
(1965) 07 KL CK 0009

In the High Court Of Kerala

Case No : Criminal A. 269 of 1964 and Cr. R.P. 474 of 1964

State of Kerala

APPELLANT

Vs

Gopalan and Another

RESPONDENT

Date of Decision : 30-07-1965

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 342

Citation : (1965) KLJ 1068

Hon'ble Judges : P. Govinda Menon, J

Bench : Single Bench

Advocate : V.R. Krishna Iyer and V.M. Nayanar, for the Appellant; P. Karunakaran Nair for Respondent 2, for the Respondent

Final Decision : Dismissed

Judgement

P. Govinda Menon, J.—Criminal Appeal 269 of 1964 is filed by the State against the judgment of the Additional Sessions Judge of Mavelikara in Sessions Case 9 of 1963 acquitting the respondents (accused). The charge against the first accused was for committing forgery on page 19 in Book No. 1, volume 174, where a sale deed Ext. P. 1 had been copied and the second accused is charged for abetment of the abovesaid forgery. P.W. 1 has filed the revision petition for the same relief. The second accused is a licensed document writer of the Vennikulam Sub Registrar's office. P.W. 1 and 2, husband and wife with others had sold three items of properties to the second accused under registered assignment deed Ext. P. 1, item 1, having an extent of 11 1/3 cents and item 2 being 12 cents in extent. In between these two items there was another property belonging to P.W. 2 having an extent of 19 1/3 cents which was not the subject matter of the sale deed, Ext. P. 1 and it remained in the possession of P. Ws. 1 and 2. On 24-11-1961 P. Ws. 1 and 2 entered into an agreement to sell this item to P.W. 3. The second accused probably wanted it for himself and did not like an item of property in-between his properties to go to another. So on the foot of an alleged agreement of sale of this property to him he filed a civil suit O.S. 407/61

before the Munsiff's Court, Thiruvalla for declaration of his rights in the property and for an injunction restraining P.W. 2 and the other defendants from selling it to P.W. 3. Ext. P.30 is the plaint in the suit. To support his case the second accused wanted some documentary evidence. P.W. 4 is an assistant working under the second accused and he was the scribe of Ext. P. 1, sale deed. The second accused, therefore, persuaded P.W. 4 to add one sentence in the original sale deed to the effect that there was a prior agreement to sell this item of property to him and that an advance amount of Rs. 350/- had been received by P.W. 2. P.W. 4 was not amenable to this. He pointed out that the document having been copied in book No. 1 without a corresponding entry in that book no correction or interpolations could be made in Ext. P. 1. The second accused said that there was no difficulty, that his friend the first accused who is a clerk in the Sub Registrar's office could be got to make the necessary interpolations in volume 174 of book 1. So on a day between 24--11--1961 and 30-11-1961 the second accused and P.W. 4 went to the Sub Registrar's Office and gave the first accused a chit showing the alteration to be made and the first accused made the necessary interpolations in the volume. A petition Ext. P.2 for effecting mutation proceedings had also been prepared and presented to the Sub Registrar at the time of the registration of the document. It is only on the first sheet that the parties had signed and on the back of that sheet the Sub Registrar had made necessary endorsements. The second accused said that he would get the document from the Village Office and make the necessary alterations in that petition and it was done. P.W. 4 agreed to interpolate the required entry in the sale deed Ext. P. 1 and did it. After thus making alterations in these documents on 18-12-1961 the second accused filed another civil Suit O.S. 438/61 against P.Ws. 2, 3 and others for specific performance. Ext. P.31 is the copy of the plaint. On receipt of the summons P.W. 3 applied for a registration copy of the sale deed. Ext. P. 8 is the copy supplied from the Sub Registrar's office. On seeing this P. W 1 assured P.W 3 that there was, in fact, no such agreement and the whole thing was a fraud played upon them. On 29-12-1961 P. W 3 filed a petition Ext. P. 9 to the I.G. of Registration. P.W. 1 also filed a petition before the District Registrar, Quilon and also before the I.G. They were enquired into by the District Registrar who reported that accused 1 and 2 were responsible for the forgery. Under the orders of the I. G. a complaint was filed before the Superintendent of Police, Quilon. The complaint was transferred to the Alleppey District. As the case was non-cognizable sanction to investigate the case was obtained and the Circle Inspector of Police, Chengannur laid the charge sheet against the accused, after completing the investigation.

