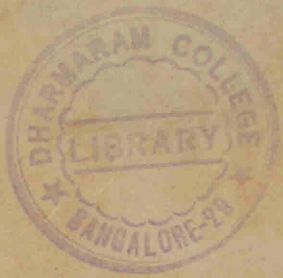
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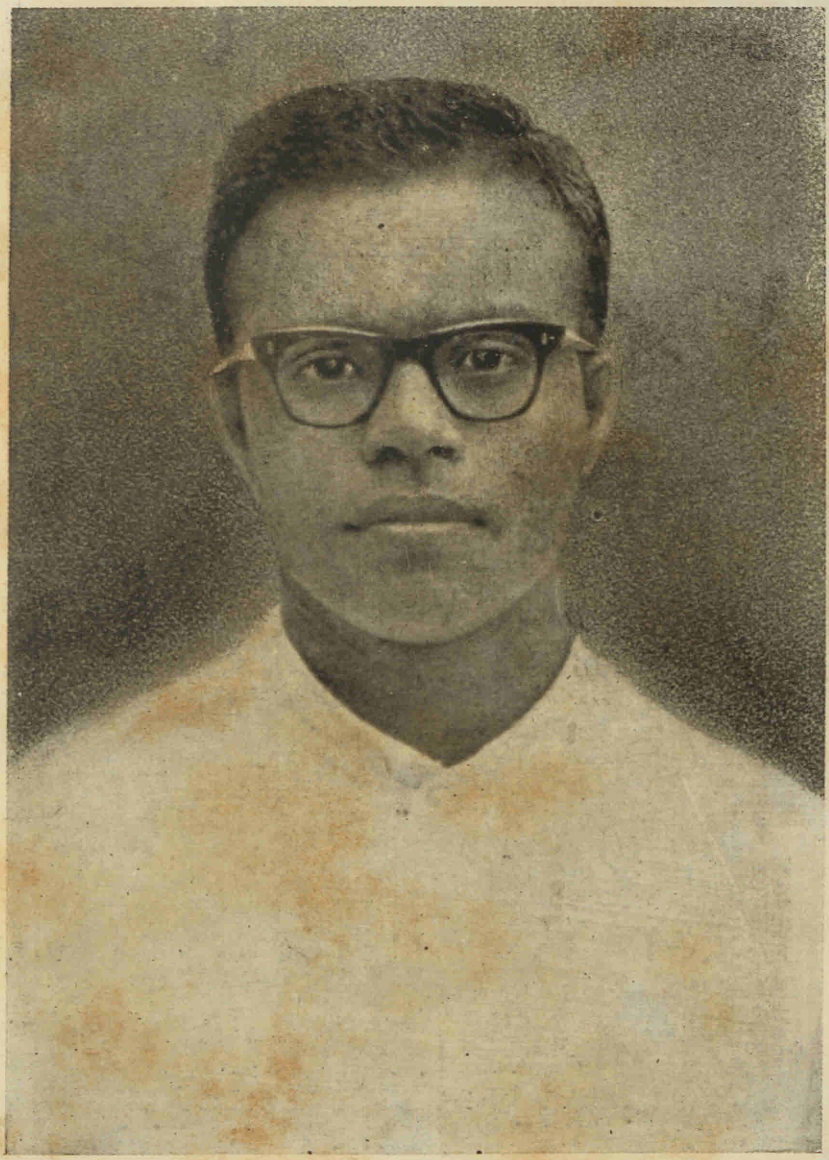
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THE PERSECUTED PRIEST ACQUITTED



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Rev. Fr. Benedict, Onamkulam

I. FR. BENEDICT ONAMKULAM

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REV. FR. BENEDICT ONAMKULAM.

Rev. Fr. Benedict Onamkulam comes from a good Catholic family of Athirampuzha in the Archdiocese of Changanacherry. The Onamkulam family has given many priests and religious who work in various parts of India Fr. Benedict's elder brother is a priest in the diocese of Vijayapuram. Two of his sisters have joined convents in the Archdiocese of Changanacherry

After completing his High School studies in the St. Ephrem's High School, Mannanam, he was accepted for priestly studies for the Archdiocese of Changanacherry. He did his minor seminary course in the St. Thomas Petit Seminary, Parel. Changanacherry and the major seminary course in St. Paul's Regional Seminary, Tiruchirapalli. Ordained in 1959, he was first appointed an assistant at the Metropolitan Church and later parish priest of St. Mary's Church, Kannampally and of St. George's Church, Alleppey. In 1964 he was transferred to Changanacherry as Manager of St. Joseph's Press and Director of St Joseph's Orphanage.

Wherever he held office, he was appreciated very much. In fact even the Police admitted privately that Fr. Benedict enjoyed high reputation wherever he worked.

His parents are still living, though both are sick.

Madatharuvi Case and Fr. Benedict's arrest.

The prosecution of Fr. Benedict for an alleged murder and his conviction to capital punishment is a surprise and a shock to all Christians.

News papers reported on 17th June the murder of a woman at Madatharuvi near Ranni. A certain woman was said to have been found at Madatharuvi Junction by dusk on the 15th evening and her dead body was found covered with wounds on the next morning. The woman was not identified and after taking a photo of the corpse and after post mortem examination, the Police gave it away to be buried. The papers gave the name of a suspect on the murder as "Manimalayachan".

One 'Mariakutty' of Alleppey was reported to have left her mother and daughter on the 15th promising to return the same evening.

Since she did not return, and since the papers reported the finding of an unidentified dead body of a woman, her mother sent her brothers to search for her. They reported her absence to the Police. Mariakutty's mother and brothers were taken to Ranni where they were reported to have identified her ornaments and clothes. According to the Police a certain person in the dress of a Catholic priest was seen by some people at Ranni hurriedly going to Tiruvalla by taxi on the same night.

On 22nd June the Dy. S. P. of Adoor and the Circle Inspector of Pathanamthitta called on the Vicar General at the Archbishop's House and enquired the following: Was there any priest from Manimala at the Archbishop's House? Was there any bearded priest at the House? Were all the priests at home for supper on the evening of 15th June? Was there any priest who was transferred from Alleppey to Changanacherry? The officers were told that there was no priest from Manimalai; no one grew beard; all except the Procurator were at home for supper on 15th and that Fr. Benedict was transferred from Alleppey to Changanacherry two years ago. Then the Police Officers met Fr. Benedict at the Orphanage where he

resides. They wanted some information which he willingly gave. They enquired about a certain "Mathewsar" who lived at Alleppey two years back and was supplying money to the murdered woman according to their information. Fr Benedict stated that he did not know of such a person.

