

NARAYANAN SATHEESAN @ BABOO

v.

STATE OF KERALA

September 29, 1977

[P. K. GOSWAMI, P. N. SHINGHAL AND JASWANT SINGH, JJ.]

*Murder charge—Conviction by High Court u/s. 302 Penal Code on appeal by State against acquittal under that section but conviction u/s 326 I.P.C. by Sessions—Non-production by the Prosecution or non-summoning u/s. 311 Crf.P.C., 1973 by Court, of the doctor who performed the operation is not fatal when corroborated by dying declaration, autopsy report and one of the eye-witnesses—Evidence Act (Act I), 1872, ss. 32(1) and s. 45.*

The appellant, though charged u/s. 302 of the Indian Penal Code for intentionally causing the death of one K. G. Thomas alias Thampi, a well built male of 32 years on the night of December 16, 1972, by inflicting a stab injury of 3×1 cm. over his left infrascapular area was, however, on a consideration of the material adduced before him, acquitted of the said charge and convicted u/s. 326 and sentenced to 7 years rigorous imprisonment by the Sessions Judge. Both the appellant and the State appealed against the said orders. The High Court accepted the State's appeal, set aside the conviction u/s. 326 and convicted him u/s 302 and sentenced him to imprisonment for life. The High Court rested the conviction on the dying declaration (Ex. p. 9) which received ample corroboration from the testimony of one of the three eye-witnesses, Pappan (P.W. 5).

Dismissing the appeal to this court u/s. 2(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) (Act 28 of 1970), 1970, the court,

HELD : (1) Non-production by the prosecution of the doctor who performed the operation on the deceased is of no avail. It is no doubt unfortunate that the prosecution has not attempted to examine the doctor who performed the operation, but this lapse is not sufficient to downgrade the enormity of the offence committed by the accused. [583 C-D, H]

(2) The High Court has correctly held that the case is clearly covered by Explanation (2) to s. 299 of the Indian Penal Code which provides that where death is caused by an injury, the person who causes it would be deemed to have caused the death although by resorting to proper remedies and skilful treatment, the death might have been prevented. [583 H, 584 A]

(3) (a) In the instant case, taking into consideration the deadly character of the weapon used, the dastardly assault made by the accused and the vital organs of the body on which the injury was caused as also the categorical statement of Dr. Jayapalan, P.W. 4, who conducted the autopsy of the dead body of the deceased that the injury No. 1 was sufficient in the ordinary course to cause death of the deceased, it is clear that the appellant deliberately caused the fatal wound on the person of the deceased. The conviction u/s 302 of the Indian Penal Code must be maintained. [584 B-C]

(b) It is true that the appellant inflicted only one stab wound on the deceased but the facts established in the case, namely, that the appellant did not act under any sudden impulse but pursued the deceased after arming himself with a dagger which is a dangerous weapon in execution of a premeditated plan motivated by ill feelings nurtured for a number of days and inflicted a severe stab injury on the vital region of the body of the deceased which perforated not only his left lung but also penetrated into and impaired the left ventricle of his heart clearly show that the appellant had the intention of causing the death of the deceased and pursuant thereto acted in a manner which brings the offence within the mischief of s. 302 of the Penal Code. The offence committed by the accused squarely falls within the purview of clause "thirdly" of s. 300 of the Indian Penal Code according to which culpable homicide is murder if the act

- A by which the death is caused is done with the intention of causing bodily injury to any person and the bodily injury intended to be caused is sufficient in the ordinary course of nature to cause death of the deceased. [583 B-E]

*Gudar Dusadh v. State of Bihar*, A.I.R. 1972 S.C. 952, followed.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 342 of 1974.

- B Appeal under Section 2(a) of the Supreme Court Enlargement of Criminal Appellate Jurisdiction Act, 1970 from the Judgment and Order dated 2-7-74 of the Kerala High Court in Criminal Appeal No. 338 of 1973 and 87/74.

T. C. Raghavan and N. Sudhakaran for the Appellant.

- C K. R. Nambiar for the Respondent.

