A VARKEY JOSEPH

v.

STATE OF KERALA, REPRESENTED BY

THE CIRCLE INSPECTOR OF POLICE

B PUTHENCRUZM, KERALA

APRIL 27, 1993

[K. RAMASWAMY AND R.M. SAHAI, JJ.]

C *Constitution of India, 1950:*

Article 134—Appeal—Concurrent findings of trial Court and High Court—Supreme Court's interference—Whether trial unfair illegal—Prosecution case whether proved—Appreciation of evidence by Supreme Court—Leading question—What—When to ask—Court's duty.

D *Penal Code, 1860:*

Section 302—Murder—Conviction—Appreciation of evidence by Supreme Court in appeal—Leading question— Prosedure—Procecution case whether proved.

Evidence Act, 1872:

E *Sections 142. 145. 154—Leading question—What—When to ask—Intention—Court's duty.*

The prosecution case was that the deceased, a discharged military officer managed to have complete hold of the properties of his father and excluded his six brothers and four sisters from enjoyment of the properties. F **The appellant, the youngest brother of the deceased, resented his conduct. Later on there was reconciliation between the appellant and the deceased. As the appellant nursing grivance against the deceased for his obstinance to exclude him of right of residence in their family property, on 5.8.1988 he came to their family house and bolting the door inside, killed the deceased inflicting on the body of the deceased 17 incised injuries and one stab injury.**

G **The appellant was charged under section 302, IPC. Before the trial Court, the prosecution, relying on the circumstances, namely, (1) motive of the accused, (2) preparation, (3) presence of accused in the neighbourhood and in the locality immediately before the occurrence, (4) presence of the accused in the house on the date of occurrence, (5) his presence immediately after the occurrence, (6) recoveries pursuant to accused's statement under** H **section 27, and (7) injury found on the finger of the accused, claimed to have**

established that the appllant committed the offence of murder. A

The trial Court found the appellant guilty and convicted him under section 302, IPC and sentenced him to undergo rigorous imprisonment for life for causing the death of his brother. High Court confirmed the conviction on appeal. Hence this appeal by special leave.

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Allowing the appeal, this Court,

HELD: 1.1. Normally when the Trial Court and the High Court concurrently found that the accused has committed the crime, this Court would refrain to appreciate the evidence. On going through the judgments of the Sessions Court and the High Court this Court entertained doubt regarding the conclusiveness of the appellants' complicence. Therefore, this Court directed the appellant to produce the evidence. Accordingly the typed evidence has been placed on record. From the evidence this Court is satisfied that the Courts below did not subject the evidence to critical analysis on the touchstone of human conduct and probabilities and overlooked material admissions and obvious unfair trial and incurable irregularities leading to grave prejudice to the appellant and miscarriage of justice. (395-A-B)

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1.2. From the evidence it is clear that prosecution brought on record the circumstantial evidence from obliging witnesses to the police. Appellant was said to have been seen before or after the occurrence by several tea shop owners and the labourers in the tea stall etc. To corroborate the evidence of tea stall owners, labourers were examined that they had seen the appellant with blood stained clothes and same were recovered pursuant to the statement under s. 27 of Evidence Act. It is preposterous to place absolute reliance on such suspect evidence. It is curious that the appellant claimed to have gone to each tea stall for tea just to enable them to note his movements. The normal human conduct would be to avoid any-body noticing him either before or after committing the offence. It is highly unbelievable that he had used two types of weapons one stabbing and another cutting weapon. (398-E-F)

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1.3. The criminal trial was unfair to the appellant and the procedure adopted in the trial is obviously illegal and unconstitutional. The Sessions Court in fairness recorded the evidence in the form of questions put by the prosecutor and defence counsel and answers given by each witness. As seen the material part of the prosecution case to connect the appellant with the crime is from the aforestated witnesses. The Sessions Court permitted even

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A without objection by the defence to put leading questions in the chief examination itself suggesting all the answers which the prosecutor intended to get from the witnesses to conect the appellant with the crime. (398-G-H)