Next day, when a good number of priests including Fr. Benedict were at the portico of the Archbishop's House, some policemen came with a youngster who is reported to be the taxi driver who took the person in the clerical garb from Ranni to Tiruvalla on the night of June 15th. The said driver is reported to have told the Police that the passenger was not among the priests present.

On the following day the police came again to question Fr. Benedict at the Orphanage. When he came away to the Archbishop's House for lunch, the Police Officers were allowed to remain in his room. On his return he found that they had made a search in his ward robe, topsided clothes and books. They questioned the orphans too in his absence.

A few days later the D. S. P. of Quilon interviewed Fr. Benedict at Pathanamthittai T. B. and then he remarked that Fr. Benedict

enjoys the best reputation in all places where he was on duty and that there was no evidence against him.

On 23-7-'66 Police went to Kasipet in Andra State, and brought down under coercion one Rev. Fr. Madukkakuzhy alleged to be the assailant, and who was on leave in Kerala during the relevant period. He was kept in custody till the end of July 1966. On 31-7-66, Rev Fr. Benedict (the present accused) was tactfully summoned to appear at the Police Club at Quilon. and he was arrested there on 1-8-'66 at 10 P. M. after having been kept there in the custody of the Police for 24 hours. "Rev. Fr. Benedict was very severely illtreated and manhandled while in Police custody. The Police openly claimed that they were following the Communist model of questioning the accused. They made him stand for several hours under a highly powerful electric light burning throughout the night. They did not allow him to sleep in the night of the 31st; and they did not give him any food or rest. He was subjected to a volley of questions all round under threat of force and violence by the Police Offiicers. Thus he was persecuted for 24 hours. During that time, he was even compelled to read out a self incriminating sta-

tement prepared by the Police. The statement, it is understood has been tape recorded by the Police, which they used as a means of propaganda against the Priest. They represent the tape record as a voluntary confession.

On 2-8-66, Fr Benedict was produced before the Sub-Magistrate, Pathanamthitta. Police got him remanded to their custody for a period of 5 days A bogus weapon recovery was also made while in Police custody. A weapon was stealthily deposited in a place, and was then recovered under the pretext that it was "pointed out" by the accused. The Police Chargesheeted the case belatedly. They did not produce the case diary before the Court, inspite of orders to that effect by the Court. The accused was refused bail, and he was kept in custody throughout.

Ultimately the case came up for trial before the Sessions Court, Quilon on 15-10-'66 Never in the history of the Criminal Cases in Kerala, have the Police taken so much interest in pinning down a culprit to the offence to which they have had booked him for They caught hold of almost all important witnesses, removed them from their residence, kept them in their custody and tutored them how they should

give false evidence before the Sessions Court. Special staff was engaged by the Prosecution to train the witnesses who were always in Police custody. They were tutored as to how they should depose in chief, and also as to how they should stand 'cross examination' by the accused's Counsel Prosecution Witnesses 2 and 3 (the mother and the daughter of the deceased) were in Police custody since 7-9-66. P. Ws. 10 and 11 were kept in custody since 20-9-'66. Other witnesses were also in Police custody since the last week in September '66 with the exception of a few. The trial began on 15-10-66. Witnesses were produced from police custody to the Court. Forty two witnesses were examined in all, of which 14 were Departmental witnesses. The remaining 28 were alleged to be independent witnesses. But 21 witnesses out of the 28 were produced in court, straight from Police custody. In fact they have not given any independent evidence in the Case. They have not stated anything according to their conscience. They only stated what they were instructed to state under force of threat, influence and coercion by the Police. Out of the remaining 7, two were priests, and the remaining 5 who spoke the truth were declared hostile to Prosecution."

The trial at Sessions lasted for nearly three weeks, and the judgement was delivered on 18-11-'66 Fr. Benedict was convicted under Sec. 302 and 364 I P. C Admittedly Fr. Benedict did not get a fair trial in the Sessions Court. The judgement was received with shock and surprise by the people at large who knew that Fr. Benedict was totally innocent.

The appeal was filed before Hon High Court of Kerala at Ernakulam on December 7th and it was received in the file in a Division Bench on 22nd December 1966.

Mr. P. T. Raman Nair, Acting Chief Justice and Justice Mr. V. P. Gopalan Nambiar, set aside the conviction and sentence of five years' R. I. and of death under section 364 and 302 I. P. C. respectively

Mr. Raman Nair took 45 minutes to read out the 36 page judgement in the sensational case. The court hall was fully packed with men and women, besides lawers. Outside, the Police had cordoned off the surging crowds.

As the Acting Chief Justice finished reading the Judgement, the crowd both inside and out side the court hall greeted the pronouncement with loud applause.

Since his release from Jail on April 8th. Fr. Benedict had a hero's triumph in all towns and villages through which he passed.

Letters from Rev. Fr. Benedict.

1. To his former Headmaster V.Rev.Fr. Aurelius C.M.I.

✠

J. M. J.

Pathanamthitta
1—10—'66.

My dear and Very Rev. Father,

Your consoling letter to hand. Thank you very much for the same. Now I remember the days at Mannanam. There I was in a drama as a priest in the prison, now in actual reality for pious cause.

I am not sorry at all. Let anything happen. About the details of the case I am not able to write now. If I get a chance every one will know it in time. One thing I assure I am not the murderer of anyone, and I am not the cause of it.

Please pray for me,

I remain,

Yours affectionately in Xt.

Sd/-

(Fr. Benedict Onamkulam)

2. To Most. Rev. Dr. Mathew Kavukatt
Archbishop of Changanacherry.

Trivandrum,
21-11-1966.

May it please your Grace,

I am not able to write a proper letter with all formalities. Still I pen these lines. I really hope that the good God will prove my innocence one day or other.

Now I pray for all those who swore falsely against me in the court. May God forgive them. I also pray for all those who render their possible helps to me in this case. My humble sincere thanks. I prayerfully remember all the inmates of the Archbishop's House and also those of the Orphanage and the press (workers)

As for my state of mind. I am happy to think that a sudden and not unprovided death is not bad. But as a punishment I do not deserve it. As a gift of God only, I accept it. Now I am getting a chance to make up for the lack of penance in my past life.