The Judgment of the Court was delivered by

- JASWANT SINGH, J.—Narayanan Satheesan *alias* Baboo, the appellant herein, was tried by the Additional Sessions Judge, Mavelikara, under section 302 of the Indian Penal Code for intentionally causing the death of one K. G. Thomas *alias* Thampi, a well built male, aged about 32 years, who was an inhabitant of Eruvallipra Muri in Thiruvalla Village, by inflicting an injury with a dagger (M.O. 1) on the back of his chest at 7.30 P.M. on December 16, 1972 at a sandy place situate on the Western side of the village road which goes to Veliyam Kadavu (Ghat Ferry) from Thirumoola on the eastern extremity of Purayidom known as Kaval Purayidom belonging to Arya Community within the jurisdiction of Thiruvalla Police Station. On a consideration of the material adduced before him, the learned Judge acquitted the appellant of the charge under section 302 of the Indian Penal Code but convicted him under section 326 of the Code and sentenced him to rigorous imprisonment for a term of seven years with the finding that he had, by means of a dangerous weapon like M.O. 1, caused grievous hurt on the person of the deceased which had endangered his life. Aggrieved by this judgment and order, both the State as well as the appellant appealed to the High Court of Kerala at Ernakulam. The High Court set aside the conviction of the appellant under section 326 of the Indian Penal Code and instead convicted him under section 302 of the Code and sentenced him to imprisonment for life. Dissatisfied with this judgment, the appellant has come up in appeal to this Court under section 2(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 (Act 28 of 1970).

- H The case as put forth by the prosecution is that a couple of weeks before the date of occurrence, there was an altercation between the appellant and the deceased over the refusal by the latter to relinquish possession of the Purayidom before the expiry of the term of one year of the lease granted in his favour by the father of the accused on a pattom of Rs. 550/- which entitled him to the usufruct of the coconut trees standing on the Purayidom; that during the course of the afore-said altercation, the appellant threatened to kill the deceased if he

did not hand back possession of the property peaceably; that irked at the refusal of the deceased to surrender possession of the Purayidom, the appellant armed himself with a dagger and followed the deceased on the evening of December 16, 1972, while the latter was passing along the above mentioned road and after thrusting the dagger in the back of the chest of the deceased, took to his heels without even taking out the weapon from the situs of the wound; that the deceased pulled out the weapon from his back and threw it on the ground whereafter blood gushed out of the wound and he fell down; that on seeing this incident Gopala Kurup (P.W.1), who was going to have his bath at Veliyam Kadavu and Thommi Mathai (PW.2) who was on his way to Thirumoola which is about five furlongs from his house to buy some provisions rushed to the scene of occurrence; that Thommi Mathai (P.W. 2) and Gopala Kurup (P.W. 1) removed the deceased about 6 or 7 feet towards the East whereafter Gopala Kurup (P.W. 1) bandaged the wound of the deceased which was bleeding profusely with his thorthu (bath towel); that while the wound was being bandaged by Gopal Kurup, Pappan (P.W. 5), the Ferryman employed by the Municipality at Veliyath for ferrying people across the Manimala river, also hastened to the scene of occurrence, saw the appellant running away and heard the deceased saying "Mathaichacha, Babu stabbed me"; than after bandaging the wound as aforesaid, Gopal Kurup (P.W. 1) Thommi Mathai (P.W. 2) and Pappan (P.W. 5) removed the deceased to the middle of the road, laid him on the level surface and started raising an alarm, on hearing which the brothers of the deceased including Geevarghese George (P.W. 11) and some other persons arrived at the scene of occurrence, that in reply to the query made by his elder brother, Geevarghese George (P.W. 11), the deceased said "Achaya, Babu stabbed me"; that the deceased was thereafter removed by his brothers in a taxi car to the Thiruvalla Hospital where P.W. 6, Dr. G. K. Pai, examined his person and found a stab injury over his left infrascapular area, 3x1 c.m., horizontal in position, both edges sharp penetrating into the pleural cavity (left side)—Direction of the wound obliquely forward and to the right side(?) Anenumothorax on the left side; that the doctor made an entry of the injury noticed by him in the relevant register of the Hospital and rendered first aid to the deceased; that while the first aid was being given to him, the deceased told the doctor that the injury was caused to him by stabbing at 8.00 P.M.; that in view of the serious nature of the wound, the doctor advised the relatives of the deceased to take him to the Medical College Hospital, Kottayam for expert medical attention and treatment; that thereafter the doctor gave intimation of the incident on telephone and by means of a letter (Ext. p-4) to the Thiruvalla Police Station whereupon P.W. 15 viz. Madhavan Pillai, Head Constable attached to the said Police Station proceeded to the Hospital but on learning on arrival at that place that the injured had already been sent to the Medical College Hospital, Kottayam, he at once returned to the Police Station and forthwith contacted Arpookara Police Station on telephone and informed the person incharge thereof that since the statement of the injured person by name K. G. Thomas who had been brought to Thiruvalla Hospital with serious injuries could not be taken as he had been removed to the Medical College Hospital, Kottayam for expert medical treatment, his

