

(1959) 11 KL CK 0043

High Court Of Kerala

Case No: Criminal Appeal No. 240 and R.T. 27 of 1959

Gopalan Nambiar and Others

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision: Nov. 25, 1959

Citation: (1959) KLJ 1405

Hon'ble Judges: K. Sankaran, C.J; Anna Chandy, J

Bench: Division Bench

Advocate: K. Kunhirama Menon, M. Ratna Singh and A. Hariharasubramoniam, for the Appellant;

Judgement

Anna Chandy, J.

Six of the seven accused in Sessions Case No. 4 of 1959 of the Kozhikode Sessions Court are the appellants. The charge against them was that on 11-11-1958 at about midnight they formed themselves into an unlawful assembly with the common object of committing the murder of one Malayil Chathu and one Karambath Chirutha and in furtherance of their common object trespassed into the house of P.W. 1 Kadungon and the first accused murdered the said Chathu by stabbing him with a dagger and accused 2 and 3 murdered the said Chirutha by strangulation, accused 4, 5 and 6 abetted the murder and along with accused 7 caused the disappearance of the evidence of the two murders. The learned Sessions Judge acquitted the 7th accused and convicted all the others either u/s 302 or u/s 302 read with Section 149 or 109 besides finding them guilty of the lesser offences charged against them. He sentenced accused 1, 2 and 3 to the extreme penalty of law and accused 4, 5 and 6 to life imprisonment. All the accused except accused 1 were also awarded various terms of imprisonment for the lesser offences. The first accused is a Nambiar and the others are Thiyyas. Accused 2 is the son of accused 3, while accused 7 is the son-in-law of accused 4. Accused 5 and 6 are brothers. P.Ws. 1 and 3 are respectively the father and mother of the deceased Chirutha and P.Ws. 2 and 5 are her brothers. The deceased Chathu was the son of a cousin of P.W. 1. Chirutha, a

Thiyya woman aged 20, was married to her father's nephew Chakkan about eight years back. After some time, differences of opinion arose between them and Chirutha used to frequent her father's house, some times staying there for three or four days together at a time. The 1st accused who is a Nambiar is the son of the manager of the Komath tarwad in whose property P.W. 1 was living. Accused 1, 2 and 5 used to meet Chirutha at P.W. 1's house and they cultivated an illegal intimacy with her for some time. Chathu who was in Waynad came to his house a few days before last Onam. He did not go back but started a business in "beaten rice" together with P.W. 2, the son of P.W. 1. Chathu then shifted his residence to the house of P.W. 1 and before long an intimacy between Chathu and Chirutha developed. Chathu resented the frequent visits of accused 1, 2 and 5 to the house to see Chirutha and asked them to stop coming there. The accused in their turn did not appreciate this attitude of Chathu and wanted to do away with Chathu in order to be rid of his interference. Chirutha came to P.W. 1's house for the last time on 10-11-58. The next day, at about mid-night, when all the inmates of the house were sleeping, P.W. 1 woke up hearing some noise and going to the northern verandah of his house, he saw by the light of a lamp kept on the wall, accused 2 and 3 holding the legs of Chathu, accused 5 and 6 holding his hands and the 1st accused stabbing him with a dagger on his chest. P.Ws. 1 and 2 cried out. On hearing their cries, the deceased Chirutha and P. Ws. 3 and 5 came out. Chirutha cried out on seeing the bleeding injuries on Chathu. The 2nd accused gave her a kick on her lower abdomen. On receiving the kick, she fell down backwards. The 3rd accused then went to the courtyard and brought M.O. 2 spade-handle and placing it on the neck of Chirutha, accused 2 and 3 pressed it from either end with their legs. Accused 5 and 6 held Chirutha's legs and accused 1 and 4 stood by watching the operations. Chirutha died immediately. Chathu also expired by that time. The commotion brought P. Ws. 6 and 8 and accused 7 to the scene. The third accused then brought a plank on which Chathu's body was placed and accused 2, 3, 4, 6 and 7 carried the dead body and threw it into an unused tank called "Thaivachakulam" The dead body of Chirutha also was disposed off in the same manner. P.W. 1 and his people were threatened by the father of the 1st accused who warned them not to report the matter to anyone. Being frightened of him the eye-witnesses agreed to do so. On 14-11-58, the dead bodies were found floating in "Thaivachakulam". This tank belongs to the Komath tarwad and they sent information to the Village Munsiff. P.W. 10, the Village Munsiff sent Ext. P. 9 statement along with Ext. P. 10 Yadast to the police station at Kuttiadi. On receiving the information, P.W. 14 the Sub-Inspector proceeded to the scene. He removed the dead bodies from the tank and held an inquest in the presence of Panchayatdars during which the dead bodies were identified by the relations of the two deceased. When questioned during the inquest, both P. Ws. 1 and 3 stated that their daughter Chirutha had come to their house on the 10th and left the place at 10 A.M. on the 12th saying that she was returning to her husband's house. They further stated that Chathu also left their house at about noon on the 12th, saying that he was going to his brother's place at