I would like to have a Malayalam Bible and an Imitatation of Christ and a crucifix. If the books are in Malayalam some others can also profit by that. I do not possess anything except a Rosary with me My prayer books

and other things will be given to me by the jail authorities after examining them.

I feel sad when I remember about the paternal heartfeelings of Your Grace and the Vicar General and of my parents.

Craving your Paternal Blessings,
I remain,

Sd/-
(Fr. Benedict Onamkulam)
C. 5151.

3. To his Parents.

(Translated from Malayalam)

Central Jail, Trivandrum,
25—11—1966.

My dearest Mummy (Mother) and Daddy (Father)

I had last come there on July 3. After that many unexpected things happened. I am now here. At first I had some mental worries. Now they are gradually disappering. I am submitting myself to the Holy Will of God. Do not weep over me, dear father and mother. Are Marykutty and Mercy at home now? I have noticed that Ousephachan (Fr. Benedict's brother) was becoming weak. Brother (Rev. Fr. Sebastian Onamkulam, Fr. Benedict's another

brother) has also become very weak. Anyhow my request is that none should further be worried and be anxious about me.

I take this occasion to inform you of a fact which is the truth. According to the Prosecution, the foundation of the case against me is that I have a child from Mariakutty No child was ever born of me to Mariakutty or any other woman in the world. This I am ready to swear solemnly before the Most Holy Eucharist. This is the truth So let any one suspect or say anything. My dear father and mother, you should be courageous Be calm. Jesus is asking of us this great sacrifice. He will give the reward also, sure.

I am in Jail since four months. I did not even have a common cold. I am keeping well. God gives me strength to suffer the mental pains and worries. I am ready. I have no fear.

Kindly ask Ousephachan to send by Money Order Rs. 15/- to me. This is to buy soap and other such things. Only Money Orders will be accepted Don't send more than Rs. 15. According to the regulations one can spend only Rs. 15 per month.

I pray for all. I request the prayers of all.

Your loving son,

Sd/-

Fr. Benedict Onamkulam.

IN THE HIGH COURT OF KERALA, ERNAKULAM.

Friday the 7th April 1967/17th Chaitra 1889

PRESENT

The Honourable the Ag Chief Justice Mr P. T. Raman Nayar

and

The Honourable Mr. Justice V. P. Gopalan Nambiyar.

Referred Trial No. 27/66 & Crl. Appeal No.356/66

S. C. No. 47 of 1966 on the Sessions Court, Quilon
P. E. No 9. of 1966 on the file of the Sub-Divisional Magistrate, Adoor

Appellant-Accused:-

Fr.Benedict, Catholic Priest, son of Devasia Joseph residing at Kunnathuparambil House, from Ouamkulam House, Athirampuzha, Ettumanoor (Manager of the St. Joseph's Orphanage, and Printings, Changanacherry).

By Advocates M/s. A. S. R. Chari,
K. T. Thomas & K. T. Thomas
Joseph Vithayathil,
K. George Varghese,
Varghese Kalliath

Respondent-Complainant:

The State of Kerala: By Public Prosecutor.

This Referred Trial and Criminal Appeal having been finally heard on 30-3-1967, the Court on 7-4-1967delivered the following:-

JUDGMENT

Raman Nayar, Ag. C. J.

The accused in this case, Father Benedict, a 37 year old Roman Catholic Priest, has been convicted by the Sessions Judge, Quilon, under sections 364 and 302 of the Indian Penal Code, of the abduction in order to murder, and the murder of a 43 year old woman by the name of Mariyakutty. He has been sentenced to five year's rigorous imprisonment for the former offence and to death for the latter. He has appealed, while the learned Sessions Judge has submitted the proceedings for confirmation of the sentence of death.

2. The deceased Mariyakutty, a widow with five children, was living with her mother, P. W. 2 in the locality known as Avalookunnu in the town of Alleppey. She had been married three times and she had left the last of her three husbands to his own resources when he became bed ridden with paralysis about five years before her own death. The youngest of her five children, a boy whom she thought fit to name Joy, was born to her about two years before her death, and it was round about this time that her third husband died.

3. From May 1962 to May 1964, the accused was the Vicar of the church referred to by the witnesses as the Chakkarakkadavu Church in the town of Alleppey, about three or four miles

from the house where the deceased and her mother P.W 2, were living. (Before that, from April 1960 to May 1962, he was the vicar of the Kannampalli Church about three or four miles from the alleged scene of offence). In May 1962, he was transferred to Changanasserry as manager of the St. Joseph's Orphanage and Press opposite the Archbishop's Palace. He was living in rooms in the orphange although eating at the Archbishop's table.

4. The evidence of the deceased's mother, P.W.2, and of her 16 year old daughter, P. W. 3 shows that the deceased left her house at about 1 O' clock on the afternoon of the 15th June 1966. She never returned. She had earlier after her return from a visit to Changanasserry on the 4th June, told P. W 2 that the Father- reading P. W 2's deposition as a whole, it is clear that by the word, "Father" the deceased meant the former priest of the Chackkarakkadavu Church who had been transferred to Changanasserry and was in the book depot there at the Palace gate, a description which though perhaps not strictly accurate clearly points to the accused; actually there is a privately owned book depot opposite the Palace gate near the Orphanage but it would appear that the accused had nothing to do with it – had asked her to go there on the 15th.

5. On the morning of the 16th June, the body of an unidentified woman was found lying ace upwards at the spot marked I in the plan,

Ext. P. 73, on the road leading from Mannamaruthi to the forest across a stream called the Madatharuvi, an unfrequented road running by the side of a hill through a tea plantation, and a lonely spot with no dwelling house within a range of a hundred yards. The body was practically naked from the waist upwards, the bodice and the chatta (jacket) which the woman was wearing having been drawn up to the armpits so as to expose the breasts. The throat was cut from ear to ear. There were a number of incised wounds on the Chest and abdomen and a contusion covering the whole of the left side of the face. On the body were the clothes, M. Os. I to 4 and the Jewels, M. Os 5 to 9. Over or around the lower part of the body was the bedsheet M O. 13 while near by lay the umbrella, M O 10.