A statement might be taken and the needful be done in the matter; that on being thus informed by Madhavan Pillai (P.W.15), Govinda Pillai (P.W. 13), Head Constable Incharge of the Police Station, Kottayam proceeded to the College Hospital and after taking the permission of Dr. K. M. R. Mathew, who was examining the deceased in the casualty room, recorded his statement (Exh. p-9) at 9.30 P.M. which was to the following effect :—

B "I know that it is a Head Constable who is talking to me now. I am called Thampi. Babu, son of Ezharapra Narayanan stabbed me with a dagger. It was on my back that he stabbed me from behind. It was at Veliyamkadavu (ferry) that he stabbed me. It was I myself who pulled out the dagger with which I was stabbed and threw it there. Ferryman Pappan and others have seen him stabbing me. It was today at 7.30 p.m. that the incident took place. It was in order to kill me on account of prior enmity that he stabbed me. The place of incident is within the limits of Thiruvalla Station. It is 40 kms. south from here."

D The prosecution case further proceeds that it was not before 2 O'clock at night intervening between 16th and 17th December, 1972 that Govinda Pillai (P.W. 13) could return to his Police Station as he had to record statements in four or five other cases intimation regarding which was received by him while he was at the Hospital; that on his return to the Police Station, Govinda Pillai (P.W. 12) prepared the First Information Report (Exh. P-10) on the basis of Exhibit P-9 and sent the same to the Munsiff-Magistrate's Court Ettumanoor; that an hour after his return to the Police Station, Govinda Pillai got intimation from the Hospital vide Exhibit P-11 that the injured person, whose statement (Exh. P-9) he had recorded had died at 3.00 A.M.; that about 8 O'clock in the morning, Govinda Pillai went to the Medical College Hospital and prepared the Inquest Report (Exh. P-8) whereafter he sent the dead body of the deceased to the Police Surgeon for post mortem examination; that P.W. 4, Dr. F V. K. Jayapalan, Professor of Forensic Medicine and Police Surgeon, Medical College, Kottayam conducted the autopsy of the body of the deceased on December 17, 1972 at 2.00 P.M. and noticed the following appearances :—

G "General—Body was that of a well built adult male. Rigor mortis fully established and retained all over. Dried blood stains were seen on the front of right fore-arm and front of chest. Injuries (antemortem) :

H (1) Sutured incised penetrating wound horizontally placed on the back of chest 3 cm. to the left of middle and 24 cm. below the top of shoulder. The wound was found entering chest cavity cutting through the 9th intercoastal space, perforated the lower lobe of left lung and penetrated the left ventricle of the heart. The wounds on the lung and heart measured 2.8 cm. in length and were found sutured. The wound was directed forwards upwards and to the right.

- (2) Sutured surgical thorocotomy wound 26 cm. in length on the outer aspect and back of left chest 17 cm. below the arm pit. **A**
- (3) Surgical wound 1.3 X .5 cm. obliquely placed on the back of chest 3 cm. below injury No. 1.
- (4) Multiple small abrasions over an area  $3.5 \times 2$  cm. on the outer aspect of right shoulder. Other findings are; Left lung was collapsed. Left chest cavity contained 75 cc. of blood clots. Pericardial cavity contained 50 cc. of blood clots. Stomach was empty and mucous was normal." **B**

