

A THE STATE OF TAMIL NADU REP. BY SECRETARY OF
GOVERNMENT

v.

SUBAIR @ MOHAMED SUBAIR AND ORS.
(Criminal Appeal No. 162 of 2002)

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DECEMBER 18, 2008

[DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM
SHARMA, JJ.]

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Penal Code, 1860 – s. 302 – Murder – Two eye-witnesses – Two dying declarations: one made before Judicial Magistrate and the other made before constable – In the dying declaration made before the Magistrate names of accused not mentioned while the same mentioned in the other dying declaration – FIR registered on the basis of dying declaration made before the constable – Conviction by trial court – On appeal, held: Acquittal justified – Evidence of eye-witnesses doubtful in view of their conduct – Dying declaration made before Judicial Magistrate deserves acceptance.

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Appellants-accused were charged for having caused death of one person. According to prosecution the accused assaulted the deceased. PWs 1 and 2 were the eye-witnesses to the incident. The eye-witnesses left the deceased in injured condition. PW 3-an auto driver, took him to the hospital. The deceased made two dying declarations; one before Judicial Magistrate (PW 12) and the other before a constable (PW-22). In the dying declaration made to the Magistrate, he did not disclose the names of the accused, while in the dying declaration made to the constable, he specifically mentioned the names of the accused. FIR was lodged on the basis of the dying declaration made to the constable. Case was registered u/s. 307 IPC. On the death of deceased, the case was altered to one u/s. 302 IPC. Trial Court held the accused guilty of offence u/s. 302 IPC. High Court acquitted them. Hence the present appeal.

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Dismissing the appeal, the Court

HELD: 1. The analysis made by the High Court to direct acquittal cannot be faulted. The conduct of PWs 1 and 2 is un-natural and unbelievable and their presence at the time of occurrence is doubtful and the testimonies of PWs 1 and 2 cannot be accepted. PWs 1 and 2 stated that they had left the injured in lurch and had disappeared from the scene making deceased to cringe an auto driver to take him to hospital. Further, both PWs 1 and 2 have stated that they did not inform about the occurrence to anybody till they were asked by the police in the mid-night of the date of occurrence. [Paras 4 and 7] [1056-H; 1057-A-B; 1058-D]

2.1. The deceased did not state in his dying declaration before the Judicial Magistrate that accused Nos. 1 to 4 were his assailants in the occurrence. Ex.P-12 is the dying declaration of deceased recorded by, Judicial Magistrate (PW-11). According to dying declaration of deceased, the Magistrate went and saw deceased in the Trauma Ward of the Hospital and she put some questions to him and was satisfied that the injured was in a fit condition and she recorded Ex.P-12 statement given by deceased in the presence of PW-12 and she obtained the left hand thumb impression of him in it. PW-12 has also given a certificate in Ex.P-12 that the patient was fully conscious and was able to speak throughout the recording of the statement. From the above, it is clear that the Judicial Magistrate after observing formalities had recorded the dying declaration of deceased in the presence of duty doctor. In that Ex.P-12 dying declaration, deceased had stated that the names of the assailants were not known. According to the prosecution case, deceased knew all the accused very well since he had an encounter with all of them a few days before the occurrence as is evident from the testimony of PW-10. [Para 5] [1057-C-F]

2.2. The prosecution relied on Ex.P-21 statement given by deceased to PW-22 Head Constable in the

A Coimbatore Medical College Hospital as his dying
declaration. According to PW-22, he recorded Ex.P-21
statement given by the deceased and the doctor (PW-25)
had given a certificate in it. PW-25 was not the doctor on
duty in the ward at the time of recording Ex.P-21
B statement and he himself in the cross-examination has
stated that usually the doctor incharge of the ward alone
would certify in the dying declaration. Ex.P-21 statement
of deceased runs to two full pages and the names of the
C accused and the overt acts on their part were mentioned
in detail and the signature of deceased is also found in
it. Ex.P-21 was recorded at 9.30 p.m. by the Head
D constable and Ex.P-12 was recorded at 10.15 p.m. by the
Judicial Magistrate. There is vast difference in both the
statements with regard to the contents and it is pertinent
E to note that Ex.P-22 first information report based on
Ex.P-21 complaint was received in the court at 6.40 a.m.
on 27.8.1989 and Ex.P-21 statement as such had reached
the court only on 28.8.1989. The actual complaint was not
sent along with the first information report and it leads
to a serious suspicion. In the circumstances, the dying
declaration recorded by Judicial Magistrate (PW-11)
deserves acceptance and in it deceased did not implicate
accused Nos. 1 to 4 as his assailants. [Para 6] [1058-B-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
NO. 162 of 2002.