Information was carried to the police station at Ranni four miles distant by P W I (the owner of the land on either side of the road) who had gone and seen the body at about 10 in the morning on being told about it by his servant who is not a witness This information was recorded by the Sub Inspector, P.W. 40, at about 2 P. M in the shape of the statement Ext P I, on which a case was registered under section 302 of the Indian Penal Code, and investigated. P W 40 went to the scene at once taking the photographer, P. W. 16, with him to photograph the body since it was unidentified and after he had reached the spot, held an

inquest, noting in his inquest report, Ext. P 58, what he observed regarding the body and the surroundings. An autopsy was conducted at the spot the next afternoon (namely, the afternoon of the 17th) by the doctor, P.W. 15, After the autopsy was over, the body still unidentified and unclaimed, was handed over to P.W.I for disposal, he being saddled with this responsbility apparently because he owned the adjoining land on either side and because it was he that had carried the information to the police. P. W. I had the body buried.

7. On the night of the 15th, P. W. 4 who lives in the house marked 2 in Ext. P 73 at the top of a hill about 150 yards south of the scene had been woken from his sleep by some noise. Then be heard the cry, "My God! I am being killed! My head is broken" which he thought came from the hill on the northern side of the scene. He switched on the light and noticed that the time was 11.45. He shouted out twice "who is that" but got no response He woke up his wife and told her what had happened and then, thinking it was only a quarrel between the carpenter living on the opposite hill and his wife, he went to bed again. He saw the body the next morning and he told P W. 1, who was there, of the cry he had heard the previous night. This information P. W. I embodied in the statement, Ext P I. he made at the police station later in the day.

8) The medical evidence shows that the deceased had suffered six penetrating incised wounds each I" × ½" deep on the chest and abdomen, and three incised wounds on the neck, two on the left side, and the third, 9" x 2" x 6" deep, extending from a point 4" below the left ear to a point about 3" below and 2" behind the right ear and cutting through all the structures of the neck including the great blood vessels, the trachea and oesophagus There was a contusion covering the whole of the left side of the face, and the left upper canine tooth had fallen off. There was a lacerated wound, 5" × 2" × 1". on the right side of the forehead and multiple small abrasions on the chest, abdomen and the left elbow joint. The penetrating incised wounds on the chest and abdomen had caused two incised wounds on the right lung two on the left lung, one on the liver and one on the spleen, each wound being 1" × ½" × ½". All the injuries were ante mortem.

9) As we have seen, the body remained unidentified when it was buried. But, from the photograph, Ext P 2, which clearly discloses the features, Mariyakutty's mother, P. W 2, and her daughter, P W. 3, have been able to recognise the body as hers and have deposed accordingly. They have also referred to a scar, about the size of a rupee, below Mariyakutty's left breast. Such a scar was noticed by the doctor, P W. 15 who conducted the autopsy, and is one of the

two marks of identification noted in his certificate. Ext. P 20, PW 3 has stated that the clothes, the jewels, and the umbrella, M. O.s 1 to 10, found on or near the body belonged to her mother. All this leaves little room for doubt that the body was the body of Mariyakutty. Indeed this has not been disputed before us, although this was one of the matters hotly disputed at the trial. (It is illustrative of the competency with which the trial was conducted that, despite this, it was not elicited from P. W. 3. that her mother, Mariyakutty, was wearing M. Os. I to 9 and carrying M. O. 10 when she left her house on the afternoon of the 15th, although that must obviously have been the case, and that, what was elicited from P. W. 2 with reference to M. Os. I to 9 was, not that these articles belonged to Mariyrkutty or were worn by her when she left the house, but section 162 of the Criminal Proceedure Code not withstanding, her previous statement to the investingating, officer P. W. 42, that she could identify Mariyakutty's belongings and that, on her saying so, she was shown the articles, M Os 1 to 9)

10) The prosecution case is that, on the night of the 15th, the accused took Mariyakutty on some pretext or other the case put forward at the trial was that it was on the pretext that they could go somewhere and make love in the open undisturbed to the spot where her body was found and murdered her there

by inflicting the injuries found on her body. The motive put forward is that the accused was in criminal intimacy with Mariyakutty, the child Joy being thus born to him, and that for fear of blackmail or exposure the accused thought it as well to do away with her.

11) The accused's case, both at the preliminary inquiry and at the trial, was a complete denial. He did not know Mariyakutty or of her death and had nothing to do with her. He went nowhere on the night of the 15th. After dinner at the Archbishop's Palace, he went to bed in his room in the Orphanage at about half past ten.

12) To prove its case the prosecution depends entirely on circumstancial evidence. And the circumstances on which it relies are

1 That the accused had strong motive for the murder;

2 That the deceased was last seen alive with the accused. They were then proceeding towards the scene of offence, the most proximate in point of time being about half an hour before the murder and in point of distance, being about six furlongs (or, according to some witnesses, 1¼ miles) from the scene;

3 That soon after midnight, within about half an hour of the murder, the accused was seen in a considerable state of agitation at palace about six furlongs from the scene

coming from the direction of the scene and that he proceeded from there to the gate of the Archbishop's Palace in Changanassery;

4) That the bedsheet, M O. 13, found on the body belonged to the accused;

5) That from a spot (marked II in the plan Ext P 73) pointed out by the accused was recovered the knife, M O.20, with which most of the injuries found on the body could have been inflicted, and which,on chemical examination, was found to be stained with human blood; and

6) That from a drawer in his room in the orphanage the accused took out and produced a blue bag (M. O. 26); the evidence of the witnesses who saw the accused go towards the scene and come away from it is that he was at the time carrying such a bag the inside of which was found on chemical examination to be stained with human blood.