The doctor opined that injury No. 1 which could have been caused with a weapon like M.O. 1 was sufficient in the ordinary course to cause death. The doctor further opined that the cause of death of the deceased was bleeding and shock following stab injury sustained by him on the back. **C**

P.W. 17, V. Rajasekharan Nair, Circle Inspector of Police, Kayamkulam, took over investigation of the crime on receipt of the express intimation regarding the registration of the case under section 302 of the Indian Penal Code on December 17, 1972. He repaired to the scene of occurrence without any loss of time, prepared the scene mahazar, seized the blood stained earth and questioned the witnesses and prepared notes of their statements on the same evening. He also seized the dagger (M.O. 1) which was produced before him by Geevarghese George (P.W. 11) on December 30, 1972. It was not, however, before January 1, 1973 that the Police could arrest the appellant at Nedumbram. **D**

After completion of the investigation, the appellant was proceeded against in the Court of Sub-Magistrate, Thiruvalla, who committed him to the Court of Sessions to stand his trial under section 302 of the Indian Penal Code with the result as stated above. **E**

Although in addition to the other witnesses, the prosecution examined Gopal Kurup (P.W. 1), Thommi Mathai (P.W. 2) and Pappan (P.W. 5), who claimed to be the eye witnesses of the incident, both the Additional Sessions Judge and the High Court while holding that their arrival on the spot was proved, discarded the evidence of Gopal Kurup (P.W. 1) and Thommi Mathai (P.W. 2) on the ground that their testimony was not trustworthy and rested the conviction of the appellant on the dying declaration (Exh. P-9) which, according to them, received ample corroboration from the testimony of Pappan (P.W. 5). **F**

Appearing in support of the appeal, Mr. Raghavan has urged that the conviction of the appellant cannot be sustained firstly because the evidence on the record is not sufficient to bring home the offence to the appellant, secondly because the dying declaration (Exh. P-9) which **G**

**H**

A has been heavily relied upon by the trial court and the High Court could not have been made by the deceased who was in a critical condition and clearly appears to have been fabricated after the death of the deceased and thirdly because the testimony of Pappan (P.W. 5) and Geevarghese George (P.W. 11) from which corroboration has been mainly derived is not cogent and convincing.

B We have carefully gone through the entire evidence on the record. While we do not consider it safe to place reliance on the eye witness account of the occurrence given by Gopal Kurup (P.W. 1) and Thommi Mathai (P.W. 2) which has been rejected as untrustworthy by the trial court and the High Court or on the statement of Geevarghese George (P.W. 11) in view of his queer and unnatural conduct in wiping away the blood from the weapon of offence and not producing the same before the Police for nearly 14 days, we think that the statements of Govinda Pillai (P.W. 13) and Pappan (P.W. 5) cannot easily be brushed aside. Pappan (P.W. 5) who belongs to the community of the appellant and has no animus against him and whose testimony is natural and consistent and whose credit has remained unshaken despite the lengthy cross-examination to which he was subjected has unequivocally stated that at about 7.30 on the evening of December 16, 1972 while he was sitting in his boat which he had rowed to the Northern ferry as there were no passengers to take across the river, he heard the cry "Heigho", "heigho" from the shore; that on ascending five or six steps, he saw the deceased standing in a bent position on the western side of the road with a dagger stuck on his back and the accused whom he knew from his childhood running westwards from near the deceased; that the deceased himself pulled out the dagger and threw it in the Purayidom; that it was after Gopal Kurup (P.W. 1) and Thommi Mathai (P.W. 2) had come running to the spot from the North that the deceased fell down on the right side; that Gopal Kurup (P.W. 1) bandaged the wound of the deceased with his bath towel and while his wound was being bandaged, the deceased was saying "Mathaicha, abu stabbed me". The evidence of Govinda Pillai, Head Constable (P.W. 13) has also remained unshaken in cross-examination. From his statement which receives corroboration from the statements of not only Dr. V. K. Jayapalan (P.W. 4) and Dr. G. K. Pai (P.W. 6) who were examined by the prosecution but also from the statement of Dr. Mathew Varghese (P.W. 5) who was examined by the appellant, it is crystal clear that the deceased (whose central nervous system remained normal and who neither lost his consciousness nor his power of speech) gave a coherent account of the circumstances leading to his injury which he faithfully and accurately recorded in Exhibit P-9 and forthwith asked the deceased to append his signatures thereon which he did with a steady hand. We are, therefore, absolutely convinced that the incident took place in the manner disclosed by the prosecution.