F From the Judgment & Order dated 30.4.2001 of the High
Court of Judicature at Madras in Criminal Appeal No. 542 of
1992.

Y. Kanangaraj, S. Thananjayan for the Appellant.

Shakil Ahmed for the Respondents.

The Judgment of the Court was delivered by

G **DR. ARIJIT PASAYAT, J.1.** Challenge in this appeal is to
the judgment of a Division Bench of the Madras High Court
directing acquittal of the respondents. Originally five persons
faced trial. The trial Court held the respondents guilty of offence
punishable under Section 302 of the Indian Penal Code, 1860
H (in short the 'IPC'). It however held that the charge levelled

against all the five accused persons under Section 120-B, IPC was not established. It also held that the charge against 5th accused under Section 302 read with Section 120B, IPC was not established. The four accused persons preferred appeal before the High court which by the impugned judgment directed their acquittal.

2. Prosecution version in a nutshell is as follows:

Veeraganesh (hereinafter referred to as 'deceased') and his friend Ganesh (PW-1) @ Ganeshamoorthy and M. Ganesh (PW-2) were having involvement in Hindu Munnani said to be a branch of R.S.S. The three were friends. On 26.8.1989, Ganeshamoorthy (PW-1), M. Ganesh (PW-2) met Veeraganesh at Rangakonar Street in Kattoor and spoke to him for about ten minutes. Babu (PW-4) the brother of Veeraganesh was also present at the spot when PW-1 and PW-2 spoke to Veeraganesh at the said place. After a brief discussion among themselves for a while, Veeraganesh went to Ganapathy along with PW-1 and PW-2 to meet his friend. As his friend was not available at Ganapathy, they returned back to RSS office in Ram Nagar and the three discussed among themselves for about ten minutes. Then all the three came to the over-bridge via Kattoor. At about 7:30 in the night, the three were going from the round about of the over-bridge towards the Post office road. On hearing somebody asking them to stop, they looked back. At that time, A-1 to A-4 who were armed with weapons came towards Veeraganesh and PW-1 and PW-2. A-1, A-2 and A-3 were armed with knives and A-4 armed with Aruval (sickle). On approaching towards Veeraganesh, they asked him to stop, and stated that he was caught now and can not escape and was lost once for all. Saying so, A-1 stabbed Veeraganesh on his abdomen and chest. A-2 who was armed with a knife stabbed Veeraganesh on the left side of his head, left shoulder, left thigh and on his leg. A-3 armed with knife assaulted Veeraganesh on the back of his chest and on the side of his chest. A-4 armed with aruval assaulted Veeraganesh on his head and face. PW-1 and PW-2 pleaded to leave him. The injured Veeraganesh bled profusely and fell into a pool of blood. A sodium vapour light was glowing at the place of occurrence

A at the said over-bridge. PW-19, the line man of Electricity Board, Coimbatore Corporation stated that on the day of occurrence he switched on the lights in the over bridge area at 6 PM in the evening and switched them off at 6 AM on the next morning. PW-1 and PW-2 who pleaded to the accused to leave
B Veeraganesh fled when they were threatened by the accused rushing towards them with weapons saying that they would also be done away with. When they returned to the place after some time, they noticed large quantity of blood. They learnt from the conversation of two or three persons at the spot that the injured had been removed to Hospital. The weapon of offence used
C by A-4 at the time of occurrence is MO-1. The knives used by A-1 to A-3 as weapons of offence are MOs:2 to 4.

PW-3 Selvaraj drove the Auto TAR-6474 from Railway function, Coimbatore to flower market via the over bridge. At that time a person was lying with bleeding wounds at the round
D about of the over bridge. He asked PW-3 to take him to Hospital. PW-3 accordingly took him to Hospital and admitted him.