13. We shall now proceed to consider how far each of these circumstances has been proved; next, whether the proved circumstances add up to something which is consistend only with the guilt of the accused and is altogether inconsistent with his innocence. But, before doing so, we must observe that much of what has been suffered to come on record against the accused (both as oral and as documentary evidence), most of it at the instance of the prosecution, but some of it at the instance of the defence, is not evidence having regard to the rules of relevancy in the

Evidence Act apart from being shut out by provisions like sections 25 and 26 of the Evidence Act and section 162 of the Criminal Procedure Code. To give but one instance, the bulk of the testimony of P W 42, the Deputy Superintendent of Police, Adoor (who took charge of the investigation at 10 A. M on 17-6-1966 and conducted it thereafter) is devoted to what he was told by the persons (including the accused) whom he questioned in the course of the investigation, or, what is worse, if worse were possible, what his subordinates P. Ws 40 and 41, who were assisting him in the investigation, told him of what they were told. So too, the evidence of P. Ws, 40 and 41 is largely about what they were told and what they told P. W. 42. A glaring example is the evidence of P. W. 41 that the deceased's son Seevikutty pointed out the accused's room to him and told him that he had gone there in April or so with his mother who took money from the priest. His report Ext, P86 to P W 48 to this effect was also received in evidence The testimony of most of the important witnesses abounds in here say, often at third or fourth hand, and the questioning of the accused under section 342 of the Criminal Procedure Code which faithfully recounts the entire evidence in all its irrelevance and futility makes interesting reading. This apart, the examination of most of the witnesses has proceeded in a very disjointed and oblique fashion with no attempt at sequence either chronological or logical, whether in the order of

the examination of the witnesses, or in the facts elicited from them. The result has been that, before us, the learned public prosecutor has had the unenviable task of hunting through the depositions of the witnesses to discover the relevant portions of their testimony and of piecing together a sentence from here and a sentence from there from the depositions of several witnesses (not infrequently depending on answers elicited in cross-examination by the defence) to present a fact obviously within the knowledge of a particular witness and which could readily have been elicited from him by a proper examination. And, even so, in not a few instances, a complete picture of what should and could have been expressly elicited has been a matter for inference. Almost the first thing that a public prosecutor asks a witness who speaks to motive or to having seen the accused or the deceased in such circumstances as to lead to some inference regarding the crime, is whether he knows the accused or the deceased and if so from what point of time Yet, P. Ws. 2 and 3 who asserted that Joy was born to the accused were not asked by the Public Prosecutor whether they knew the accused; nor even directly by the defence, although it is apparent from a reading of their depositions as a whole, that they did not. With the exception of P, W. 9, none of the witnesses who claim to have seen the accused and deceased proceed together towards the scene of offence and the accused return alone, was

asked by the Public Prosecutor whether he had seen the accused or the deceased before. Even facts noticed by the investigating officers, P. Ws, 40. 41, and 42, have had to be ascertained by piecing together stray sentences here and there in their depositions with stray sentences here and there in those of the several mahazar witnesses and in the mahazars themselves. Thus, in recounting the facts it might often happen that we shall not be in a position to point out to any particular piece of evidence as proving a particular fact.

14. In considering how far the prosecution has succeeded in proving the circumstances on which it depends, we shall confine ourselves to the evidence we consider relevant. Fortunately there is a large measure of agreement between the Public Prosecutor and counsel for the accused as to what is and what is not relevant and our own views on the matter We shall, however, briefly refer to the pieces of evidence which we have included or excluded against the contentions of either side and state our reasons for doing so.

15. Now to the circumstances, one by one. Regarding the first namely motive, there is hardly any admissible evidence. What the prosecution set out to prove was that the accused was in charge of the free distribution of milk powder and wheat to the poor while he was the vicar of the Chakkarakkadavu Church. Mariyakutty who was a poor woman, used

to get milk powder and wheat from him and they became intimate with the result that she bore him a child (the boy called Joy) in June 1964, a month after the accused had been transferred to Changanacherry. There after, she used to go to the accused at Changanacherry once or twice a month taking their child with her, and get money from him Rs. 50/–, Rs 100/-, Rs. 200/- at a time so that she was able to lead a comfortable existence and buy clothes and make jewels for herself. Her frequent visits to him with the child, attended as it was by blackmail and the fear of exposure, made life unbearable for the accused with the result that the accused decided that his only way out was to do away with Mariyakutty.

16. The evidence on which the prosecution depends to prove this is the oral testimony of P. Ws. 2, 3 and 20. But, the only admissible portion of the evidence of P Ws. 2 and 3 is that Mariyakutty conceived Joy at a time when her husband was bedridden with paralysis and had no access to her, that before the birth of the child she was in very poor circumstances but that after that she used to go some where once or twice a month and come back with money Rs.50/- Rs. 100/–, Rs 200/-, at a time and was thus able to lead a comfortable existence And, so far as P.W. 20 is concerned, the only admissible portion of his evidence is that Mariyakutty used to buy provisions from him on credit paying him

once or twice a month about Rs. 50/- at a time, a piece of evidence that is of little value even if it is relevent. Regarding their evidence as a whole, it is clear that none of these witnesses had seen the accused before, and that the statements of P. Ws. 2 and 3 to the effect that Mariyakutty used to get milk powder and wheat from the priest of the Chakkarakkadavu Church, that her child was born to him, that it was to this priest (by then in Changanacherry in the book depot outside the Archbishop's palace) that she used to pay her bi-monthly visits, and that it was from him that she got the money with which she came back, and the statement of P.W. 20 that it was with the money given to her by the priest in book depot near the gate of the Changanacherry palace that she used to pay him his dues, are based wholely in what Mariyakutty told them. The witnesses themselves have no manner of personal knowledge regarding these matters. These alleged statements of Mariyakutty, it seems to us, are clearly hearsay, excluded by section 60 of the Evidence Act and not made relevant by any of the other provisions of the Act.

17. The learned Public Prosecutor contends that these alleged statements of Mariyakutty are relevant under section 32 1) of the Evidence Act as also under sections 7,8 and 11. Now, a reading of section 32(1) makes it quite clear that it is not every statement of a relevant fact made

by a person who is dead that is itself made relevant by that provision in cases in which the cause of that person's death comes into question. To become a relevant fact, the statement must be as to the cause of the person's death or as to any of the circumstances of the transaction which resulted in his death. That Mariyakutty was made pregnant by the accused, or that she used to visit him with her child, or that she used to get money from him, certainly did not cause her death, and they seem to us to be too remote from the transaction which resulted in her death to be regarded as circumstances of that transaction. In *Narayana Swami V Emperor* (1) their Lordships of the Privy Council observed.

"The circumstances must be circumstances of the transaction; general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or he was going to meet a particular person, or that he had been invited by such person to meet him would each of them by circumstances of the transaction, and would be so whether the person was known, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. 'Circumstances of the transaction' is a phrase no doubt that conveys some

1. A. I. R. 1939 P. C. 47

limitations. It is not as broad as the analogus use in 'circumstantial evidence' which includes evidence of all relevant facts It is on the other hand narrower (sic-wider?) than 'res gestae'. Circumstances must have some proximate relation to the actual occurrence, though, as for instance, in a case of prolonged poisoning they may be related to dates at a considerable distance from the date of the actual fatal dose".