1.4. Leading question to be one which indicates to the witnesses the real or supposed fact which the prosecutor (plaintiff) expects and desires to have B confirmed by the answer. Leading question may be used to prepare him to give the answers to the questions about to be put to him for the purpose of identification or to lead him to the main evidence or fact in dispute. The attention of the witness cannot be directed in chief examination to the subject of the enquiry/trial. The court may permit leading question to draw the C attention of the witness which cannot otherwise be called to the matter under enquiry, trial or investigation. The discretion of the court must only be controlled towards that end but a question which suggest to the witness, the answer the prosecutor expects must not be allowed unless the witness, with the permission of the court, is declared hostile and cross-examination is directed thereafter in that behalf. therefore, as soon as the witness has been D conducted to the material portion of his examination, it is generally the duty of the prosecutor to ask the witness to state the facts or to give his own account of the matter making him to speak as to what he had seen. The prosecutor will not be allowed to frame his questions in such a manner that the witness by answering merely "yes" or "no" will give the evidence which the prosecutor wishes to elicit. The witness must account for what he himself had seen. (399-E F-H, 400-A)

1.5. Sections 145 and 154 of the Evidence Act are intended to provide for cases to contradict the previous statement of the witnesses called by the prosecution. Sections 143 and 154 provide the right to cross-examination of F the witnesses by the adverse party even by leading questions to contradict answers given by the witnesses or to test the veracity or to drag the truth of the statement made by him. Therein the adverse party is entitled to put leading questions but section 142 does not give such power to the prosecutor to put leading questions on the material part of the evidence which the witnesses intends to speak against the accused and the prosecutor shall not be G allowed to frame questions in such a manner which the witness by answering merely "yes" or "no", but he shall be directed to give evidence which he witnessed. The question shall not be put to enable the witness to give evidence which the prosecutor wishes to elicit from the witness nor the prosecutor shall put into witness's mouth the words which he hoped that the witness will utter nor in any other way suggest to him the answer which it is desired that the H witness would give. The counsel must leave the witness to tell unvarnished tale

of his own account. (400-B-C) A

1-6. Leading questions were put to the witnesses to elicit on material part of the prosecution case in the Chief examination itself without treating any of the witness hostile. It shows the fact that the prosecutor led the witnesses what he intended that they should say the material part of the prosecution case to prove against the appellant which is illegal and obviously unfair to the appellant offending his right to fair trial enshrined under Art.21 of the Constitution. It is not a curable irregularity. (400-D) B

1.7. Suspicion is not the substitute for proof. There is a long distance between 'may be true' and 'must be true' and the prosecution has to travel all the way to prove its case beyond all reasonable doubt. (400-E) C

1.8. The prosecution not only not proved its case but palpably produced false evidence and the prosecution has miserably failed to prove its case against the appellant let alone beyond all reasonable doubt that appellant and he alone committed the offence. (400-F) D

CRIMINAL APPELLATE JURISDICTION Criminal Appeal No. 326 of 1993.

From the Judgment and Order dated 6.2.1992 of the Kerala High Court in Crl. A. No. 349 of 1989. E

M.M. Kashyap for the Appellant.

M.T. George for the Respondent. F

The Judgment of the Court was delivered by

K. RAMASWAMY. J.: Special Leave granted.

The appellant was charged, found guilty and convicted under section 302 I.P.C. and was sentenced to undergo rigorous imprisonment for life for causing the death of his brother Mathew on August 5, 1988 at about 8 a.m. in their Ramanattu house in Mazhuvannur in kerala State. It was confirmed on appeal by High Court of Kerala in Criminal Appeal No. 349 of 1989 dated February 6, 1992. Thus this appeal by special leave. G H

A The prosecution case in nutshell is that Ramanattu Varkey had seven sons and four daughters. During his life time he executed repeated settlement deeds settling his extensive properties of 60 acres, double storeyed building and factories which lead to acrimony among his children. In 1976 the deceased Mathew was charged for patricide but was acquitted . He was a discharged military officer and managed to have complete hold of the properties and excluded other brothers and B sisters from enjoyment of the peorperties. The appellant is the youngest and he resented the conduct of the deceased. The prosecution case itself was that later on there was reconciliation between the appellant and the deceased as spoken to by the widow of the deceased (PW. 10) and one brother (PW. 12). According to the prosecution the accused nursed grievance against the deceased for his obstinance C to exclude him of right to residence in their family Ramanattu house. Consequently he was living at Ernakulam where from his wife hails. The prosecution case was that on the fateful day the appellant came and killed the deceased in the Ramanattu house, bolting the door from inside.

