

MADRAS RECORD OFFICE.

Government of Madras.

Judicial **DEPARTMENT.**

G.O. No. 398	Press
230-231	~~Mis~~
Dated 19-3-1918	64

Not to be folded or roughly handled

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*Proceedings of the Madras Government, Judicial Department,
19th March 1864.*

No. 230. Read the following letter from C. DALE, Esq., Government Pleader, Madras; to the Honorable A. J. ARBUTHNOT, Chief Secretary to Government, Fort Saint George, dated Madras, 9th March 1864, No. 56.

In continuation of the letter I had the honor of addressing you under the date and number noted in the margin, I now do myself the honor of enclosing, for the information of the Honorable the Governor in Council, a copy of the Proceedings passed by the High Court, in Case No. 5 of 1864, from the Sessions Court of Calicut.

In the High Court of Judicature at Madras.

Thursday, the eleventh day of February, one thousand eight hundred and sixty-four.

Present.

The Honorable Mr. Justice Phillips, and the Honorable Mr. Justice Frere,

Referred, trial No. 9 of 1864.

Alikhan and another,—Prisoners.

Trial referred by the Court of Session of Calicut for confirmation of the sentence of death passed upon the said 1st prisoner in Case No. 5 of the Calendar for 1864.

This case coming on this present day to be heard and decided, the Court, after hearing J. D. Mayne, Esq., Counsel for the said 1st prisoner; S. Terumalachari, Vakeel for the 2nd prisoner; and C. Dale, Esq., Government Vakeel for the prosecution, delivered the following judgment:—

Judgment.—The testimony on which the Session Judge has based his conviction of the 1st prisoner, is mainly that given by the 1st, 2nd, 4th and 5th witnesses, who are members of the family of the deceased Killadar, and who were close by or in the verandah where the deceased was seated, when, on the 5th November last, he received the fatal shot. There is also the testimony of the 3rd witness, an aged horse-keeper, who seems to have been employed as a domestic servant about the person of the deceased, and was also present at the time of the murder. From the statements made by these five persons, it is manifest beyond any doubt, if they are to be believed, that a few moments after the Killadar had received his death-wound, they well knew that the 1st prisoner had shot the deceased, and that this knowledge was gained as well from their own presumptions in regard to the 1st prisoner, as from the declarations of the 3rd, 4th and 5th witnesses, who depose that they recognized him as he fled through the Court-yard immediately after the deceased had been shot. We observe, however, that the assertions implicating the 1st prisoner, which rest on this professed knowledge, were not put forward until more than seven weeks after the murder, and that the silence thus preserved by five individuals, in regard to the perpetrator of the crime, was, according to their own statements, the consequence of their dread of his power and of the threats he had uttered. We observe, further, that, prior to the alleged utterance by the prisoner of any threats, the family of the deceased, that is, the 1st witness, his wife; the 2nd witness, his daughter; and the 4th and 5th witnesses, his sons, lads of 12 and 15 years of age, had been visited by the Adikary and the village Police officers a very short time after the murder, and their alleged recognition of the murderer as he fled, and yet that not the slightest hint was thrown out that they knew or suspected by whom the crime had been committed. The same silence was preserved during the early part of the following day when (the 1st prisoner not being present) the principal authorities of the Talook, including the head of Police, came to the house of the deceased and were in communication with the Killadar's family and household, who thus had, on two convenient occasions, every possible facility for imparting what they knew to the proper officers and demanding their aid and protection. But such knowledge as they have pretended to possess was, in fact, laid before the Police only 53 days subsequent to the murder, when, on a special inquiry being ordered by the Acting Head Assistant Magistrate, it was deemed advisable, in supersession apparently of the local officer, to employ on

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that duty the Subordinate Magistrate of a neighbouring division, and no complaint having been preferred to apprehend and place under restraint the 1st prisoner against whom was then adduced the evidence with which the Session Court has been content, and on which rests the capital sentence we are now called on to affirm.

2. Admitting the possibility of the 1st prisoner's power to exercise, in the vicinity of his own residence, the influence which he is stated to have exerted, we should, nevertheless, have felt considerable difficulty in believing that the wife, daughter, and two sons of the murdered man would have been so dead to the ordinary dictates of human nature as to have abstained on the night of the murder, and on the following morning, from charging with it the 1st prisoner, (a step son of the 1st witness) had they really possessed the knowledge which 53 days later they put forward. Assuming, also, that the 3rd witness was, as is deposed, called by the 1st prisoner and detained in his house, six miles from the late Killadar's place of abode, shortly after the murder, we find no ground for supposing that a person of this witness' class and position could not readily have put himself in communication with the Police authority before the 1st prisoner made his appearance on the 6th November; and it is clear to us that the fear of the 1st prisoner which, as is said, pervaded the family of the deceased, could not have reached the 3rd witness on the night of the Killadar's death. But our disbelief in these respects is materially strengthened by the character of the testimony given by the five first witnesses, which, besides containing minor improbabilities of a kind wholly unmistakable bears strong internal marks of preparedness and concoction.