At about 8.15 PM, the deceased was brought to Emergency Ward by Selvaraj (PW-3), the Auto driver. Dr.
E Radhakrishnan (PW-13) was on duty at that time in emergency ward. At that time, the said Veeraganesh told PW-13 that on that night, at about 7.30 p.m., at the over-bridge near the Head Post office, Coimbatore, 4 known persons whose identity was well known to him, assaulted him with knives and aruvals. When
F PW-13 examined Veeraganesh, he noticed various injuries on his body. PW-13 gave Tetanus injection to Veeraganesh who had sustained the injuries and admitted him as inpatient in the Trauma ward. PW-13 gave his opinion in which he had stated that the injuries caused to Veeraganesh could have been caused by the weapons which are MO-1 and MO-2 to 4 and
G has also issued a copy of the Accident Register in this regard marked exhibit P-3. He sent the information furnished in exhibit P-14 to the out-post Police station located in the premises of the Hospital.

H While PW-20 Vivekanandan was on duty at the Out Post

Police Station of Coimbatore Medical College Hospital on 26.08.1989, received the copy of the intimation regarding the admission of Veeraganesh with stab injuries and at 7.45 PM, he informed Coimbatore B-I Bazaar Police station over telephone. Subsequently, the information was entered in the OP Police Station records, and the Head Constable subsequently came and received the intimation.

At about 8.15 PM while Raja Shanmugam (PW-22), the Head Constable was on duty in Coimbatore B-1 Bazaar Police Station, on the information given by PW-20, he visited the OP Police Station of the Hospital and received the intimation. He visited the Trauma ward and recorded the statement of the said Veeraganesh and read over the same to him and on his acceptance that it was recorded correct, he got his signature in the statement. The said statement is exhibit P-21. Veeraganesh was in a condition to give the statement at that time. Dr. Jayaprakash (PW-25) who was present with PW-22 at that time gave a certificate to the effect that Veeraganesh was conscious and well oriented at the time of giving the above said statement. The said certificate (Exhibit P-30) is incorporated in Exhibit P-21. PW-22 returned to Police Station at 9.30 PM and registered the case in Cr.No.1027/1989 u/s 307 IPC and sent the FIR along with the complaint to the Chief Judicial Magistrate. He sent the copies of the FIR to the concerned Superior officers. The FIR prepared by him is PW-22.

Chandrasekar (PW-27) was the inspector of Police of B-1 Bazaar PS. He came to the Police station at 21.30 hrs before setting out on night rounds. He came to know of the registration of this case by PW-22. As law and order problem existed at that time within the area under his control, he had to be present in that area in his station limits in view of the same. While leaving the Police Station, he gave instructions to bring the FIR to the SOC and accordingly after attending the law and order situation in his limits, he came to the spot of occurrence in the night at 10.30 PM. The place of occurrence was on the over bridge at Avinashi Road, Head Post office road junction. He observed the scene of occurrence in the presence of PW-5

A Krishnan and Anand and prepared the observation mahazar Exhibit P-1. The sketch of the scene is Exhibit P-31. PW-27 seized blood stained earth from the spot of occurrence, the control earth from the spot of occurrence (unstained tar portion of the road), the torn four yard dhoti, currency notes, Hawaii
B chappal and other materials (MOs 5 to 15 mentioned therein) under the cover of mahazar, in the presence of witnesses. After making arrangements to bring a photographer to the spot of occurrence, he visited the Hospital, examined and recorded the statement of Veeraganesh, seized the blood stained shirt, brief
C worn at the time by Veeraganesh, Exhibit P-16, Exhibit P-17 in the presence of PW-5 and in the presence of Anand under the cover of mahazar. As instructed by PW-27, Johan (PW-26), the photographer, visited the spot of occurrence on 26.08.1989 at 12 p.m and took photographs, which are MOs 19 to 26. The negatives of the said photographs are MOs 27 to 34.