Kottapally. P.W. 2, the brother of Chirutha also gave the same version to the police. However, on further investigation, these statements were seen to be false and information was received that it was the accused who were responsible for the death of Chirutha and Chathu. After completing the investigation, P.W. 16 the Circle Inspector laid the charge before the Sub-Magistrate, Badagara on 15-12-1958.

2. All the accused pleaded not guilty. First accused stated that he was innocent and was falsely implicated by Chirutha's people who committed the murder and deposited the dead bodies in the tank. Second accused also stated that he was innocent and that he and P.W. 1 were on inimical terms, because P.W. 1 considered him responsible for the refusal of fourth accused to give his daughter in marriage to P.W. 2 the son of P.W. 1. The third accused simply denied everything. The fourth accused also spoke about the enmity of P.W. 1 because he refused to give his daughter in marriage to P.W. 1's son. Accused 5 and 6 also denied everything.

3. The death of Chathu and Chirutha is not disputed. Ext. P. 12 is the inquest report prepared by P.W. 14. P.W. 12 conducted the autopsy and issued post-mortem certificates Exts. P. 3 and P. 4. The body of Chathu had a perforating incised wound on the right side of the chest which on dissection was found to have pierced the pleura and right lung and cut the pulmonary vessels. P.W. 12 gave his opinion that the injury was ante-mortem and that death had occurred before the body was thrown into the tank. According to him, death was due to shock and haemorrhage resulting from the lung injury. On the person of Chirutha, P.W. 12 noted extensive bluish appearance of the skin on the chest and neck. Her eye-balls were seen protruding as also her tongue. Her jaws were clenched and her tongue bitten. The hyoid bone was found broken and crushed. According to P.W. 12, death was due to suffocation resulting from strangulation and throttling. He was also of the opinion that death had occurred before the body was immersed in water. The medical evidence has not been seriously challenged and we find no difficulty in agreeing with the finding of the learned Sessions Judge that Chathu died due to bleeding from the wounded lung and Chirutha died of suffocation due to strangulation and throttling. It may also be mentioned that though the identity of the dead bodies appears to have been challenged before the Sessions Court, it was conceded before us by the Learned Counsel for the appellant that the dead bodies have been correctly identified to be those of Chathu and Chirutha.

4. The next question for consideration is as to who caused the injuries that resulted in the death of Chathu and Chirutha. We would like to state even at the outset that the prosecution case suffers from certain vital and fundamental defects which afford justification for the defence contention that Chirutha and Chathu met with their tragic end in a manner different from that alleged by the prosecution. The witnesses to the actual occurrence are P. Ws. 1, 2, 3 and 5. P.W. 1 is the father of the deceased Chirutha, P.W. 3 her mother and P. Ws. 2 and 5 her brothers. P.W. 1 swears that at about midnight, he woke up on hearing some noise and when he