From the evidence it is apparent that Mathew met with a gruesome murder D with one stab injury and 17 incised injuries, injury No. 14 was a stab injury and was inflicted on the chest said to be with MO-IV and other incised injuries with MO-III chopper on his head, face, shoulder, hands and knees etc. There is little doubt from the prosecution evidence that the deceased met with homicide and the offender committed gruesome murder with an intention to kill. But the main question is whether the appellant alone perpetrated the crime. There is no direct E evidence in proof of the prosecution case. It relies upon circumstantial evidence to connect the appellant that he alone had committed the offience. The circumstances relied on are: (1) motive of the accused; (2) preparation; (3) His presence in the neighbourhood and in the locality immediately before the occurrence; (4) presence of the accused in Ramanattu House on the date of occurrence; (5) his F presence immediately after the occurrence; (6) Recoveries pursuant to his statement under section 27; (7) Injury found on the finger of the accused. From these circumstances the prosecution claimed to have established that the appellant had committed the offence of murder.

The evidence of PW. 10, widow PW. 11, one sister PWS. 12 and 16 other G brothers and the documentary evidence Ext. P6 etc. would show that disputes among the brothers and sisters regarding the properties did exist, in particular, the evidence of PWs. 10 and 12 establishes that Mathew excluded his brothers and sisters, took possession of the entire properties and was enjoying. A perliminary decree for partition at the behest of PW. 12 was granted but final decree proceedings were pending. The deceased kept the Ramanattu House locked. In H this case the evidence of PWs, 1, 2, 4 to 7, 14 and 21 is material to connect the

appellant with the crime. Normally when the Trial Court and the High Court concurrently found that the accused had committed the crime, this Court would refrain to appreciate the evidence. On going through the Judgments of the Sessions Court and the High Court we entertained doubt regarding the conclusiveness of the appellants' complicence. Therefore, we directed the appellant' counsel to produce the evidence. Accordingly the typed evidence has been placed on record. From the evidence we are satisfied that the Courts below did not subject the evidence to critical analysis on the touchstone of human conduct and probabilities and overlooked material admissions and obvious unfair trial and incurable irregularities leading to grave prejudice to the appellant and miscarriage of justice.

PW. 1 was examined to prove the motive, the subsequent presence of the appellant near about the place of occurrence. PW. 1 admittedly is agnate of the deceased and the appellant. He was also a co-accused with the deceased, and had worked for him. He also admitted that he was enimically disposed towards the appellant. During the life time of their father he also worked in their fields. It was suggested that the deceased stabbed Issac and John, other brothers but he denied the same while other witness admitted it. He was examined to prove that he was said to be present in the Coffee House of PW. 4 and he saw the appellant with blood stained clothes at about 7 or 7.30 a.m. and also saw him later while he was sitting in the coffee hotel. He claimed that he was sitting there from 7 O' Clock onwards. He found two or three drops of blood on appellant's Dhoti. It is incredible to believe his evidence for diverse reasons. He was a co-accused with the deceased. He was enimically disposed towards the appellant and his presence was not spoken by PW. 4, the Coffee House owner and it is unimaginable that he had to remain in coffee hotel from 7 a.m. to 8 a.m. or 8.30 a.m. just to sip coffee. He also admitted that Ranjit, another brother had duplicate key of the house. He admitted in his cross-examination that no body was present in the tea stall on that day when the accused came there. He also admitted that none had seen the appellant at the junction. He admits that between 7.30 to 10 a.m. the business at the junction was very busy. It is not has case that he accosted the appellant the tea stall. He disclaimed knowledge that Mathew was convicted in a case of attempt to murder of Issac and John, his other brothers. He also admits that Ranjit used to complain to him that Mathew was not paying his share of income from the property. From this evidence it is clear that Ranjit had a duplicate key of the house and other brothers equally had motive against the deceased. Mathew attempted to kill his two other brothers and was prosecuted for the said offence. The appellant and the deceased had reconciled and there is no evidence of subsequent hostility. PW. 1 had motive to perjure the evidence and he is a chance witness at best. So it is very difficult to place absolute reliance on his evidence that he saw the appellant before and after the occurrence in the hotel. PW. 2 was a labourer. He claimed that at about

