

(1964) 08 KL CK 0007

In the High Court Of Kerala

Case No : Criminal Revision Petition No. 505 of 1963

Sreedhara Marar Raman Pillay and Others

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 14-08-1964

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 154, 157, 367, 537
Evidence Act, 1872 — Section 101, 102, 103, 104

Citation : AIR 1965 Ker 196 : (1965) CriLJ 215

Hon'ble Judges : S. Anna Chandy, J

Bench : Single Bench

Advocate : P. Subramonian Potti, S.A. Nagendran and V. Sreedharan Nair, for P.W. 1, V. Nagappan Nair and K.K.K. Kurup, for the Appellant; State Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

S. Anna Chandy, J.—Accused 1 to 3 brothers, accused 4 their fattier, accused 6 their mother and accused 6 their sister have all been tried under Sections 148, 149, 326, 341 and 294B. I. P. C. by the Neduma-ngad First Class Magistrate who acquitted accused 4 to 6 of all the charges and convicted accused 1 to a under sections 326 and 324, I. P. C. The three convicted accused unsuccessfully appealed before the Trivandrum Additional Sessions Judge and are now seeking to get the order vacated in revision.

2. The prosecution alleges that long-standing disputes existed, between the accused and P. W. 1 the son of the fourth accused's deceased brother Gangadnaran Pillai, regarding the title and possession of 1 acre and 88 cents of land. Accused 4 filed a suit against P. W, 1 and his brother and obtained a decree declaring his title to half the property and possession of the whole. Accused 4 appealed against the decree to the District Court and had obtained an injunction restraining P. W. 1 and others from entering the properties. In spite of the order of injunction, they were disturbing the possession of the accused and the fourth

accused had to petition the Executive First Class Magistrate on 10-4-1963. The petition was endorsed to P. W. 10 the Hub inspector of Kattakada for enquiry and report. On the forenoon of the date of incident i.e., 16-4-1963 the Sub-inspector went to the property in the company of accused 4 and two police constables and finding the brother of P. W. 1 engaged in preparing the land for cultivation the Sub-inspector questioned him and asked him to go over to the station with the records of the civil case.

3. The prosecution case is that at about 2 P.M. the same day while p. W. 1 was passing by the lane near the accused's house, the fourth accused called out "here he is coming" when accused 1 to a rushed out. Accused 1 asking him whether he wanted the property, cut him thrice with a chopper at the lower part of his right leg almost at the level of the ankle and caused three lacerated in Juries and a fracture of the tibia and accused 2 gave a blow with the handle of an axe above the left eye on the forehead. When P. W. 1 fell down accused 3 cut him with a chopper on his right and left knees and left thumb. After that accused 4 to 6 went to the lane and tied P. W. 1's hands and took him to the courtyard and laid him there. Then accused 4 kicked him forcibly on the abdomen. Afterwards accused 1 and 3 cut and destroyed about 10 to 15 plantain trees in the compound and accused 4 pulled down some kadjans from the roof of the Mouse and set fire to it. Accused 5 put out the fire by pouring water.

4. The version of the accused is that P. W. 1 and his brother Sivasankara Pillai who were very much annoyed at the police enquiry in the forenoon trespassed into the accused's Elankam house in the afternoon, P. W. 1 being armed with a chopper. They called out to accused 4 and others to come out of the house, but when they refused to come out, P. W. 1's brother set fire to the house saying they would stir out only if they are smoked and P. W. 1 chopped off some 10 to 15 plantain trees in the accused's compound. Accused 1 who was just then returning home for his lunch chased out P. W. 1's brother and fell down in the attempt. P. W. 1 then aimed a cut at accused 1 which was thwarted by accused 2 with the axe-handle. P. W. 1 began to cut accused 1 when he in the fallen condition waved the chopper and cut P. W. 1 on his leg. P. W. 1 fell down and sustained injuries on his knees. Accused 3 was not there at all. Accused 4 then went to the Kattakada Police Stations and reported the matter to the Head Constable P. W. 9 who keeping him at the station went to the house of the accused and the next day brought accused 5 and 6 also to the station. Four defence witnesses were examined in support of the defence case.