D Smt.S. Kalavathi who was the Judicial Magistrate on 26.08.1989 received the requisition for recording the dying declaration (PW-11) at 10 PM, visited the Trauma ward in the Hospital and after knowing the details regarding the concerned person, she examined him. After confirming that he was
E conscious and well oriented, she recorded his statement. She took the left thumb impression of the injured person on the dying declaration. The said statement is Exhibit P-12. Doctor Balasubramaniam (PW-12), gave a certificate to the effect that the injured was conscious at the time of giving the dying declaration.

F On 29.08.89, as per the information received by him, PW-27 arrested the accused A-1 Zubair, A-2 Mohammed Khan, A-3 Rafi at 12.00 a.m. at Podanur-Pollachi Road Junction at Aathupalam. When he enquired them separately, they gave separate statements, which were recorded. On the basis of
G these statements recoveries were made.

On 29.08.1989 at 7.30 P.M. while Dr. Govindaraj (PW-18) was on duty in emergency ward, the accused Mohammed Zubair along with the medical memo given by the inspector of Police, B-I Bazaar Police station, came for treatment. He was
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having following injuries on his person:

1. A skin deep cut injury on his left index finger, it was of 2 cuts length on the outer aspect of the finger. It was in a half healed state.
2. A small cut injury on his left thumb.
3. A contusion beneath his left ear.

He was treated as out patient. In this regard a copy of the exhibit P-19 was issued. On the same day PW-18 examined A-3 Rafi and found the following injuries on his person:-

1. A small cut injury on his right index finger.
2. A cut injury of about 1cm length skin deep on his left thumb.

He was also treated as out patient and a copy of the AR register, Exhibit P-20 was issued.

Dr. Perumalrajan (PW-14) gave treatment to Veeraganesh on 27.08.89. He treated him to stabilise his general condition and blood pressure to prepare him for the surgical operation. He performed the surgery on him at 10:45 PM.

Dr. Baskaran (PW-16) examined Veeraganesh on the night of 31.08.89 at 9.30 PM and found his condition critical. Despite the intensive treatment given Veeraganesh died at 11.25 PM on that night. In this regard he sent an intimation Exhibit P-15. PW-27, the Inspector of Police who received the intimation altered the section of law and submitted the express report, altering the section into 302 IPC, Exhibit P-32, to the Judicial Magistrate. Subsequently, he held inquest on the dead body of Veeraganesh in the presence of witnesses at the Hospital and prepared the inquest report, Exhibit P-33. He sent the requisition for post mortem examination of the dead body, Exhibit P-17 through PW-21, the Police constable John Viswanathan. On receipt of the requisition PW-17 Dr. Diwakaran, the Additional Professor of Coimbatore Medical College Hospital, commenced the post mortem examination at 8 AM on 01.09.89. During post mortem examination he noticed abrasions with reddish brown scab, over the right fore arm, over the back of the left shoulder, over the outer aspect of the left

A arm, over the front of right knee and above the right big toe. Apart from them, he noticed incised sutured wounds of muscle deep over the center of the forehead, over the root of the nose, over the bridge of the nose, below the lower lips, over the right side of the chin, over the right cheek, over the lower portion of the right ear, over the right side of the angle of the jaw, over the right side of the outer aspect of the neck, behind the right ear on the scalp, over the parieto-occipital area, over the mid-occipital area, over the root of the neck and left side of the front chest, over the right side aspect of the chest, over the right side outer aspect of the chest. These injuries were mentioned from 6 to 22. He also gave the measurements of the wounds. Further, he mentioned the surgical wounds from 23 to 44. He also gave the locations of the wounds and their measurements. He gave post mortem certificate with his opinion, Exhibit P-28 stating that the deceased would have died of septic complication of stab injuries over the abdomen. He further stated that the injuries 41 to 44 were sufficient to cause the death of an ordinary man. These injuries 41 to 44 were found on the small intestines.

PW-27 submitted a requisition, Exhibit P-23 sending the properties seized in this case for chemical analysis. Rajamani (PW-23), the Head Clerk deposed about the details regarding the details of the forwarding note sent to the Forensic science Laboratory, Exhibit P-24 and regarding the reports received from the said lab, Exhibit P-25 and Exhibit P-26.