2. When questioned in the committing Magistrate's Court both the accused stated that what the witnesses have stated is false and they generally denied the commission of the offence.

In the sessions court the accused were questioned in detail about each item of evidence against them. The first accused admitted having occasional money transactions with the second accused. He also admitted that he knew P.W. 4 as a

document writer under the second accused. He denied having committed the alleged forgery and stated that he did not know anything about it. The second accused would have it that the disputed entry Ext. P. 1 (a) was there in the sale deed before it was presented for registration and that no alterations were made in Ext. P. 1 sale deed or the pokkuvaravu document Ext. P. 2. He denied having utilised the services of P.W. 4 to interpolate the disputed entry in the sale deed and the first accused for writing up the disputed entry in Volume 174. He denied having made any admission to the Sub Registrar that he had got the entries made. He added that since in the disputed entry in Volume 174 there was no mention about the actual amount while in Ext. P. 1 (a) entry the amount was mentioned, the Sub Registrar wanted him to take the sale deed to his office for making necessary corrections in the volume and as he did not accede to this request the Sub Registrar has given false evidence as otherwise he feared that he would be made personally responsible for the non-collection of stamp duty for the disputed entry in the volume. No witnesses were examined in their defence.

3. That the disputed entry in Book No. 1 Volume 174 is a subsequent interpolation is well established and admits of no doubt whatsoever. A mere look at the original document would convince anybody that the disputed entry is subsequently written up. It is clearly in a different hand and P.W. 6 the clerk who has copied the document in the book has sworn that all except this disputed entry is in his hand writing. Ext. P. 17 (a) is the photostat copy of the disputed entry on page 19 of Volume 174. After the end of the third page and at the top of the fourth page where the schedule of property was copied the following sentence was thrust in:

After page 4, P.W. 6 who had copied it has drawn a line indicating that there was no other writing, but now above that line is seen the words written up. Similarly in Ext. P.1 which is the sale deed page 3 ended with the words but now a new word has been added forgetting probably that on page 4 which contained the schedule of properties the word had already been and above that the following sentence has been entered:

In the face of all this tell-tale piece of evidence it is idle for the second accused now to contend that Ext. P.1 (a) entry was there when it was given for registration. If really the entry was there when it was copied in book 1, it is most unlikely this would not have been copied in the first instance in book No. 1, Volume 174. P.W. 6 the clerk who copied the document is definite that Ext. P. 1 (a) was not there when he originally copied it, and that Ext. P. 1 (a) alone is not in his handwriting. After copying the usual practice is that one clerk would read the document and the head clerk would compare it with the book entry. It was clerk Mr. Mathew who read Ext. P. 1 and P.W. 8 the head clerk, who compared, has sworn that Ext. P.1 (a) was not in Ext. P. 1 and that the interpolation entered in book No. 1, Volume 174 was not there when comparing was done. Added to this there is the evidence of P.W. 1. It may be that being inimical with the second accused P.W. 3 was anxious to purchase the property and offered a higher price,

but I find no good grounds to disbelieve P. Ws. 1 to 3 on this point. So I entertain no doubt that the interpolated portion in book No. 1, Volume 174 is not in P.W. 6's hand-writing and that it was subsequently got written up.

Another circumstance to suggest that the disputed entry would not have been there when it was registered is the plaint Ext.P.30. That was filed on 24-11-1961. If really the disputed entry was in Ext.P.I on that date mention would certainly have been made about it in the plaint and Ext. P.I would have been produced along with the plaint under the provisions of Order 7, Rule 14, C. P. C. A suit for specific performance of the agreement to sell could straight away have been filed instead of the suit for declaration of his rights and injunction.