Surely the circumstances in question which at best may give rise to an inference as to the motive for the murder cannot be described as circumstances of the transaction which resulted in the deceased's death. With great respect we are unable to subscribe to the view taken in *T. Ratnakaran V. State* (2) that the fact that a decease woman had become pregnant by the accused might furnish the accused with a motive for murdering her, makes the fact of her pregnancy by him a circumstance having such proximate relations to her death as to make it a circumstance of the transaction that resulted in her death and thus make a statement by her regarding this circumstance evidence under section 32(1). The decision no doubt purports to follow *Narayana Swami V. Emperor.* But we think that that decision leads to the contrary result as held in *In re Appanarasayya*(3) where evidence suggesting motive derived from statements made by the deceased was held to be inadmissible. How can such a circumstance be said to be

2. A.I.R. 1955 T.C. 87
3. A. I. R: 1941 Madras 101

"directly related to the *occasion* of the death" which is the test propounded by their Lordships of the Privy Council? (The emphasis is ours).

18. Our attention has been drawn to the following observation in *Saravanabhavan V. State of Madras*(4)

> "There is evidence to show that on the date of the occurrence perami scolded Saravanabhavan and told him that he (Peramia) would revoke the will. He went to Dharampuram and told Balasubramaniam what had taken place between him and Saravanabhavan Peramia's statement was of course, provable as a transaction resulting in his death. The same night these three murders took place".
>
> (Saravanabhavan was the accused in the case and was a legatee under Peramia's will, Peramia was one of the murdered persons and Balasubramaniam was a prosecution witness)

We do not regard this as authority for the proposition that a statement by a person from which a motive for his murder can be inferred is admissible under section 32(1) of the Evidence Act. There is nothing in the judgment to indicate that it was by reason of that provision that their Lordships regarded Peramia's statement as provable. On the contrary, the reference to that statement as a transaction resulting in his death which was compaseed that very night seems to

4. A. I. R. 1965 S. C. 1273 at P. 1275.

us to indicate that their Lordships had section 6 in mind.

19. So far as sections 7, 8 and 11 are concerned, it is enough to observe that, except where a statement, otherwise than from the witness-box, is itself made relevant as. for example, under section 6, section 8 explanation 1, section 14 (see Illustrations (k), (l) and (m)), and section 32, a fact, however relevant, can be proved only by direct evidence and not by hearsay, although previous statements of a witness might be admissible for corroboaration under section 157 or contradiction under section 145. With great respect it seems to us that the real basis of the decision in *Allilan Nunshi v State*(5) on which reliance is placed by the prosecution is that the statement there held to be admissible was a statement accompanying conduct which was regarded as influencing a fact in issue and was therefore relevant under Explanation 1 to section 8. The very fact that such a statement was made, apart from the facts stated in the statement, was also held to be relevant under section 8 as showing a motive for the crime.

20 In any view of the matter, a statement by a woman, untested by cross-examination, as to who was the father of her illegitimate child, is, in the very nature of things, most undependable.

21 In our view the prosecution has failed to establish that the acused had sufficient, or, for

5. A.I.R. 1960 Bombay 290

that matter, any motive to do away with the deceased.

22 With regard to the second circumstance, we have already seen that, on her return home on the 4th June, the deceased told her mother, P.W.2, that the father meaning thereby the accused had asked her to go to him at changanacherry on the 15th June. P. W. 2's evidence is that accordingly, the deceased left her house on the 15th. (Obviously the deceased must have told P. Ws. 2 and 3 where she was going when she left her house on the 15th unless she left it in their absence, which is not the case – indeed the evidence of P. W. 2 shows that she was present for she asked the deceased why she was not taking Joy with her – and what she said then being more proximate to the event than her statsment on the 4th June should have been of greater evidentiary value. But this was not elicited either from P. W. 2 or P. W. 3. No doubt, the latter states in her evidence that the deceased left her house on the 15th for Changanacherry to meet the accused as directed by the latter and that, again as directed by the latter she went alone without taking her child Joy with her as was her wont. But it was not elicited from P. W 3 how she came by these facts, though obviously it must have been from the deceased that she learnt them unless it be from P. W. 2. Clearly, she had no personal knowledge of these facts and since it does not appear that they were stated to her

by the deceased, her testimony regarding these facts cannot go in as a statement made by the deceased'. This statement of the deceased is clearly relevant under section 32 1) of the Evidence Act as construed in *Narayana Swami V. Emperor*(1). We doubt whether that further statement elicited from her when she was leaving the house on the 15th, by P W. 3's query as to why she was not taking her child, that she had been asked not to bring the child, since the father would have no time to fondle it, is relevant. That the deceased went to Changanacherry on the afternoon of the 15th to meet the accused as directed by him and that she went alone is no doubt a circumstance of the transaction that resulted in her death; that the accused had asked her not to bring the child with her, it seems to us, is not such a circumstance. But, assuming both statements to be relevent, they cannot, by themselves, prove that the deceased actually went where she said she was going, or that if she did, she did so at the instance of the accused.

23. For the rest evidence regarding this circumstance consists of the testimony of P Ws 6 and 14 At about 10 P M on the 15th June, P.W 14, the driver of a private car was at the petrol-pump opposite the State Transport bus stand at Thiruvalla, about five miles from Changanacherry, having gone there to have the tyres of his car inflated While he was standing there after inflating the tyres, the accused went up to him with a woman whom he identifies with the woman in

the photograph Ext. P 2) and asked him whether his car would be available to take them to Mannamaruthi where his mother was lying ill. P. W. 14 told the accused in reply that his car was not a taxi and added that the taxi (KL A. 1542) of which P. W. 13 was the driver, which was lying near by, could be hired. The accused requested P. W. 14 to hire the taxi for him and accordingly P W. 14, accompanied by the accused and the woman, went to P. W. 13 and engaged his taxi for a hire of Rs 32/—. Then the accused got into the front seat of the taxi, the woman got into the back seat, and taxi drove away. The accused was at that time wearing a cassock. He was also wearing spectacles and was carrying a bulging blue bag and an umbrella and a three-cell electric torch. The woman was wearing a chatta, a mundu and a neriyathu (upper cloth, and was carrying an umbrella and a two-cell electric torch.

