against the witness and abused him for having come to the area where the members of the Dravida Kazhagam were residing. P.W. 11 also abused in return. At that time, P.Ws. 1,12 and accused 4 and 9 and one Thiaga-rajana who came there effected a mediation and P.W. 11 was sent away. When P.W. 11 was returning home along the river-bund, he saw Baluswami (deceased in this case) and P.W. 2 Thangavelu coming from the east to the west near Kochakudi road junction. P.W. 11 told the deceased Baluswami as to what had happened near the house of the 9th accused. P.W. 1 had also joined them. While they were talking there, the accused who belonged to the Dravida Kazhagam, pelted stones at them. In retaliation; the prosecution witnesses and Baluswami hurled brick bats. The accused then marched towards the prosecution witnesses and there was a scuffle, in which, according to the prosecution witnesses, the 1st accused was armed with a sulukki and accused 2 and 3 were armed with aruvals, accused 7 and 11

were armed with bala and alakku aruval respectively and the other accused were armed with sticks except the 4th accused who was unarmed. The accused advanced towards the place where prosecution witnesses were. There was pelting of stones by either side. The first accused, who was coming in front, pushed Baluswami in the paddy field of Subbia Pillai. Baluswami fell down in the field. Immediately, accused 1 to 3 jumped into the field and the second accused cut Baluswami on the left shoulder with aruval while the third accused cut him on the right forearm with aruval. The first accused, in his turn, stabbed Baluswami on the right side of his chest with sulukki. While the first accused withdrew the sulukki, the iron portion of it got embedded in Baluswami's chest and the stick portion alone came out.

5. As regards the attack on Baluswami (the deceased) P.Ws. 1 to 12 were put up as eye-witnesses, and they gave details of the occurrence and ascribed specific parts to the various accused in causing Injuries to Baluswami and the prosecution witnesses.

6. After the attack on Baluswami and after the crowd had left, Baluswami walked towards the mandapam. He was helped by P.W. 10 Muniammal to reach the western side of the house of P.W. 16 Ladan. Baluswami and the other injured witnesses were taken to the Government Hospital, Tiruvarur, in a cart. At 5-30 p.m. the same day, P.W. 18, Dr. Sheela Robert attached to the Government Hospital, Tiruvarur, examined Baluswami and found on him three injuries which are described in Exhibit P-7 the wound certificate given to him. On the same day, the doctor examined the injured persons, P.Ws. 2, 3, 4, 5, 6, 7, 8 and 9 and accused 4, 5, 13 and 14 and gave them all wound certificates.

7. The doctor, P.W. 18 sent a message through P.W. 23 to the Sub-Inspector of Police, P.W. 25. P.W. 25 reached the hospital at 6-30 p.m. and he recorded a dying declaration, Exhibit P-26, from Baluswami. The doctor certified that the patient was conscious when Exhibit P-26 was recorded. P.W. 25 also recorded a statement (Exhibit P-33) from the fifth accused at the hospital. Baluswami was sent to the Headquarters Hospital, Nagapattinam for further, treatment. He was taken in an ambulance to the Nagapattinam Hospital. P.W. 19, the Civil Assistant Surgeon attached to the Headquarters Hospital, Nagapattinam admitted Baluswami the same day as an in-patient. P.W. 20 the District Medical Officer, conducted operation on Baluswami and removed from his chest M.O.1, the iron portion of the sulukki. Baluswami died, in the hospital at 12-10 a.m. on 10th October, 1973. The news of the death of Baluswami was communicated to the police, who altered the crime into one under Section 302, Indian Penal Code, and sent express reports and commenced investigation.

8. P.W. 21, the doctor attached to the Headquarters Hospital, Nagapattinam, conducted autopsy on the dead body of Baluswami at 1 p.m. on 10th October, 1973 and found on the dead body three injuries. Injury No. 3, on dissection, was found to have pierced the underlying pleura and, according to the postmortem certificate (Exhibit P-30) and the evidence of the doctor, was necessarily fatal.

9. The prosecution relies on the testimony of P.Ws. 1 to 12 and the two dying declarations given by Baluswami, one to the doctor (P.W. 18) as per Exhibit P-8 and the other (Exhibit P-26) given to the Police Officer (P.W. 25).

10. The learned Judge was not prepared to accept the testimony of P.Ws. 1 to 12 regarding the existence of an unlawful assembly. He found that the prosecution had not proved that the common object of the unlawful assembly was to cause the death of Baluswami. He found that both sides had indulged in a free fight. As a result, he found that the offences under Sections 147 and 148 had not been made out against the several accused. As already stated, the learned Judge acquitted the several accused of specific charges of causing injuries to the prosecution witnesses, for, according to the learned Judge, considering the nature of the injuries caused to both sides in the course of the free fight between the two groups, the accused cannot be held liable for the various charges regarding the injuries caused to the witnesses. The learned Public Prosecutor also did not press some charges as there was no sufficient evidence to substantiate them.