4. Learned Counsel for the second accused referred me to the evidence of P.W. 14 the village officer that the petition for transfer of patta would be sent by the Sub Registrar to the taluk office from where it would be received in his office and that while it was with him nothing could have been done from his office. It was, therefore, argued that Ext. P. 2 could not have been later altered. But P.W. 14 has admitted that such papers are not kept locked up and are kept outside on his office-table. It cannot, therefore, be said that it would not have been possible for the second accused to have completely changed one sheet adding this sentence. So the mere fact that no interpolation is now noticed in Ext. P.2 is no reason by itself to hold that the interpolated portion would have been there prior to its being presented for registration and it must have been so written in the sale deed also.

5. The charge framed by the court, I find, is only in respect of the forgery committed on page 19 of book No. 1, Volume 174 and the second accused is charged only for having abetted the first accused in making that entry. Why a separate charge for abetting P.W. 4 in forging Ext. P. 1 (a) was not framed against the second accused. I am unable to understand. That offence is not committed in or in relation to a proceeding in court, so that I do not think complaint of the court is necessary.

The main question now for decision is whether the prosecution has succeeded in proving that it was the first accused who had made the alteration and thereby committed the forgery and how far the prosecution has succeeded in proving abetment by the second accused. We have first the direct evidence of P.W. 4 who has given evidence about himself and the second accused going to the Sub Registrar's office, the second accused giving the chit, the first accused taking the volume from out of the almirah and making necessary entries in the volume. P.W. 4 has stated that he was waiting outside. So it would not have been possible for him to see what actually was written by the first accused. P.W. 4 is the person who committed forgery by subsequently writing up Ext. P.I (a) and he is on him on showing an accomplice. He was mentioned as an accused in the first information report and could have been proceeded against along with accused 1 and 2. Being accomplice evidence prudence requires that such evidence should be corroborated in material particulars. There is little or no corroboration of his

evidence. His evidence has been elaborately considered by the learned Sessions Judge in paragraph 4 of the judgment and he has been found to be a thoroughly unreliable witness. It is unnecessary to go through the same ground again. Without corroboration his evidence cannot be accepted. It has come out in evidence that the room where the clerks sit measures 25 x 15 feet. The almirah from which the first accused is alleged to have taken the volume to make the disputed entry is only 15 feet from the seat of P.W. 11, Eleyamma another clerk. It is admitted that she was present at the time when the alteration was made. If that is so one would normally expect P.W. 11 to have seen what had transpired, but curiously enough not one question has been asked to her about the visit of the second accused or about the first accused taking out the volume and making the entries therein.

6. Besides the Sub Registrar there are 8 other clerks in the office including the head clerk. Specimen writing of all the clerks seem to have been taken and forwarded but the expert is seen to have examined the disputed writing with the standard writing of the first accused alone. If the disputed writing had been compared with the admitted writing of the head clerk and the other clerks it would have been possible for the prosecution to have eliminated the possibility of any other clerk being responsible for writing the disputed entry. Again neither the head clerk nor the other clerks in the office who were examined were asked whether it is in the handwriting of any one of them.

P.W. 6 is the clerk who copied the document in the volume. He was asked in whose hand-writing the disputed entry Ext. P.I (a) was. Even in examination-in-Chief he stated that he cannot definitely say in whose hand-writing the entries were made. To a suggestive question the reply he gave was, "I am not definite, it appears to be in the hand-writing of the first accused." This witness was admittedly working in the office only for a couple of days and his capacity to identify the handwriting of the first accused would be very little. He admitted that he did not know the hand-writing of any of the other clerks.