5.. The learned Advocate for the defence attacks the appellate judgment as being not in conformity with the provisions of Section 367 of the Criminal Procedure Code. The attack appears to be well-merited. The points for determination) are not raised and there is no consideration of the prosecution evidence worthy of mention. The learned Judge was concentrating more on the Defects of the defence case and the defence evidence. Whatever little reference to the prosecution evidence there is ineffective as there is a failure to appreciate

the oral evidence in the light of general probabilities and the salient circumstances that have come out. Witnesses can and may easily perjure, but circumstances properly established rarely mislead. Witnesses are not averse to bury grains of truth in high heaps of chaff of untruth. The paramount duty of every Court in such circumstances is to separate the grain from the chaff on a careful and scrupulous analysis and if that is not possible give the benefit of it to the accused lest the Innocent be convicted.

6. This Court has time and again tried to impress upon the lower Courts the necessity to bear in mind the provisions of Section 367, Criminal Procedure Code when writing Judgment (vide) Chellappan Nair v. State of Kerala, 1960 Ker LT 965 and Bharatban Pilial v. State of Kerala, 1963 Ker LT 1060 . Where the appellate Court agrees with the judgment of the trial Court and dismisses the appeal it may not be necessary for that court to write a lengthy and elaborate Judgment, but there seems to be no doubt that the Judgment should be independent and self-contained so that it may indicate that the appellate Court had considered the case in a proper perspective and the High Court in revision may be able to follow it without reference to the trial Court judgment. As observed by Horwill, J. In re, In Re: Bonthu Appadu and Others, :

"It is even more essential that an appellate Court should give reasons for its orders than that the trial Court should do so; for in the latter case the accused has a remedy by way of appeal before a tribunal which has to consider questions of fact as well as of law. In revision, on the other hand, findings of fact are ordinarily accepted."

I am aware that the High Court is not invariably bound to interfere in revision because there is an irregularity in the form of a Judgment unless there is reason to believe that there has been a failure of Justice, in this case I am convinced that there has been such a failure. The normal practice would be to send back the case to the appellate Court for rehearing. But in this case where there is an imposing array of circumstances which point to the truth of the defence case and in the unacceptable nature of the prosecution evidence I am not for unnecessarily harassing the accused and am inclined to dispose of the case here. In this connection it may be pertinent to refer to the following observation of the Supreme Court in Jumman v. State of Punjab, AIR 1957 SC 469:

"The Supreme Court, is, in criminal appeal under special leave, ordinarily bound by the finding of fact arrived at by the High Court; but if it is found that the High Court has not dealt with the" appeal as it should have, the Supreme Court will proceed to hear the appeal on the evidence."

Before dealing with the evidence of the two eye witnesses it is highly necessary to refer to a few circumstances, in the nature of the defence plea in this case, it was; of paramount importance to have fixed the scene of incident. The learned Judge made an attempt to consider the question and stated:

"According to P. w. I, the incident must have Happened at the place nearest to

the Elankam House shown in the plan. But P. W. deposed that the incident occurred at the place where it turns to the south. Ext. I"-3 scene mahazar also is not very definite on the exact scene of occurrence and the place from where M.O. III was taken."

and left it at that without solving the problem. Perhaps the line of least resistance was adopted. The prosecution version that the occurrence took place in the lane in front of the accused's house is not established. According to P. W. 1 the scene is the portion of the lane where it turns to the west at a distance of about 100 feet from the house. P. W. 2, says that the scene is the place where the lane turns to the south in which case the distance to the lane would be greater. In Ext. D.5 plan, the lane is shown as lying north to south and not east to west as P. W. 1 would have it. Even Ext. P-3 scene mahazar is not very helpful in the matter, it describes the soil at the scene as loose sand (Original in vernacular omitted) and states that some bloodstained sand was taken from there. However what is recovered is M. O. VI (Original in Vernacular omitted) which appears to be a piece of earth plastered with cow-dung. The learned Magistrate who has dealt with the point attempted to explain it by saying that as M. O. VI was not subjected to chemical analysis it is not possible to say whether it was actually bloodstained or not.

7. The non-mention of the arson and cutting of the plantain trees in the First Information Statement by P. W. 2 and the presence of blood in the chopper said to have been used by accused A to cut 10 to 15 plantain trees are sure indications that the arson and cutting of plantain palms were before the weapons were used against P. W. 1 and not after it. The learned Judge as well as the Magistrate presumed that there was no blood since the weapons were not sent for Chemical Analysis and finds fault with the Head Constable for noting; the existence of blood "In the usual manner". This is rather a strange way of approach. The explanations given by P. W. 2 for not referring to the acts of arson and mischief committed by the accused to create evidence of the incident having taken place in their courtyard, and by the Head Constable F. W. A for not bringing it out in spite of the fact that he had been to the spot and noted it himself are not at all acceptable. The only reasonable inference possible "is that the story that the accused were responsible for those acts was an afterthought.