went to the northern verandah, he saw accused 2, 3, 5 and 6 holding Chathu by his arms and legs and accused 1 stabbing him with a dagger, while accused 4 was standing nearby. The witness cried out and Chirutha and others came out of the house. Chirutha was kicked on the abdomen by the second accused. She fell down on her back. The 3rd accused then brought a spade-handle from the nearby fuel-shed and placing it across her neck, accused 2 and 3 pressed on it while accused 5 and 6 held her legs. The dead bodies were then removed one by one by accused 2, 4, 6 and 7 on a plank brought by the third accused from the fuel-shed. The witness further stated that the first accused's father met him on the morning of 12-11-1958 and threatened him with dire consequences if he disclosed the matter to anyone. P. Ws. 2, 3 and 5, the other inmates of the house give identical versions. As already noted, all of the witnesses, except P.W. 5 a 12 year-old boy who is alleged to have been in hiding during the earlier part of the investigation, gave statements to the police which are completely at variance with their present versions. They had stated to the police that Chirutha and Chathu left the house of P.W. 1 on the morning of the 12th, Chirutha at about 10 A.M. saying that she was going to her husband's place and Chathu at about noon saying that he was going to visit his brother at Kottapally. Their stories were so convincing as to lead the police completely off the track for several days till, as alleged by them, they discovered P.W. 5 from his hiding place and got from him the true version. It is against this background that their evidence has to be appreciated. A large number of discrepancies and contradictions have been pointed out in their evidence. The learned Sessions Judge has faithfully listed them all but has tried to pass over them as immaterial. We are unable to agree to this view. The learned Sessions Judge seems to have considered each one of these defects as if it stood alone and unrelated to the general background of the case, the defence contentions, or the corresponding defects in the evidence of the other witnesses. To take an example, the learned Sessions Judge has mentioned the fact that while in the trial court P.W. 2 would swear that he witnessed the whole incident in the light of a bed-room lamp hanging from a nail placed high up on the pillar of the verandah, he stated in the committal court that the lamp was hanging from a nail on the inside wall of the verandah. The learned Sessions Judge has dismissed this discrepancy as of little consequence. No doubt when considered by itself the discrepancy seems nothing more than an inadvertent mistake. A closer analysis however, shows that the mistake is not insignificant. It is in evidence that the night was dark and moon-less and that but for the lighted lamp the witnesses would have been unable to see what was happening in the mid-night darkness. It is also seen that if the lamp was hung from the inside wall and not from the pillar as is now alleged, there would not have been enough light for the witnesses to have seen everything that happened in the verandah as well as the courtyard. Therefore, the mistake committed by P.W. 1 about the location of the lamp taken along with the fact that the self-same mistake has been committed by the other inmates of the house, in their testimony before the committal court, and the admission of P.W. 1 that the lamp produced in court,

(M.O. 1) does not belong to him, go a long way to probabalise the defence contention that either there was no lamp at all or that the witnesses are now trying to change the location of the lamp to a place more favourable to their claims to have seen the entire incident. The discrepant and varying versions given by the witnesses regarding the parts played by the several accused have been brushed aside lightly by the learned Judge. P.W. 1 who stated in the committal court that accused 2 and 3 held Chathu's hand and accused 5 and 6 held his legs when he was being stabbed, has come out before the Sessions Court with the version that accused 5 and 6 held Chathu's hands and accused 2 and 3 his legs. This discrepancy is dismissed by the lower court as a mere slip. The learned Judge is also of the view that such discrepancies are of no consequence so long as there is reliable evidence that the accused have partaken in the crime. Similarly P.W. 2 who in his statement before the committal court said that it was accused 3 who brought the spade-handle and pressed it across the neck of Chirutha and did not say that accused 2 had any part in it, added before the Sessions Court that accused 2 also took part in the pressing of the spade-handle. According to the learned Judge nothing turns on this since it is only an omission. To justify the omission on the part of the witness, the learned Judge went to the extent of using the C.D. Notes. It is an improper use of the C.D. Again P.W. 2 who in his C.D. Notes did not attribute any part to accused 5 and 6 in the death of Chirutha stated before the Sessions Court that they were holding the legs of Chirutha. The learned Judge is of the view that nothing turns on this omission so long as the witness has clearly stated before the Sessions Court that they did so P.W. 5 also did not mention in the committal court the part played by accused 2 in pressing the spade-handle on the neck of Chirutha and it was before the Sessions Court that he came out with the version that accused 2 joined accused 3 in pressing the handle. This is also according to the learned Judge only an insignificant omission. These variations and discrepancies and additions in the parts played by each accused assume much importance in this case where there is a decided attempt to create an artificial picture and attribute distinct acts to each of the accused. The varying versions given by P.W. 2 as to whether it was a mat or a cloth that was made use of by accused 2 to wipe off the blood on the verandah is also significant in this case where there is no intrinsic evidence to fix the scene of incident as the verandah of the house. Similarly the discrepancies in the evidence as to whether the spade-handle was brought from the western verandah of the house or from the fuel shed assumes importance when the theory about the use of the spade-handle itself looks quite improbable and artificial.