P.W. 8 the head clerk only stated that the disputed entry in the volume has got a resemblance to the writing of the first accused. He is also not definite and he did not tell the District Registrar that the entry is in the hand-writing of the first accused. P.W. 10 the Sub Registrar also has given evidence that the disputed entry bears resemblance to the hand-writing of the first accused. But he also did not tell the District Registrar that the interpolated entry is in the hand-writing of the first accused. Learned Judge has discussed the evidence of the head clerk and the Sub Registrar in para 18 of the judgment and has rightly found that no reliance could be placed on their evidence.

P.W. 7 is another clerk of the Office. He has stated that he is acquainted with the hand-writing of the first accused, but when asked about the disputed entry stated that he cannot definitely say in whose hand-writing it is.

7. Prosecution places much store on the evidence of P.W. 14 the Examiner of

Questioned Documents. For purpose of eliciting his opinion the entire page in the volume containing the disputed entry Ext. P. 19, the statement of the first accused before the District Registrar and a photostat copy of page 32 in that volume which had been copied by the first accused marked Ext. P. 18 were sent for comparison. The photostat copy relating to the entire document No.3275 is Ext. P. 17 and the disputed entry therein is Ext. P. 17 (a). The mark given by the expert for this Ext. P. 17 (a) is Q. (1). The photographic copy of Ext. P. 19 statement of the first accused has been separately given the mark Section (1) to Section (5) . On a comparison of the Malayalam letters in Exts. P. 18 and P. 19 and the disputed entry in Ext.P.17 he has given his opinion which is Ext. P. 21. He has referred therein to 9 peculiar individual features which, according to him, go to show that the writing in these three documents are by one and the same individual. It was come out in evidence that this expert does not know to read Malayalam words and he only knows the letters. In cross-examination some instances of dis-similarity were brought out in certain letters and they were separately marked as defence exhibits. Learned Judge has referred to these in para 20 of his judgment. In view of these dissimilarities learned Judge was not prepared to place much trust on the opinion of the Expert.

8. In the Sessions court, Learned Counsel for the accused took objection that the standard hand-writing in Ext. P. 18 and P. 19 which have been compared with the disputed hand-writing had not been proved by any one of the witnesses to be in the hand-writing of the first accused. When the arguments were in progress the Public Prosecutor presented a petition u/s 540 Cr. P.C. to recall the Sub Registrar, P.W. 10 for the purpose of questioning him and proving that the original of Exts. P. 18 and P. 19 are in the hand-writing of the first accused. This was objected to by the defence and learned judge after hearing arguments rejected the petition on the ground that the prosecution had ample opportunities of questioning P. Ws. 6, 8 or 10 and P.W. 15 could also have been asked to prove that Ext. P. 19 which was written in her presence is in the hand-writing of the first accused. Learned Judge took the view that the effect of examining any further witness at that stage would be to fill up the lacuna in the prosecution evidence and dismissed the petition. I cannot share the view of the learned Judge. I am unable to find any objection in recalling the witnesses and questioning them about this. It is true that the public prosecutor has clearly bungled in having failed to establish the elementary and most essential fact that the standard writing sent for comparison is in the hand-writing of the first accused but he has frankly admitted that it was an inadvertent omission.

9. So the question arises whether the learned Judge did exercise his discretion properly and whether he should have recalled and examined either P. W. 10 or any other witnesses to prove that Exts. P. 18 and P. 19 were in the hand writing of the first accused.

Section 540 is in the following terms:

Any court may, at any stage of any inquiry, trial or other proceedings under this

Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

The section gives unrestricted powers of summoning or recalling any witness if his evidence appears essential to the just decision of the case.

this Court had occasion to consider the powers of the court to examine witnesses u/s 540 in the case in *State v Aboobaker* (1960 KLT 1142). That was a case charge sheeted by the police, but no witnesses were produced by the prosecution and on that ground the accused were acquitted. In appeal against the order of acquittal this Court expressed the view that it was a case where the Magistrate ought to have examined witnesses at least u/s 540Cr. P. C.