A 8 O'Clock he went to Ramanattu house alongwith other labourers to work in the fields of the deceased. Accused was seen at the house with a white Dhoti and he noticed blood drops on it. He claimed that when the appellant came near him, he made an extra judicial confession that he had a fight with the deceased and he went away without saying anying. He was an accused in a complaint laid by Issac against him. He admitted that Mathew arranged a lawyer for him and the deceased B looked after his case. He also admitted that in the absence of Mathew, Ranjit was entering into the house with a duplicate key. He also admitted that the deceased attempted to kill Issac and John but he claimed that it was hearsay. He also admitted that there were many others in the neighbourhood field of Ramanattu house and that nobody had heard the appellant's making an extra judicial C confession to him that he had a fight with the deceased. He also admitted that he did not tell any body that he saw blood stained marks. He also admitted that he did not tell to the police when he was first questioned and that he did not tell the colour or the border of the towel. From this evidence it is clear that he is an accused and the deceased arranged dafence counsel to him in a case filed against him by Issac and that he is a chance witness. It is incredible to believe that the appellant made D an extra judicial confession. There is no corroborative evidence that he worked on that day in the field of the deceased.

PW. 4 is the tea shop owner, one km. away from Ramanattu house towards south. He was examined to prove that the appellant came to him at about 6. p.m. in the previous day of occurrence. He kept a small bag with him. The next day E around 8.30 a.m. he came to his shop and asked for the return of his bag. He changed his dress and thereafter he had a tea and went away. He admitted even to the leading questions put by the prosecutor that he did not see anything on the Dhoti. He did not give any special reason as to why the appellant had to come to his shop alone on the previous day and kept the bag with him. He did not claim to F have any close friendship with the appellant. He admitted that the bag was kept in the open place. He did not speak to the presence of PW. 1 in his stall. when the appellant had come immediately after the occurrence and asked for the bag to change his dress one would expect that PW. 4 would have seen the blood stained cloths now said to be of the appellant. He admitted to the leading questions that he did not find any blood stain on the appellant's white Dhoti. He is obviously G accommodating witness to the police. Therefore, his evidence is of little assistance to connect the appellant. We have the evidence of PW. 5 that at about 8 or 8.30 a.m. he went to the shop of PW.4 for tea and bread toast. He claimed that he reached there at 7.30 a.m. and remained in the tea shop till 8.30 a.m. His presence too was not spoken to by PW. 4. He admits in the cross-examination that his house is 1/2 k.m. to PW. 4's tea shop. In between there is another tea shop belonging to Ithupery H and to the north of his house there is yet another tea shop and he is a labourer. He

claims that due to rush he remained there but none had spoken about the rush in the tea stall let alone PW 4. He also admitted that Ranjit was visiting Ramanattu house. It was also admitted that Ranjit was assisting the prosecution and he was instructing him to give evidence. From this evidence it is clear that he was a brought up witness and has no regard for truth. When there are two tea shops nearby his house it is incredible to believe that he went to the shop of PW. 4 at 1/ km only to see that the appellant had come between 8 and 8.30 a.m. with a white Dhoti and blood stained drop. He also spoke that the appellant had thereafter changed the dress and he wore pant and shirt. His wearing pant and shirt was not even spoken by PW. 4. Therefore, he is a false witness brought up to corroborate the evidence of PW' s. 1 & 4. Then we have the evidence of PW 6. He is another tea stall owner at a distance of 1-1/4 k.m. from the place of occurrence. He claims that he had seen the appellant around 5-5.30 a.m. in his shop. He admitted that there are other tea shops nearby and there was no special reasons for the appellant to come to his shop. He admitted that he cannot say how many other persons came to his tea shop on that day. He also admitted that no body from Ramanattu house took tea in his shop, either before or thereafter none from the village had taken tea from that shop. He also admitted that near Ramanattu house there are other tea shops. Police had examined him after two or three days after the death. It is, therefore clear that he is an obliging witness to the police.