H This does not, however, conclude the matter. The important question as to the nature of the offence committed by the accused still remains to be determined by us. adopting the reasoning of the trial court, it is emphasized by learned counsel for the appellant that since the appellant inflicted only one stab injury on the person of the

deceased and the deceased died during the performance of operation on his lung and heart and the prosecution has not tried to establish either that the doctor who performed the delicate operation was a specialist or a competent and skilful surgeon and took all reasonable care and caution or that the death was the inevitable result of the stab injury, the appellant can at the utmost be held guilty of the offence under section 326 of the Indian Penal Code. We find it difficult to accede to this contention. It is true that the appellant inflicted only one stab wound on the deceased but the facts established in the case viz. that the appellant did not act under any sudden impulse but pursued the deceased after arming himself with a dagger which is a dangerous weapon in execution of a premeditated plan motivated by ill feelings nurtured for a number of days and inflicted a severe stab injury on the vital region of the body of the deceased which perforated not only his left lung but also penetrated into and impaired the left ventricle of his heart clearly show that the appellant had the intention of causing the death of the deceased and pursuant thereto acted in a manner which brings his offence within the mischief of section 302 of the Penal Code. It is no doubt unfortunate that the prosecution has not attempted to examine the doctor who performed the operation but this lapse is, in our opinion, not sufficient to downgrade the enormity of the offence committed by the accused. It cannot be overlooked that Dr. V. K. Jayapalan (P.W. 4) who conducted the autopsy has categorically stated that stab injury No. 1 was 'sufficient in the ordinary course to cause death' and that the cause of death of the deceased was bleeding and shock following the said injury.

In *Gudar Dusadh v. State of Bihar*<sup>(1)</sup> where the accused made a pre-meditated assault and inflicted an injury with a lathi on the head of the deceased which was sufficient in the ordinary course of nature to cause death and actually resulted in the death of the latter, it was held that the mere fact that the accused gave only one blow on the head would not mitigate the offence of the accused and make him guilty of the offence of culpable homicide not amounting to murder.

In the instant case, the prosecution having succeeded in establishing that the stab injury inflicted on the person of the deceased was sufficient in the ordinary course of nature to cause the death, the offence committed by the accused squarely falls within the purview of clause 'thirdly' of section 300 of the Indian Penal Code according to which culpable homicide is murder if the act by which the death is caused is done with the intention of causing bodily injury to any person and the bodily injury intended to be caused is sufficient in the ordinary course of nature to cause death of the deceased.

Again the non-production by the prosecution of the doctor who performed the operation on the deceased is of no avail to the appellant. As rightly held by the High Court, the case is clearly covered by Explanation 2 to Section 299 of the Indian Penal Code which provides that where death is caused by an injury the person who

(1) A.I.R. 1972 S.C. 952.

- A** causes it would be deemed to have caused the death although by resorting to proper remedies and skilful treatment the death might have been prevented. It appears that the attention of the Additional Sessions Judge was not drawn to this aspect of the matter and while quoting a passage from Modi's Medical Jurisprudence and Toxicology (1963 Edition), he not only glossed over the last sentence thereof where it is succinctly stated that "it should be noted that the liability
- B** of the offender is in no way lessened even though life might have been preserved by resorting to proper remedies and skilful treatment" but also tried to highlight something which did not possess any significance. Taking into consideration the deadly character of the weapon used, the dastardly assault made by the accused and the vital organs of the body on which the injury was caused as also the categorical statement of Dr. V. K. Jayapalan, Professor of Forensic
- C** Medicine, who conducted the autopsy of the dead body of the deceased that the injury No. 1 was sufficient in the ordinary course to cause death of the deceased, we have no hesitation in holding that the appellant deliberately caused the fatal wound on the person of the deceased and in maintaining the conviction under section 302 of the Indian Penal Code.
- D** For the foregoing reasons, we find no merit in this appeal which is dismissed.

S.R.

*Appeal dismissed.*