Reference has been made there to the decision of the Madras High Court in *Rengaswami Naicker Vs. Muruga Naicken*, where Ramaswami J., after discussing the case law stated:

Under Section 540 the court has unrestricted powers of summoning a witness and that it is not only the prerogative but also the plain duty of a court to examine such of these witnesses as it considers necessary for doing justice between the State and the subject.

Learned Judge has quoted therein an extract from Burke in the trial of Warren Hastings:

A Judge is not placed in the High situation merely as a passive instrument of the parties. He has a duty of his own, independent of them and that duty is to investigate the truth.

Reference is also made to the observation of Lumpkin J., in *Epps v State* (U. S. A.):

Counsel seek only for their client's success; but the Judge must watch that justice triumphs.

This decision also brings to the forefront the paramount duty of the court in examining witnesses for a just decision of the case.

In another case in *Ram Bali v State* (A. L R. 1952 All. 289) dealing with the powers of a Judge to examine court witness, Desai J., stated:

Sessions Judge is expected to try a criminal case intelligently and not leave everything in the hands of the public prosecutor and the defence counsel. It is his duty to find out whether the examinations of any witness would be necessary in the interests of justice or not. He is bound to examine any witness whose evidence he considers essential in the interests of justice. He cannot evade this statutory responsibility by omitting to give all thought to the question whether

the evidence of any witness left out by the parties is essential or not.

10. Reference may be made to two other decisions: one is *In Re: K.K. Narayanan Nambiar*, . In that case after the prosecution had closed their case and defence witnesses were examined, the prosecution requested the court to examine a court witness to demonstrate that what the defence witness deposed is not true. It was contended that no witness should be examined at the bidding of any person and that Section 540 is intended only for the benefit to the accused and by examining a witness as asked for by the prosecution great prejudice would be occasioned.

Horwill J., stated:

I see no reason why Section 540 Cr. P.C. should be so limited. It is in the interests of justice that a guilty person should be convicted just as it is in the interests of justice that an innocent person should be acquitted. If the court thinks that in order to give a just finding it is necessary to examine a witness, then it could not be an improper exercise of the powers of the court to summon that witness u/s 540 Cr. P.C. merely because the evidence supports the case of the prosecution and not that of the accused. It is possible to argue that the Public Prosecutor should have foreseen that there was a discrepancy between what P.W. 9 was going to speak to and the endorsement on the stamp papers, which the accused would be certain to exploit, and that he should therefore, have examined the stamp vendor to explain this discrepancy; but I do not think that this lack of foresight on the part of the prosecution should preclude the court from examining the stamp vendor and clearing up the point.

11. In the other case *Kesavan Pillai v Emperor* (A.I.R. 1929 Mad. 837) a witness was recalled and examined for the purpose of proving document. Strong objection was taken, by the defence to the Sessions Judge's procedure in having recalled the witness after her deposition had been concluded, Waller J., speaking for the Bench stated".

There is no force in the objection Section 540 Cr.P.C. gives a judge the fullest description to recall a witness at any stage of a trial and makes it imperative for him to do so, if he considers further evidence essential to the just decision of the case. Here an essential document had been overlooked by the prosecution and it was the Judge's duty to have it admitted in evidence. To argue that he should not have carried out that duty, as the result was fatal to the accused, is to suggest that the words "just decision" mean a decision in favour of the defence.

But the court must bear in mind that when examining court witness the prosecution and the accused must be equally entitled to cross-examine that witness and if the evidence of the court witness is prejudicial to the accused he should be questioned again u/s 342 for giving any explanation and an opportunity to rebut the evidence, if need be. Subject to these twin rules dictated by fairplay and justice there can be no other restriction for the exercise of the discretion by the court.

12. However, this commission to recall and examine witnesses to prove the standard writing cannot very much affect the decision of this case. Even proceeding on the basis that Exts. P. 18 and P. 19 were duly proved the main evidence in proof of the hand-writing is that of the expert. Generally expert's opinion must always be received with great caution but perhaps none so with more caution than the opinion of hand-writing experts. It appears to me dangerous to place implicit reliance on the evidence of hand-writing experts alone in the absence of evidence of witnesses thoroughly conversant with the disputed hand-writing. It is unsafe to base a judgment purely on an expert's opinion without substantial corroboration. His Lordship Gajendragadkar J., as he then was, in *Misra v Mohammed* (A. L. R. 1963 S. C. 1728 at p. 1736) has stated:

Evidence given by experts of hand-writing can never be conclusive because it is after all opinion evidence.