24. P. W. 13, the driver of taxi car K.L.A. 1542, does not however, support the prosecution. His evidence is that it was at 9 30 A. M on the 15th June that his taxi went to Mannamaruthi and that the passengers he carried were two estate owners belonging to Palinkunnu He returned to Thiruvalla at 4 30 P. M Thens at about 4 45 P. M. he took two passengers from the Thiruvalla Railway station to a place called Nellimala about 20 miles distant and came back. Apart from a trip to a place called

Pannai, Six miles from Thiruvalla, earlier in the morning, and back, between 8·15 and 9.15 A. M. these were all the trips his taxi made that day as shown by entries, Ext. P 12. (a), in his account book, Ext. P 12· He did not know the accused and the accused had never travelled in his car

25. P· W. 13 was cross-examined by the prosecution, with leave of court, and was contradicted by the statement, Ext. P.13 he had made to P. W· 42. That, of course, does not make Ext· P· 13 substantive evidence and the net result is that P· W· 13's testimony has to be ignored—we are not prepared to rely on it for the purpose of disbelieving P. W. 14.

26 On the night of the 15th June, P· W· 6 and a fellow worker who is not a witness, were working in the copra yard marked 12 in the plan, on the southern side of the Mannamaruthi Madatharuvi Road, a few yards to the east of the Mannamaruthi junction where this road takes off from the main Ranni-Manimala Road· The Mannamaruthi junction is about 25 miles distant from Thiruvalla. P. W· 6 and his companion were sorting copra by the aid of an electric light attached to a post in front of the yard when a car came and stopped at the Mannamaruthi junction· P. W· 6 looked that way and then he saw the accused and a Christian woman get down from the car and go eastwards towards the scene of offence past the copra yard. He saw them clearly

by the light of electric lamp by which he was working and after that, by the light of the car when it turned into the Madatharuvi Road in order to reverse and go back southwards along the main road. The accused was wearing the cassock of a catholic priest. He was also wearing spectacles and was carrying an electric torch in his right hand, a bag under his left armpit, and an umbrella hanging from his left forearm. The woman was wearing a mundu, chatta and neriyathu and she was carrying an umbrella and an electric torch. The next morning, on hearing that a woman had been stabbed to death on the Madatharuvi Road, he and his companion went to place and saw the body. It was the body of the woman he had seen the previous night with the accused.

27. To prove the third circumstance the prosecution depends on the evidence of P. Ws. 5, 7, 8 and 9 to a lesser extent on that of P. W. 19.

28 At about midnight on the night of the 15th June, P. W. 5 was proceeding southwards along the main road past the Mannamaruthi junction. She and her neihgbour, Thanka (who is not a witness) were taking home her old mother-in-law (who also is not a witness) who had insisted on going to the Mission Hospital about a furlong north of the junction to see her dying grandson whose illness had suddenly taken a turn for the worse that night. As she approached the junction, P. W. 5 saw the light of a torch from the road

running eastwards, and she flashed the country torch she was carrying inorder to see who it was that was coming at that late hour of the night. It was the accused. He was in the grab of a Catholic priest. He was carrying a long electric torch in his right hand and had a blue bag under his left armpit and an umbrella hanging from his left forearm. His face registered perturbation ("Paribrahmam" the malayalam word used is not easy to translate—it imports an element of fear, anxiety, agitation, hurry, worry and perplexity). The accused who was walking very fast, turned southwards at the junction and went ahead of her. P. W. 8 and her companions followed him for about a hundred feet, at a distance of four or five feet behind him, and them they turned eastwards along the branch road leading to their house, while the accused pursued his course southwards along the main road.

29 P. W. 7, a mechanic of the Chandrika Motor Service, was working with a fellow worker Kuriakose (who is not witness) in the Chandrika Workshop, 3½ miles south of the Manamaruthi Junction, on the night of the 15th. At about 1.30 A. M., they were standing outside the workshop after finishing their work when the accused came walking from the north The accused went up to them and asked P. W. 7 whether a car would be available, adding that he wanted it for going to Thiruvalla to fetch a doctor and buy some medicine for his father who was lying seriously ill in the Mannamaruthi hospital. The

accused was then dressed in the cassock of a Catholic priest and was carrying a blue plastic bag under his left armpit, as also an umbrella and a three cell electric torch. P. W. 7 took the accused to P. W. 8, a welder by profession, who owned private car, K L. Q 3729, and who was living hardly a hundred yards south of the workshop. P. W 7 and the accused woke up P. W 8 by knocking at his door and calling out to him the accused's voice and manner registering "Paribrahmam". They repeated to P. W. 8 the story which the accused had earlier told P. W. 7. P. W. 8 agreed to take the accused to Thiruvalla and accordingly brought out his car, but not before he had noticed the "Paribrahmam" on the accused's face, the cassock he was wearing, the blue bag he was carrying under his armpit, the umbrella hanging from his left forearm, and the electric torch he was carrying in his right hand. The accused got into the back seat of the car while P. W. 7 got into the front seat. P. W 8 first took the car to the petrol pump on the opposite side of the road and bought ten litres of petrol for which the accused paid with a ten rupee note and would not wait for the change It was about 2 A. M. by then. (P. W. 19, the attendant who supplied the petrol saw P. Ws. 7 and 8 in the front seat of the car and a catholic priest, whom be does not identify with the accused, in the back seat. He did not notice the blue bag or the electric torch or the umbrella or the "paribrahmam" registered by the priest although he did hear the priest say that there was no need

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to wait for the change and that he was in a hurry to go). Then, as directed by the accused, P.W. 8 drove the car to Thiruvalla, a distance of about 21 miles, and when they joined the Main Central road at Thiruvalla, at the place called the S. C. Junction, the accused asked to be set down there. The car was stopped and the accused got down. He paid P. W. 8 Rs. 10/-, and P. Ws. 7 and 8 went in the car to the Thiruvalla Railwaystation for a cup of Coffee. On their return they saw the accused standing in front of the Transport bus stand about 50 yards north of the place where they had left him. P. W. 8 stopped the car and asked the accused whether he wanted the car again, and on being answered in the negative, drove back home. It was then about 3 O' clock in the morning.