3. The evidence of the 6th witness is liable to the same objection as that which, in our minds, affects the testimony of the 3rd witness, and we are further unable to attach credit to the declaration of the 7th witness that he withheld the fact of his having met the 1st prisoner with a gun in his hand close by the Killadar's house just before a shot was fired, because he was not asked if he knew anything when, on the morning following the murder, the Palghaut Tahsildar was at the house of the deceased, instituting inquiries.

4. The deposition of the 9th witness before the Acting Head Assistant Magistrate, is so discrepant from that given in the Session Court relative to what passed, when, on the night of the murder, he met, as he states, the 1st prisoner at the Kulputty ferry, that we cannot attach any value to it; and we are of opinion that the statements of the 8th witness in respect of his call on the 1st prisoner for a loan of money and what took place at the interview which ensued, are not such as can safely be believed.

5. The result then of our consideration of this record and of the arguments adduced by Counsel for the 1st prisoner at the bar, is that the charge preferred against him does not, in our opinion, receive that support from the evidence for the prosecution which is wanted to justify the grave conclusion regarding his guilt at which the Session Judge has arrived. We, therefore, decline to confirm the capital sentence passed in the Session Court, and order that the 1st prisoner be acquitted and set at liberty.

6. The removal by the 2nd prisoner of the lamp which stood in the verandah, to the place where the deceased Killadar seated himself after taking his night meal, should not, we consider, be explained to the disadvantage of the prisoner, unless there be very satisfactory proof that it was not done at the bidding of the deceased, as the prisoner has urged, or that it was not done as an act of courtesy towards an aged host. We are not, however, of opinion that evidence of this obviously necessary character has been adduced.

7. The 2nd prisoner's visit to the late Killadar's family is held by the prosecution to have been unusual and unexpected. It was regarded by the deceased, it is said, as the visit of an enemy, and it would seem from the statements of the members of the family that it created a foreboding of evil in the mind of the late Killadar, which was intensified when he heard a rustling of leaves in the clump of plantain trees from which the shot was fired, and prohibited, as is alleged, the removal of the lamp towards himself.

8. We are unable to believe that a person regarded by the aged head of the house, as has been declared, would have ventured on a visit to one of its members, for the purpose admitted by

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the prisoner and corroborated by the 1st, 3rd, 4th and 5th witnesses; or if, in truth, he had intruded on the society of the old man who regarded him as an enemy, that he would have been indulgently received and invited to remain and partake of the evening meal with the family, and, more than this, have had accommodation prepared for his sleeping there. But assuming it to have been necessary to extend the rights of hospitality to an individual known to be living in, and to have come from, the house of a person so inimical to the deceased Killadar, as the 1st prisoner is, by the prosecution, described to have been, we are unable to believe that the alleged voluntary and uncalled for removal of the lamp by the 2nd prisoner would not, in the circumstances stated to have taken place, at once have been treated by the several members of the family then present, as an act manifestly connecting him with the fatal shot which so soon followed that removal. As an unavoidable sequel to any such conclusion, we feel that the 2nd prisoner must and would have been denounced to the local and village officers who came to the spot soon after the shot had been fired, for it has not been shown or asserted that the motives for fearing the 1st prisoner applied to the 2nd prisoner also, and that the considerations applicable to the 1st prevented them from accusing the latter, too, of participation in a deliberate pre-arranged murder.

9. We do not gather from the record, and we find nothing in the circumstances attending the death of the late Killadar, which rendered necessary the removal of the lamp to aid the murderer in taking aim at the deceased; for it is sufficiently obvious, in our opinion, that the light available to a family for their evening meal, would have been ample for the purposes of the assassin, sheltered as he appears to have been by the darkness of the plantain trees at a few yards distance from the elevated position of the Killadar when he was shot.

10. For these reasons, and adverting to our opinion before declared of the character of the testimony of the first five witnesses, by which alone the 2nd prisoner is affected, we arrive at the conclusion that the conviction of this prisoner cannot be sustained. Accordingly, we annul the sentence of transportation for life passed on him by the Session Judge, and direct that he be set at liberty.

11. The witnesses examined in the Session Court have been admonished, the record shows, according to Clause 5, Section 18, Regulation VII of 1802, which was repealed by Act XVII of 1862.

(A true Copy.)

(Signed) C. F. CHAMIER,
Registrar, Appellate Side.

No. 231.

ORDER THEREON, 19th March 1864, No. 398.

Communicated to the Magistrate of Malabar.

(True Extract.)

Chief Secretary.

To the Magistrate of Malabar.

Exd. J. Tulloch.

Ind. 1861, Sept 3
From Govt Pleader

To Chief Secretary to Govt.

Dated 12th March 1864

No 56

(With an Enclosure)

No 52

Forwarding a Copy of
the Proceedings passed by the
High Court in Case No 5 of 1864
from the Sessions Court of Calicut
No 398 - 19th March 1864.

Communicated to
the Magistrate of
Malabar.

The Magistrate
of Malabar

31st 1864
20th 21st
22nd 23rd
24th 25th
26th 27th
28th 29th
30th 31st