5. We shall now deal with the evidence of P. Ws. 6 and 8, two independent witnesses who have been examined to corroborate the evidence of the eye-witnesses. P.W. 6 is the nearest neighbour of P.W. 1. He says that on hearing a hue and cry in P.W. 1's house he ran up and saw Chathu and Chirutha lying dead on the verandah. All the seven accused were there as also the inmates of the house. He saw that the first accused had a knife in his hand. The witness went near the verandah but being

frightened at the sight, went back to his house. P.W. 8 Moideen is also a neighbour. He says that on hearing a woman's cry from P.W. 1's house he went there and saw accused 1, 2, 3, 5 and 6 on the northern verandah. First accused was having a knife and his hand was blood-stained. The witness got frightened and began trembling. He immediately went back to his house. The defence case is that these two witnesses had really seen nothing but have been forced to give evidence by the police who wanted some witnesses other than the relations of the deceased. This contention seems to be well-founded. It is seen that these witnesses did not disclose what they saw to anyone till they were questioned by the police some three weeks after the incident. They say that they were too frightened to speak about the incident. However it is not clear as to what put them in such mortal fear. They do not say that any of the accused or their people threatened them nor do they say that P.W. 1 or his people asked them to keep the whole thing a secret. It is not reasonable to expect these people who saw two persons murdered, to keep silent about it. They might not have thought it their duty to rush to the police and report the matter but their conduct in keeping the matter a dead secret and not divulging it even to their friends and relations and that for nearly three weeks is to say the least suspicious. In short none of these witnesses has impressed us as truthful.

6. Shri Kunhirama Menon, the Learned Counsel for the appellant Strenuously argued about the various circumstances that go against the prosecution case and mentioned certain fundamental defects which according to him "shatter the foundation of the prosecution case." The Learned Counsel spoke at some length on the significance of the differences in the versions given by the eye-witnesses at the time of inquest and before court. When questioned at the inquest P. Ws. 1, 2 and 3 stated that Chirutha and Chathu were in their house till late in the morning of the 12th when Chirutha went away to her husband's house and Chathu went to his brother at Kottapalli whereas in court these witnesses stated that they saw Chirutha and Chathu being murdered at about midnight on the 11th. They explain this amazing change of front by saying that they gave the earlier version to escape the wrath of accused 1's father who warned them not to reveal the truth. The learned Sessions Judge accepted their explanation on the ground that P.W. 1 being the tenant of Komath Tarwad would not have had the temerity to disobey the orders of accused 1's father who is the Kariasthan of the tarwad. We are unable to agree with the learned Sessions Judge on this point. These are not days when tenants consider themselves entirely at the mercy of the landlords beholden to cater to their every wish however depraved it may be and it is hard to believe that the father, mother and brothers of Chirutha having witnessed her brutal murder could have contained their sorrow and anger to such an extent as not to utter a word against the guilty persons. It is even more strange to see these relations giving out a false story in order to deflect the course of investigation. These witnesses do not say that either accused 1 or his father directed them to give out any particular version of the incident, nor do they say that they had consulted each other to fix up the story they