11. The main charge, the learned judge concerned himself, was the charge under Section 302, Indian Penal

Code, against accused 1 to 3. Regarding the Second and the third accused, the learned Judge gave them the benefit of doubt as Baluswami had not mentioned about the parts played by those two accused in the attack against him, in the very first dying declaration, Exhibit P-8, given by him. The learned judge found that so far as Exhibit P-8 is concerned, there is no reason for not accepting it and, relying on that as well as the testimony of P.Ws. 1 to 12, the eye-witnesses, regarding the injury inflicted by the first accused on Baluswami, he found that the case of the prosecution that it was the first accused who caused the fatal injury to deceased Baluswami, could be safely accepted.

12. Mr. G. Gopalaswami, learned Counsel for the appellant submitted that the learned Judge having not accepted the testimony of the eye-witnesses, he was in error in placing, reliance on the two dying declarations, Exhibits P-8 and P-26. He submitted that the dying declarations, by themselves could not be acted upon as there is material discrepancy between the two dying declarations, as the second dying declaration has attributed specific parts to accused 2 and 3 regarding the attack on the deceased and has mentioned the presence of four persons who have not been mentioned in the earlier dying declaration, Exhibit P-8. According to the learned Counsel, the second dying declaration which was recorded by the police cannot be safely acted upon and, in any event, as Baluswami had shown a tendency to implicate more persons in his second dying declaration, that dying declaration cannot be accepted as containing a true account of the incident so far as the participation of the first accused is concerned.

13. As the contention of the learned Counsel is about our accepting the two dying declarations, we would refer to them in some detail. The doctor, P.W. 18, before whom Baluswami was produced at 5-30 p.m. examined him and issued the wound certificate. The doctor found the condition of the patient serious and sent information to the Sub-Magistrate for recording a dying declaration. As the Sub-Magistrate was not available, the doctor proceeded to record the dying declaration of Baluswami as narrated by him. She read over the contents of the statement to Baluswami and he accepted the same to be correct and then signed it in her presence. She has certified that the patient was conscious when he made the said statement.

14. The only 'Challenge in cross-examination of this witness regarding Exhibit P-8 is that when she recorded Exhibit P-8, Baluswami and the other injured persons were together. In Exhibit P-8, Baluswami had stated that he ploughed his lands ; he did not know about the dispute in the village; he was pushed into the field : Accuseds 1, 7, 4, 12, 6, 10, 11, 3 and 9 were near him and accused 1 stabbed him; beyond that he did not know anything. The learned Counsel does not dispute the fact that the deceased made the dying declaration in a conscious state and it was recorded by the doctor, P.W. 18. He contends that the statement in Exhibit P-8 cannot be accepted as the truth. In order to question the credibility of Exhibit P-8, he referred to the second dying declaration, Exhibit P-26, which was recorded at 7 p.m. by P.W. 25, the Sub-Inspector of Police. In this dying declaration, Baluswami had stated that on 9th October, 1973 he ploughed his land and came near the house of the 9th accused; accused 1 to 12 were there armed with aruvals, sulukki, bamboo sticks etc; and the first accused pushed him down, the second accused cut him on the left shoulder, the third accused cut him with an aruval on the right hand and the first accused stabbed him with sulukki on the chest, and that the iron portion of the sulukki got embedded in his chest. He swooned and later recovered at Tiruvarur hospital. He learnt that P.Ws. 2, 3, 5 and 9 were attacked with aruvals and . sticks by persons belonging to Dravida Kazhagam. He further stated that the occurrence took place in a field near the house of the 9th accused, at about 3 p.m. The learned Counsel pointed out that in Exhibit P-26, the presence of accused 2, 5, 8 and 12 was mentioned for the first time and specific parts were attributed to accused 2 and 3 regarding the attack on the deceased, namely that the second accused cut on the left shoulder and the third accused cut with an aruval on the right hand. It was submitted that in the interval between the recording of Exhibit P-8 and the recording of Exhibit P-26 Baluswami was in the midst of his party-men and they induced him to falsely ascribe parts to the second and the third accused and implicate four more accused. As Baluswami had proved himself to be amenable to influence and willing to falsely implicate other persons the learned Counsel submitted that no reliance can be placed on either of the two dying declarations, Exhibits P-8 and P-26. We are unable to accept the contention of the learned Counsel that Baluswami was influenced by his party men to falsely

implicate and ascribe parts to the second and the third accused. Baluswami was in a very bad state and could have been suffering from excruciating pain. The iron part of the sulukki was left embedded in his chest and what would have been foremost in his mind was to mention the person who inflicted that injury which had left the sulukki in his chest. He had mentioned to the doctor, P.W. 18, that it was the, first accused that stabbed him with sulukki. It may be that when he gave Exhibit P-26 he was in a slightly better state to account for the other injuries which were less serious, by mentioning the persons who caused those injuries. It may be that because,, at the earliest point of time, the parts played by the second and the third accused were not mentioned, they will be entitled to the benefit of doubt, but that does not mean that the statement of Baluswami that the first accused stabbed him is not true. The learned Judge has found that the main core of the case,, namely, that it was the first accused that caused the fatal injury is found mentioned in both the dying declarations. Exhibits P-8 and P-26, and there can be no doubt in accepting the part played by the first accused. So far as accused 2 and 3 are concerned, the learned Judge gave, them the benefit of doubt as the parts played by them were not mentioned in the earlier dying declaration.