8. The curious procedure adopted by the Head Constable in registering the case and recording the first information only strengthens this inference. The Head Constable begins the First Information Report by saying that he got the information from somebody at the Aryanad Junction at 7 F. M. that F. W. 1 was cut by choppers and beaten with axe-handle by all the six accused and was lying injured in the courtyard of the accused's house in a serious condition and therefore he went up to the spot and finding F. W. 1 unable to get up and walk removed him to the Trivandrum hospital where the statement of P. W. 2 was recorded as P. W. 1 was not able to talk and then returned to the station and registered the case at 12 noon, if it is a fact that Head Constable P. W. Y was in

charge of the Kattakada Station at 7 i". M, on 16-4-1963, he was bound as required by Section 157, Criminal Procedure Code to record the definite information he received about a cognizable offence committed by the accused, then and there from the informant and send a report to the Magistrate. The so-called First Information Ext. P. 1 we have in this case is only a second information. Even when the Head Constable goes to the spot and finds the injured in the midst of his friends and relations who helped in the removal of the injured to the hospital no statement is recorded from anybody. P. w. 2 is a stranger whose presence in the car was not at all necessary. In any case there was no justification for not recording P. w. 2's statement on the spot. P. W. 6 the doctor says that he saw the injured at 8.30 P. M. when he told him that the injuries were caused by cutting with a chopper and axe. The injured was in the operation theatre for about one and a half hours. But at 9 P. M. P. W. 2's statement was recorded. The condition of P. W. 1 was not, so dangerous as to require the recording of a dying declaration. The injuries on P. w. 1's leg and other parts are not so serious as to bring in any unconsciousness or inability to talk. No certificate or opinion is recorded from P. W. 6 that P. W. 1 was not able to talk. On the other hand what he says is that P. w. 1 could talk and did talk but there was no necessity for further talk. We find a deliberate attempt to record a made-up statement by a chance witness who waited at least for 5 1/2 hours at the spot from 2 P. M. to meet the police officer who came walking from Aryanad junction to the spot and then accompanied him all the way to the hospital to give a statement. Ignoring the strange and improper procedure adopted by the Head Constable in recording the first information and registering the case the lower courts take to task accused 4 for not promptly informing the police about the arson and mischief and have drawn an adverse inference therefrom. The fourth accused states that he went straight to the police station and conveyed the information to P. W. 9 who however asked Mm to remain the station when he proceeded to the scene. His statement is supported by the evidence of D. W. 4. There seems to be some force in the defence contention that accused 4 who gave the first information in the case was kept in custody to be formally arrested the next morning and his complaint was suppressed. It is surprising that the long delay in taking p. w. 1 to the hospital and in interfering the police did not strike the lower courts as something strange. Sivasankara Pillai the brother of P. W. 1 appears only to attest the body mahazar at the hospital after 9 F. M. carefully avoiding the police presumably because he was one of the aggressors and his hands were not clean. The prosecution also obliged him by keeping him away from the witness box though he was met by F. w. , 10 when he went for petition enquiry.

9. Some puzzling features about the injuries found on P. W. 1 also indicate the falsity of the prosecution version, p. w. 1 sustained seven injuries as noted in Ext. P. 4 wound certificate. Of the four lacerated wounds three are on the posterior aspect of the right leg near the ankle and one just above the inner end of the left eye. The three incised wounds were two of them on " either knee and