are to tell the police. Therefore the fact that these witnesses, who were not examined in the presence of each other, came out with identical statements at the inquest, indicates not so much a nebulous fear of the landlord as a definite plan not to be involved in the matter. The similarity of the statements given at the inquest can also mean that these witnesses were only repeating the truth. The learned Sessions Judge justifies the strange conduct of the blood-relations of Chirutha in not revealing the true case about her murder on the ground that they are poor, uneducated rustics who would not have resisted or disobeyed the commands of the accused. On the other hand, for that very reason one would have expected them to blurt out the truth and not keep the secret so effectively that the police could get no scent of it at all until three weeks after the murder. The ingenious explanation given by them for the disappearance of Chathu and Chirutha is against the theory that they are uneducated rustics who could have been easily threatened or fooled by others. According to the police they got scent of the real culprits only some three weeks after the inquest when they questioned P.W. 5, the 12 year-old son of P.W. 1, who was kept in hiding in the house of a relation. However, some of the admissions made by P. Ws. 1 and 5 question the truth of this story. P.W. 1 admitted in the Magistrate's Court that on the Thursday following the incident, that is just two days after the incident he reported to the jenmi of the tarwad the part played by the accused in the murder of Chathu and Chirutha. That significant admission would indicate that the case against the accused in all its details was published in the locality long before the time the police say they heard about it from P.W. 5. The inadvertent admission made by P.W. 5 in the committal court that he was staying in the house itself even after the incident would expose the hollowness of the allegation that he was kept in hiding at the neighbouring Chathat house and could not be questioned till 28-11-1958. Another admission relating to the same point made by the witness in the committal court was that during his stay at Chathat house his teacher (Kurukkal) went there to see him. This indicates that his hiding place was known to others though the police say it took them three weeks to spot him. In his argument to support his acceptance of the evidence of P. Ws. 1, 2 and 3, the learned Sessions Judge holds up the decision in *State v. K.M. Mathew alias Sunny*, reported in 1959 KLT 709, as if it were a shield for the protection of prevaricating witnesses. In that case two witnesses, servants in the accused's household gave in court a version of the incident different from that they gave to the police at first. The court believed their evidence on the ground that they gave an acceptable explanation for the difference in their versions, namely, the pressure put on them by the accused's father to give out a false story to the police. However that case does not lay down any general rule that a court can safely believe witnesses who give false statements to the police first and then swear to entirely different versions in court. The acceptability of their evidence depends upon the bona fides of the explanation for their varying statements. The question whether such an explanation is genuine, is of course a question of fact and would depend entirely on the circumstances of each case. We have already stated our reasons for refusing to

believe the explanation put forward by P. Ws. 1, 2 and 3 for their false statements to the police. Moreover in this case P. Ws. 1, 2 and 3 are not mere witnesses who have no personal interest in case, but are the nearest relations of the deceased. When such persons who are virtually the complainants, furnish false information to the police so as to deflect the course of investigation, their conduct looks extremely suspicious.