PW. 7 claims to be an auto-rickshaw driver. He was examined to prove that the deceased allighted at Ramanattu house from a bus by name Raja and he travelled in the bus and alighted at junction to take the auto-rickshaw which he was driving and thereafter the appellant had travelled in his auto-rickshaw at 8.45 a.m. and paid him Rs. 10 as fare. He admitted that he is a labourer and had no licence to drive auto. He claimed that he had driven auto for three years and said that he had taken auto on hire from several people but he did not remember even the number of any one of the auto which he claimed to have driven nor the owner's name of even one of the vehicles. He did not claim any prior acquaintance with either the deceased or the appellant. He also did not know even the fare he was collecting per k.m. He admitted that he did not know the changes in the rates of the auto-rickshaw. It was suggested that he was giving false evidence at the instance of the police. The suggestion appears to be well justified. This witness was examined to connect that the deceased came to Ramanattu house on that day and the appellant left the scene around 8.45 a.m. This is nothing but false evidence as he had no prior acquaintance with either the appellant or the deceased and it is anybody's guess as to how it was possible for him to remember them on that day. There is no evidence that he also travelled by that bus and why? Thus this evidence is not only false but incredible to believe. PW. 14 is another owner of tea shop at Valakam. He claimed that the appellant had placed a coffee coloured bag with him

promising that he would collect it on the next day. About 10 or 20 days thereafter he came to the shop and collected it. He admitted that the police came and placed the bag in his shop before making panchnama and thereafter they came with the accused and Panch witness; prepared the Mahazar and recovered blood stained clothes. This was elicited the chief examination itself to the leading question put to him. He was neither treated hostile nor was cross-examined by the prosecution. He admitted that the appellant did not pay any money for the tea he had taken. The bag said to have contained white Dhoti, coloured towel with blood stain. He did not say that the accused kept those clothes in the bag. He admitted that he had seen the clothes in the bag when the Mahazar was prepared and before that he did not open the bag. He also admitted that he did not tell the police about the identity and contents of the bag. PW. 21 is the doctor who had examined the appellant to establish that the appellant was found healed wound in the medial left finger. The Mahazar sent to him contained a statment that injury was sustained while causing the injuries to appellant's brother on August 5, 1988 at 8 a.m. It is, therefore, obvious that the police prepared the Mahazar and sent him to be examined by PW. 21. He admitted that he cannot say the age of the wound.

From the above evidence it is clear that prosecution brought on record the circumstantial evidence from obliging witnesses to the police. Appellant was said to have seen before or after the occurrence by several tea shop owners and the labourers in the tea stall etc. To corroborate the evidence of tea stall owners, labourers were examined that they had seen the appellant with blood stained clothes and same were recovered pursuant to the statement under s. 27 of Evidence Act. It is preposterous to place absolute reliance on such suspect evidence. It is curious that the appellant claimed to have gone to each tea stall for tea just to enable them to note his movements. The normal human conduct would be to avoid any body noticing him eihther before or after committing the offence. It is highly unbelievable that he had used two types of weapons one stabbing and another cutting weapon.

The most startling aspect we came across from the record is that the criminal trial was unfair to the appellant and the procedure adopted in the trial is obviously illegal and unconstitutional. The Sessions Court in fairness recorded the evidence in the form of questions put by the prosecutor and defence counsel and answers given by each witness. As seen the material part of the prosecution case to connect the apellant with the crime is from the aforestated witnesses. The Sessions Court permitted even without objection by the defence to put leading questions in the chief examination itself suggesting all the answers which the prosecutor intended to get from the witnesses to connect the appellant with the crime. For instance, see the evidence of PW. 1. "Then 1 saw Jose (appellant) coming from the north and