Some of the witnesses spoke regarding the motive for the murder of Veeraganesh and the criminal conspiracy hatched by the accused to murder him. Durai (PW-7) stated to have witnessed all the accused on the night of 13.7.1989 at Oppanakara Street and also witnessed A-5 having a notice in his hand and accused Hyder Ali having a tin box with glue in his hand. PW-7 also witnessed them pasting the notice on a petty shop located opposite to a bank. The notice contained the wordings, "Islamic Fatwa. We would murder the RSS Mookambigai Mani, Sampath, Paramasivam who incite religious ill-feelings, within a week" which also contained the word "jihad" in it. PW-7 also spoke about having witnessed the four accused coming out of a mosque discussing among

themselves and later, going to the shop of one Bilal Hajiyar and continuing the discussion in his shop about four days prior to the occurrence. In the deposition given by Devan (PW-8), has spoken about having witnessed the accused two or three times, at Bilal Hardwares shop and discussing among themselves and also about having witnessed the accused A-5 threatening Veeraganesh at Race course, in front of cosmopolitan club, saying that "my anger would subside only if you are murdered", Prior to a week before the occurrence. PW-8 further spoke about having witnessed the four, five accused secretly discussing among themselves in front of big mosque and their subsequent going in to the Bilal Hardware shop.

In the evidence given by Sankar (PW-10), has stated that in about the first week of August 1989, on a particular day, when he was going with Veeraganesh near the over-bridge, the said five accused stared at him and A-5 told Veeraganesh, "we are waiting for you only, wait" and further stated that, when PW-10 hurriedly took Veeraganesh in an Auto and fled the scene, A-5 told Veeraganesh, "you escaped today, how many days will you have some one with you".

Sekar (PW-24), the Inspector of Police has given evidence with regard to the cases registered against Veeraganesh and the accused. PW-24 has deposed about the Coimbatore B-1 Bazaar PS Cr. No.440/1998 u/s 141, 302, 149 IPC registered against Veeraganesh and 22 others, B-1 Bazaar PS Cr.No.420/1998 u/s 141, 148, 341, 302 r/w 149 IPC registered against Ramnarayan, Veeraganesh, Mookambikai Mani, Paramasivam and Sampath; B-1 Bazaar PS Cr.No.3Z55/1998 registered against Basha and 10 others belonging to Muslim community. The accused were muslim fundamentalists and the deceased Veeraganesh and others belonged to the organisation Hindu Munnani and that a number of cases were registered against them. Saraswathy (PW-9) is the mother of Veeraganesh. She had spoken that her son was the District organiser in Hindu Munnani and that he used to speak in the Public Platforms and that the muslims had an animosity against him as a result of his speeches made in the public meetings.

Murugasamy (PW-5), the Inspector of Police, CB-CID, took

A examination in this case on 2.9.1989. After examination of witnesses as per the information received by him, he arrested the accused Hyder Ali at Ambrampalayam on 7.9.1989 at 6 AM and subsequently sent him to Judicial custody.

B Mukkambu (PW-29), the Inspector of Police, CB-CID., arrested A-5 at Bilal Hardware in N.H, Road, Coimbatore on 23.09.1989. As per the statements of witnesses Devan, Durai and Sankar, he arrested A-5 and remanded him. He completed the investigation in this case and on 20.8.1990 he submitted the charge sheet against the accused u/s 120(B), 302 and 120(B) read with Section 302 IPC against the accused.

C After taking the evidences of the prosecution witnesses, as per the Section 313 of Code of Criminal Procedure, 1973 (in short the 'Code') the accused were questioned with regard to the evidence led against them by the prosecution. A-1 stated that it was a false case foisted against him and that was not
D concerned in that case. A-2 submitted that the case was a false case and that he was the first younger brother of Basha. A-3 stated that the case registered against him was a false case and his father's name was Hanifa and that Shajahan was not his father's name. A-4 stated that he was not at all
E concerned in the case. A-5 stated that it was a false case intentionally foisted against them. No defence witness was examined on behalf of the accused.