In the case in *Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee* since deceased and after him his legal representatives and Others, it was held that expert's evidence as to hand-writing being opinion evidence, can rarely if ever, take the place of substantive evidence. Before acting on such evidence it is usual to see whether it is corroborated either by clear direct evidence or by circumstantial evidence.

At the most, expert opinion on hand-writing can raise a suspicion as to the genuineness of a document, but it is of no moment unless confirmed by other evidence. Ah such proof is even in its best form precarious, and often extremely dangerous. Many persons write alike; having the same teacher, writing in the same office, being of the same family--all these produce similitude in writing, which in common cases, and by common observers is not liable to be distinguished. In the circumstances of this case this view taken by the learned judge that it would be dangerous to base decision upon the inconclusive data furnished by the expert appears to be correct and the prosecution has failed to prove that the disputed writing is in the hand-writing of the first accused.

In a case depending upon comparison of hand-writing the court is competent to use its own eyes for deciding the question and the court cannot accept the expert's opinion like an automation.

But as to comparison of signature or writing by the court, the warning uttered by Jankins, C. J. that a comparison of hand-writing is at all times as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject has always to be remembered. Since I have come to the conclusion that the evidence of the other witnesses regarding the hand-writing of the first accused is unsafe to be acted upon, I do not think that it would be safe and admissible for the court to rest the decision of the case by comparing the two writings. Learned Sessions Judge who had compared the writings could not confidentially come to the conclusion that it was in the hand-

writing of the first accused though the similarity might create suspicion. In all probability it may be in the hand-writing of the first accused himself but suspicion however strong it might be cannot be a substitute for proof.

13. The other item of evidence on which reliance was placed in proof of the guilt of the accused is the alleged admission said to have been made by the second accused to P.W. 10 the sub Registrar. P.W. 10 admits that he knew that forging had been committed in a document kept in his office. He has stated that P.W. 12 the peon told him that the second accused had gone to his house to speak about this matter. He sent for the second accused and when he was asked to speak the truth the second accused confessed to him that it was got done by the first accused and necessary alterations were made in the sale deed by P.W. 4 and by him in the Pokkuvaravu document taken from the Village office. If really the second accused did tell him about the fraud that was perpetrated the first thing that anybody would have done is to question the first accused about it and make a report to his superior officers. He has no satisfactory explanation for not having done so. Learned Judge who had the privilege of seeing this witness was not at all impressed by his evidence and has given reasons why he found it unsafe to rely on his evidence about the second accused having made a confession. Equally unreliable is the evidence of P.W. 12, the peon of the office. According to him there was another person who had heard the conversation between him and the second accused, but no such evidence has been adduced.

I cannot compliment the District Registrar for the perfunctory way in which the enquiry was conducted. A mere look at the document ought to have convinced P.W. 15 that the disputed entry was a subsequent interpolation and the attempt should have been to question and find out as to who in the office was responsible for it, but curiously not one witness seems to have been asked in whose hand-writing the disputed writing is. She admitted that when she questioned, the second accused had denied commission of the offence and had told her that Ext. P. 1 (a) entry was in the sale deed even before it was got registered. That statement of the second accused may be false, but there is no admission by him that the interpolation was got done by him. If there is no satisfactory proof of any abetment of the first accused or that the first accused committed the forgery, the second accused has also to be acquitted, because the only abetment alleged and charged against him is that he abetted the first accused. So on a careful consideration of the evidence, facts and circumstances of this case I find that the acquittal is well justified.

The appeal filed by the State and the Revision Petition filed by P.W. 1 are dismissed.