going towards south". Did you notice his dress then? Yes. He had worn a white dhoti..... Did you notice his dhoti? Yes. I had seen two or three drops of blood on his dhoti. Suddenly I had a doubt". Similarly PW. 4 also at that time "Did any one from Ramanattu house came for tea? Yes. Jose came. When did Jose came to have tea? I do not remember..... Did Jose came on the previous day. Yes came about 6 p.m. in the evening. Did he say anything? He brought a bag and said let it be here I shall take this bag after some time.....What was the dress of the accused when he came to the shop? He was wearing white dhoti and tied a cloth on his hand. Have you noticed anyting particular on the dhoti? No". Similar leading questions were put to other witnesses also to elicit on material part of the prosecution case in the Chief examination itself without treating any of the witness hostile. Section 141 of the Indian Evidence Act, 1872 defined leading question to mean "any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question. Section 142 Leading questions must not, if objected to by the adverse party, be asked in an examination-in-Chief or in a re-examination, except with the permission of the Court. The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved. Section 143 envisages that Leading questions may be asked in cross-examination. Section 145 gives power to put to the witnesses in the cross-examination as to previous statement made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of which are to be used for the purpose of contradicting him.

Leading question to be one which indicates to the witnesses the real or supposed fact which the prosecutor (plaintiff) expects and desires to have confirmed by the answer. Leading question may be used to prepare him to give the answer to the questions about to be put to him for the purpose of identification or to lead him to the main evidence or fact in dispute. The attention of the witness cannot be directed in Chief examination to the subject of the enquiry/trial. The Court may permit leading question to draw the attention of the witness which cannot otherwise be called to the matter under enquiry, trial or investigation. The discretion of the court must only be controlled towards that end but a question which suggest to the witness, the answer the prosecutor expects must not be allowed unless the witness, with the permission of the Court, is declared hostile and cross-examination is directed thereafter in that behalf. Therefore, as soon as the witness has been conducted to the material portion of his examination, it is generally the duty of the prosecutor to ask the witness to state the facts or to give his own account of the matter making him to speak as to what he had seen. The prosecutor will not be allowed to frame his questions in such a manner that the

witness by answering merely "yes" or "no" will give the evidence which the prosecutor wishes to elicit. The witness must account for what he himself had seen. Sections 145 and 154 of the Evidence Act is intended to provide for cases to contradict the previous statement of the witnesses called by the prosecution. Sections 143 and 154 provides the right to cross-examination of the witnesses by the adverse party even by leading questions to contradict answers given by the witnesses or to test the veracity or to drag the truth of the statement made by him. Therein the adverse party is entitled to put leading questions but Section 142 does not give such power to the prosecutor to put leading questions on the material part of the evidence which the witness intends to speak against the accused and the prosecutor shall not be allowed to frame questions in such a manner to which the witness by answer merely "yes" or "no" but he shall be directed to give evidence which he witnessed. The question shall not be put to enable the witness to give evidence which the prosecutor wishes to elicit from the witness nor the prosecutor shall put into witness's mouth the words which he hoped that the witness will utter nor in any other way suggest to him the answer which it is desired that the witness would give. The counsel must leave the witness to tell unvarnished tale of his own account. Sample leading questions extracted hereinbefore clearly show the fact that the prosecutor led the witnesses what he intended that they should say the material part of the prosecution case to prove against the appellant which is illegal and obviously unfair to the appellant offending his right to fair trial enshrined under Art. 21 of the Constitution. It is not a curable irregularity.

Suspicion is not the substitute for proof. There is a long distance between 'may be true' and 'must be true' and the prosecution has to travel all the way to prove its case beyond all reasonable doubt. We have already seen that the propsecution not only has not proved its case but palpably produced false evidence and the prosecution has miserably failed to prove its case against the appellant let alone beyoud all reasonable doubt that the appellant and he alone committed the offence. We had already allowed the appeal and acquitted him by our order dated April 12, 1993 and set the appellant at liberty which we have little doubt that it was carried out by date. The appeal is allowed and the appellant stands acquitted of the offence under section 302 I.P.C.

V.P.R. Appeal allowed.