7. The learned Sessions Judge seems to have been very favourably impressed by the medical evidence which he describes as completely consistent with the prosecution case. However the corroboration offered by the medical evidence loses much of its significance when it is seen that the entire prosecution evidence was got at long after the medical opinion as to the cause of death was made known to the police. In fact we feel that there is some justification for the defence contention that the prosecution version of the murder of Chirutha was put into the mouths of the eye-witnesses solely for the purpose of explaining the medical evidence on the point. The prosecution case is that when Chirutha fell down on being kicked by accused 2, accused 3 went into the nearby fuel-shed and brought a spade-handle. This was placed across the neck and accused 2 and 3 pressed it with their feet at either end, while accused 3 and 6 held Chirutha's feet and accused 1 and 4 stood by. It is not clear why such an elaborate procedure was necessary to do away with Chirutha. If the accused wanted to kill her, accused 1 who was standing ready with a dagger in his hand could easily have stabbed her, or if accused 3 was particular to kill her himself, he could have taken the dagger from accused 1 and stabbed Chirutha. Accused 3 could equally well have killed Chirutha by throttling her with his hands or strangling her with a piece of cloth. Instead of acting in any such obvious manner, accused 3 goes to the fuel shed and comes back with M.O. 3, spade-handle precisely the kind of instrument which if placed across the neck and pressed down with great pressure could result in the crushing of the hyoid bone. This elaborate and improbable version of the murder of Chirutha seems to be nothing more than an awkward attempt to make the prosecution case conform to the medical evidence. The learned Sessions Judge has also relied upon the existence of certain injuries on the dorsal aspect of the left index finger, thumb and middle finger of accused 1 as a circumstance lending assurance to the accused's guilt. The suggestion of the prosecution is that these injuries were caused by accused 1 being bitten by Chathu while accused 1 was holding the throat of Chathu with the left hand and stabbing him with the right. There is no such evidence in the case and it is clear that it was not possible for Chathu to cause those injuries unless it be that accused 1 had actually inserted his hand into Chathu's mouth. The 1st accused has stated that the injuries were caused by coming into contact with broken pieces of a soda bottle when he fell down and that explanation does not sound too far-fetched.

8. Apart from the testimony of the eye-witnesses, there is no other evidence to fix the scene of incident. According to the prosecution, Chathu was stabbed while lying on the verandah. However the earth taken from there and sent for chemical analysis

showed no signs of blood. Again according to the prosecution, Chathu's blood-stained mat and the piece of cloth used by accused 2 to wipe the blood off the verandah were burnt by accused 2 in the courtyard. Though the prosecution case is that the remnants of these articles were recovered from a heap of ashes in the compound by the police under Ext. P. 14 seizure list, no such objects have been marked in evidence. In short there is no intrinsic evidence at all to fix the scene of incident as the verandah of the house of P.W. 1.

9. The prosecution case regarding the motive for the crime is also not free from defects. According to the prosecution when Chathu became intimate with Chirutha, he resented the continued visits of accused 1, 2, and 5 to the house to see Chirutha. He tried to stop these visits. The accused therefore decided to do away with Chathu and thus remove the only obstacle to the continuance of their intimacy with Chirutha. If this be the motive then it is difficult to understand why the accused thought of murdering Chirutha also for Chirutha's death defeats the very purpose for which the accused undertook the highly dangerous course of murder. It cannot be said that in the heat of the moment they forgot the purpose of their crime because the technique used in murdering Chirutha was as deliberate as it was elaborate. Again accused 2 and 3, son and father, accused 5 and 6 direct brothers, accused 4 and 7 father-in-law and son-in-law are all alleged to have joined together with the common object of murdering Chathu so that some of them would get unrestrained freedom to carry on illicit intimacy with a woman of easy virtue. This unlikely combination of persons and the motive, present one of the biggest obstacles in accepting the prosecution story as true. Though not bound to do so, the learned advocate for the defence pointed out a number of possible ways in which Chathu and Chirutha could have met with death. It is possible that in their attempt to elope, the lovers were attacked and killed by Chirutha's husband Onakkan. It is also possible that they may have been killed by some robbers, for the ornaments worn by both of them were found missing or as suggested by the 1st accused, Chirutha's people might have had something to do with her death and that of her paramour. Whatever be the merits and demerits of these theories, the fact remains that the prosecution has not proved its case beyond doubt. It is unfortunate that the cruel murderer of two young persons should go unpunished. But we have already pointed out that the evidence adduced by the prosecution is far from satisfactory and convincing. It will be extremely unsafe to rely on such evidence and enter a conviction against the accused. Hence the conviction has necessarily to be set aside. In the result the order of conviction and sentence passed against all the appellants are set aside and they are acquitted. They will be set at liberty forthwith.