On the basis of complaint filed, first information report was lodged and investigation was undertaken. On completion of
F investigation, charge sheet was filed. Since the accused persons pleaded innocence, trial was held. Twenty nine witnesses were examined to further the prosecution version. The trial Court found the accused guilty. In appeal, the High Court found the evidence of PWs 1 and 2 as well as the so called
G dying declaration to be not credible and cogent and directed acquittal.

3. It was submitted that the reasons given by the High Court to direct acquittal are without any basis. There is no appearance for the respondents.

H 4. It is seen that PWs 1 and 2 stated that they had left the

injured in lurch and had disappeared from the scene making deceased to cringe an auto driver to take him to hospital. Would any close friend of a person involved in the movement allow such a thing to happen to him is the question looming large and there is no explanation for it. Further, it is curious to note that both PWs 1 and 2 have stated that they did not inform about the occurrence to anybody till they were asked by the police in the mid night of the date of occurrence. The conduct of PWs 1 and 2 is un-natural and unbelievable and their presence at the time of occurrence is doubtful and the testimonies of PWs 1 and 2 cannot be accepted.

5. Veera Ganesan did not state in his dying declaration before the Judicial Magistrate that accused Nos. 1 to 4 were his assailants in the occurrence. Ex.P-12 is the dying declaration of deceased recorded by, Judicial Magistrate Kalavathi (PW-11) at Coimbatore Medical College Hospital. According to dying declaration of deceased from the hospital at 10.00 p.m. on 26.8.1989 she went and saw deceased in the Trauma Ward and she put some questions to him and was satisfied that the injured was in a fit condition and she recorded Ex.P-12 statement given by deceased in the presence of PW-12 and she obtained the left hand thumb impression of him in it. PW-12 has also given a certificate in Ex.P-12 that the patient was fully conscious and was able to speak throughout the recording of the statement. From the above, it is clear that the Judicial Magistrate after observing formalities had recorded the dying declaration of deceased in the presence of duty doctor. In that Ex.P-12 dying declaration. Deceased had stated as follows:

"Today night four persons chased and stabbed me near the fly-over. Their names are not known. One month before, they exhibited posters that we would all be killed. It is not known who are they."

(Underlined for emphasis)

6. Deceased in the above statement has stated that four persons attackd him and he did not know their names. According to the prosecution case, deceased knew all the

A accused very well since he had an encounter with all of them a few days before the occurrence as is evident from the testimony of PW-10. In such circumstance, if really accused Nos. 1 to 4 had attacked deceased, definitely he would have told the names or identification of the assailants. The prosecution relied on Ex.P-21 statement given by deceased to PW-22 Head Constable in the Coimbatore Medical College Hospital as his dying declaration. According to PW-22 Head Constable, he received intimation about the admission of deceased in Government Hospital at 8.15 p.m. and he went to Trauma Ward in the hospital and enquiry deceased at 9.30 p.m. and recorded Ex.P-21 statement given by him and Dr. Jayaprakash (PW-25) had given a certificate in it. PW-25 was not the doctor on duty in Trauma ward at the time of recording Ex.P-21 statement and he himself in the cross examination has stated that usually the doctor incharge of the ward alone would certify in the dying declaration. Ex.P-21 statement of deceased runs to two full pages and the names of the accused and the overt acts on their part were mentioned in detail and the signature of deceased is also found in it. Ex.P-21 was recorded at 9.30 p.m. by the Head constable and Ex.P-12 was recorded at 10.15 p.m. by the Judicial Magistrate. There is vast difference in both the statements with regard to the contents and it is pertinent to note that Ex.P-22 first information report based on Ex.P-21 complaint was received in the court at 6.40 a.m. on 27.8.1989 and Ex.P-21 statement as such had reached the court only on 28.8.1989. The actual complaint was not sent along with the first information report and it leads to a serious suspicion as noted by the High Court. In the circumstances, the dying declaration recorded by Judicial Magistrate (PW-11) deserves acceptance and in it deceased did not implicate accused Nos. 1 to 4 as his assailants.

7. The High Court highlighted the above said aspects to direct acquittal. We find that the analysis made by the High Court to direct acquittal cannot be faulted. The appeal is without merit and dismissed accordingly.

K.K.T.

Appeal dismissed.