15. We are not persuaded to accept the other grounds relied on by the learned Counsel for discrediting the two dying declarations. Soon after the incident,. Baluswami gave the statement in which he ascribed the specific overt act to the first accused. The plea that Baluswami belonged to a political party which was inimically disposed against the accused's party or that the members of his party were present to tutor him, does not appeal to us, for, it is not disputed that Baluswami would have had the opportunity of seeing his assailant. He was fit enough to give a dying declaration. So far as the injury on the chest is concerned, he would have known his assailant and there is no reason at all for him to omit the real assailant and falsely implicate the first accused. As he had himself known the assailant, we fail to see how the presence of the other persons belonging to his party would make any difference.

16. It was next submitted that much weight cannot be given to the dying declaration of a person who did not have much regard for truth. In this connection, learned Counsel suggested that Baluswami belonged to a political party which had no faith in -the existence of God. We do not think that the fact that a person belonged to the Communist Party would make any difference in assessing the truth or otherwise of the dying declaration. We are not prepared to accept the general suggestion that that party, as a whole, does not believe in the existence of God. It may be that the Party may not believe in God, but there may be persons belonging to the Party who may have faith in God. It is accepted that even in Russia there are churches where persons are at liberty to go and pray. A nonbeliever can be a votary of truth whereas a believer may not be. We therefore decline to be influenced by the suggestion that Baluswami belonged to a Party which has no faith in God. The learned Counsel also relied on the decision of the Supreme Court reported In *Pompiah v. State of Mysore* : 1965CriLJ31 , which reiterated the view expressed by it in *Khusal Rao v. State of Bombay* : 1958CriLJ106 , and submitted that, as the dying declaration cannot be subjected to close scrutiny as it is made in the absence of the accused who had no opportunity to cross-examine the deponent, it should not be accepted without corroboration. This Court, in *In re, Guruswami* (1940) 1 M.L.J.24 : I.L.R. (1940) Mad. 158 : A.I.R. 1940 Mad. 196, has laid down that a dying declaration can be accepted without corroboration and all that is necessary for the Court is to satisfy itself whether the statement is true and, if it is convinced that the statement is true, it is the duty of the Court to convict. The position as stated by the Supreme Court in *Khusal Rao v. State of Bombay* : 1958CriLJ106 it as follows:

In order to pass the test of reliability, a dying declaration has to be subject to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But, once the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, after examining the dying declaration, in all its aspects, and testing its veracity, the Court has come to the conclusion that it is not reliable by itself and that it suffers from an infirmity, then, without corroboration, it cannot form the basis of a conviction.

17. We have already pointed out that we have no reason for not accepting the testimony of the dying declaration, Exhibit P-8. Though we do not reject Exhibit P-26 as false, we feel that the names of the second and the third accused are not mentioned in Exhibit P-8 and for that reason they are entitled to the benefit of doubt. In other words, we accept the truth of both the dying declarations, but we base our conclusion only on Exhibit P-8 which was earlier and hold that the persons not mentioned therein are entitled to the benefit of doubt. We accept the dying declaration, Exhibit P-8, and the testimony of the prosecution witnesses who say that it was the first accused that caused the fatal injury to Baluswami. The learned Judge, while declining to accept the testimony of P.Ws. 1 to 12 regarding the presence of an unlawful assembly with the common object of causing the death of Baluswami, found that it was safe to accept their testimony regarding the injury that was caused by the first accused to the deceased. We accept the reasoning of the learned Judge. We accept the testimony of P.Ws. 1 to 3, 5 to 8 and 10 to 12 (P.W. 4 has turned hostile to the prosecution and P.W. 9 has not attributed the fatal injury to the first accused). The learned Counsel pointed out that so far as the specific injuries on the prosecution witnesses were concerned, the learned Judge was not prepared to accept the testimony of the prosecution witnesses and the same rule should be applied regarding the injury caused by the first accused to the deceased. We are unable to accept the contention, for, the learned Judge does not reject the testimony of P.Ws. 1 to 12 regarding the injuries caused to the prosecution witnesses, but he refrains from convicting the accused on the ground that because the injuries were caused in a free fight between the two parties, the accused cannot be held liable for the various charges regarding the injuries caused to the prosecution witnesses. Apart from this reason, it is seen that so far as the injury caused to the deceased by the first accused is concerned, the truth or otherwise of the testimony of the prosecution witnesses is guaranteed by the said fact being found mentioned in Exhibit P-8 and Exhibit P-26. We agree with the conclusion of the learned Judge and hold that the prosecution has satisfactorily proved that it was the first accused that caused the fatal injury to the deceased Baluswami and that the conviction of the first accused for the offence under Section 302, Indian Penal Code, and the sentence of imprisonment for life imposed on him for the said conviction are correct, and they are confirmed and the appeal is dismissed.