the other on the palmar aspect of the left thumb. The doctor P. W. 6 was told by P. W. 1 that the injuries were caused by cutting him with an axe and chopper. The doctor unhesitatingly gave out his opinion that the injuries might have been caused "as alleged". This cryptic medical opinion is misleading. In spite of judicial disapproval, some doctors still continue to give this "as alleged" opinion. The prosecution case is that accused 2 hit P. W. 1 by an axe handle and the injury caused is a trivial lacerated wound above the inner end of the left eye. A hit with an axe-handle should have created a very serious injury, if an alleged by P. W. 1 he was cut with an axe an extensive, deep and smashing injury would have been the result. F. W. 1 says that accused 1 cut him from his front by a chopper. P. W. 1 also says that accused 1 bent and cut him on his right leg (original vernacular omitted). P. W. 2 says accused 1 (original in vernacular omitted) accused 2 {original in vernacular omitted} P. W. 1 (original in vernacular omitted). P. W. 3 says that accused 1 jumped to the front of P. W. 1 and accused 2 jumped behind P. W. 1: "accused 1 (original in vernacular omitted). No right-handed man cutting from the front can inflict three serious lacerated injuries on the posterior aspect of the right leg of the victim who was standing still unless some circus-feat is performed. P. W. 1 who heard the abusive threat to kill him hurled by accused 1 could not have stood rooted to the spot to receive all the cuts on the leg by the assailant who comes and bends low before him as if to worship him with a chopper. The learned Judge need not have indulged in speculation to reconstruct a somewhat curious theory (vide para 10) with a determination to reconcile all arguments against an improbable prosecution story. If the defence version is considered, the injuries on the posterior aspect of the right leg can easily be explained. A fallen man cutting from his prostrate condition can very well inflict such injuries. When it was argued that a man coming to wreak his vengeance on his enemy is not likely to choose the hind part of the right leg for attack, it was suggested that the deceased wanted only to disable F. W. 1 and not to kill him. This is meaningless. What P. W. 1 says is that accused 1 called aloud "stop there: you son of a profligate: I shall finish you." and ran up to him with a chopper and bowed down and gave him three cuts on the (original in vernacular omitted) of his right leg. The location and the nature of the injuries probabillise the defence case of trespass by P. W. 1.

10. The motive was also for F. W. 1 and his brother to be in the aggressive and not the accused. On 10-4-1963 P. W. 10 the Sub-Inspector had come to a nearby property for enquiry into the petition filed by accused 4 against F. W. 1 and his brother for trespass into the property in spite of the order of injunction, p. w. 1's brother was found in the property by the police officer who directed him and his brother (F. w. 1) to appear before the station with the records. This enquiry at the spot and the direction by the police officer must have given the necessary provocation for this outburst by F. W. 1 and his brother. There was absolutely no reason why having moved the authorities in the matter and that effectively the accused should be so desperate as to be waiting for F. W. 1 to pass along the lane to pounce upon him with choppers and axe-handies in the manner alleged.

Moreover if an elderly gentleman and a retired school teacher like accused 4 and his wife and daughter have really taken part in the attack as alleged it is more likely to be in connection with the trespass into their homestead and the destruction of their homestead and cultivation, it is only such an attack in her residence that could have prompted accused 5 to resist her own sister's son. The theory that P. W. 1 who stays about a mile off was passing along the lane in front of the accused's house for the innocent purpose of taking tea from a nearby shop also appears to be not true. The evidence of D. W. 2 the village Officer who prepared Ext. D-5 plan shows that the path lies to the west of the accused's house and it is only to get into the accused's house that one should come to the lane in front of the house. The identity of the dhobi mark on the "pesa" cloth which P. W. 1 was found wearing and the clothes of the accused is another circumstance which lends support to the defence case that F. W. 1 got into the accused's courtyard took the cloth found and wore it and tied the one he was wearing round his head before he started the acts of aggression. The learned Judge makes short work of this Inconvenient circumstance by saying that the accused did not examine the dhobi. Instead of meeting the array of circumstances which go against the truth of the prosecution case the learned Judge seeks to answer them by the rather strange observation in para 13 of the Judgment that:

"The Ingenuity of weaving a defence version consistent with the injuries on the victim and coinciding with some facts of the prosecution case, would not make the defect" version ipso facto true) and acceptable, if", as a matter of fact, the incident had Happened otherwise."

THIS seems to be a connundrum and runs counter to the observations of the Supreme Court in *Aher Raja Khima v. State of Saurashtra*, (B) AIR 1956 SC that:

"When an accused person offers a reasonable explanation of his conduct then even though he cannot prove his assertions they should ordinarily be accepted unless the circumstances indicate that they are false."

The burden of proof to establish the guilt of the accused is ever on the prosecution and no plausible criticism or the defence evidence or the failure of the accused to establish his innocence should be deemed as sufficient evidence to discharge the burden lying heavily on the prosecution.

11. it is in this background that we have to appreciate the evidence of the eye-witnesses.

12. (After discussion of the evidence the Judgment proceeds) The intrinsic infirmities of their evidence coupled with the improbable story that they are speaking to ought to induce any court to discard their evidence.

13. The order of conviction of the accused has only to be set aside. The revision is allowed and the conviction and sentence passed against the accused are set aside. The fine if realised from accused 2 and 3 will be refunded to them.