30 P. W. 9. is the owner-driver of taxi car No. K. L. A. 1634 and he was waiting with his car for custom at the taxi stand next to the bus stand on the night of the 15th June when, at about half past three, the accused went to him and asked to be taken to Changanacherry. The accused was in the dress of a Catholic priest and was carrying an umbrella, a blue bag, and a three cell electric torch. As directed by the accused P. W. 9 dropped him in front of the Changanacherry Palace, the distance of about five miles at about four in the morning, and, after taking his fare of Rs. 6/-, went back to Thiruvalla. (More than three quarters of P. W. 9's examination-in-chief is devoted to his title to the car

as if he were a plaintiff in a suit for its recovery and, of course, counsel for the defence could not lag behind!)

31) There seems to us some degree of artificiality in the way in which these witnesses, who speak to the accused's progress to the scene, and his return therefrom, depose to the three-cell electric torch with the accused was carrying in his right hand, the blue bag he was carrying under his left armpit, the umbrella he was carrying hanging from his left forearm, and the spectacles he was wearing, not to mention the particularity with which P. Ws, 14 and 6, the witnesses to the onward march, noticed the clothes which the accused was wearing and the umbrella and the two cell electric torch she was carrying. That apart, it seems to us some what improbable, that if the accused were taking the deceased to her doom, he would, after seeing P. W 6 and his companion working in the copra yard, have walked so close to the light by which they were working as to give them an opportunity of seeing him and his companion. Or even that he would have had the car stopped at the junction so that the driver of the car could see him go eastwards with the deceased. A slight detour would have taken him beyond the gaze of P. W. 6 and his companion, and this would have been quite in keeping both with his real purpose and the estensible purpose of which he must have made pretext for persuading the deceased to go with him. Then again, if the prosecution case were

true would the accused, after having committed the murder, in his attempt to leave the place unnoticed, present himself for examination by P. W5 with the aid of her country torch at the Mannamaruthi Junction? He must have seen P. W. 5 and her two companions coming along the main road from the north, for, P. W. 5 was flashing her torch. Would not his natural conduct have been to stop some distance away and let them pass before going his way? Again, would the accused have not P. W, 9 to drop him right out side the palace gate at at changanacherry so that P. W. 9 would know where he belonged and the early risers of the locality, where he was wel known, could see him come and get down from the car?

32. Perhaps these artificialities and improbabilities might not, by themselves, suffice to discredit the testimony of P. Ws. 14, 6, 5, 7, 8 and 9 (mentioning them in the order in which one would have expected them to be examined but one very significant fact is that none of these winesses, with the exception of P. W. 9. had seen the accused before.) In the case of some of these witnesses this fact was not expressly elicited even in cross-examination although in chief examination they spoke as if the accused was a person known to them. But, reading their depositions as a whole, it is clear that they saw the accused that day for the first time, and we might add that the prosecution has no case to the contrary). Even P. W. 9's claim to previous acquaintance with the accused turned out on

cross-examination to be based on nothing more than having seen him getting down at the bus stand on three or four occasions without knowing who he was. All these witnesses saw the person who they assert was the accused, by night (it was a dark night before the new moon) by artificial light, some of them from a distance and not for long, with no great opportunity for such close observation as to impress his featuress on their mind, and, although each one of them was at great pains to make out that there was ample light for them to see the person well, we are by no means satisfied that they cannot (even if we accept their evidence at its face value) be making an honest mistake as to identity and mistaking the accused for some other person of the same build and complexion and wearing the same kind of dress. For, the remarkable fact is that, although the accused was a stranger to these witnesses, no test identification parade was held to exclude the possibility of mistake. What happened was that P. Ws 5 to 8 were sent for to the Police Club, Quilon on 1-8-1966. The accused was there with a few others, the only person in a priest's garb. He had been taken there by the investigating officer, P. W. 42, for interrogation on the 21st July-and the witnesses recognised the accued as the priest they had seen on the night in question. This, it seems to us, is worse than useless for the purpose of excluding mistake for, it is quite possible that their recognition of the accused as the priest they saw that night

and their subsequent assertion to that effect in court was due to the force of suggestion. That on the 29 th July these witnesses were shown another suspect priest at the police club, who they thought was not the priest they had seen on the night in question, lands little assurance to their identification of the accused as the priest whom they did actually see And, so far as the identification by P. W. 7 is concerned, we might say that his powers of observation are such that, although on the evidence it is clear that the accused was in his clerical garb when P. W. 7 saw him at the police club on 1-8-1966, P. W. 7's evidence is that the accused was at that time wearing white pants with black strips and a shirt at one stage he said that the accused was wearing pants and coat.

33 All the authorities are agreed that evidence of identity based on personal impressions alone of witnesses who are strangers to the offender is, by itself, an unsafe basis for a verdict and that the least that can be done in such cases to exclude mistaken identity is to hold a test identification parade - it would of course, be different matter if there were other evidence to ensure the correctness of the identification: there is none in this case There is no reason whatsoever why such a parade could not have been arranged in this case The accused, who was willing enough to go to the police club for interrogation, would have been willing enough to go before a magistrate for the purpose of an

identification parade, and we have doubt that the proper course to be followed by the investigating officer was to have the witnesses appear at such a parade to be held by a magistrate, instead of showing the accused to them at the Police Club.

34 For all these reasons, we do not think it safe to accept the evidence of these witnesses to hold that the accused proceeded with the deceased from Thiruvalla to Mannamaruthi junction, and then eastwards towards the scene round about 11 O' clock that night, and that he returned alone a little after midnight and went back to Changanacherry. In other words we do not consider the second and third circumstances as satisfactorily proved.

35 The fourth circumstance is that the bed-sheet, M. O. 13, found on the body belonged to the accused. For this circumstance the evidence is that of the dhobies, P. Ws. 10 and 11. Admittedly P. W. 10 was the accused's dhobi and was washing his clothes for him ever since he was transferred to Changanacherry, and admittedly again, P. W. 11 did wash the accused' clothes for him on one occasion when P. W. 10 was ill, taking the clothes for washing on the 2nd June 1966 and returning them after a week according to the witness, but only on the 17th June, according to the accused. The mark used by P. W. 10 for the accused's clothes was the letter, "N" in black, written with the paste of the marking nut, and the mark used by P. W. 11 on the solitary occasion on which he washed the

accused's clothes was the figure, "3" in red, written with marking ink, Both P. W. 10 and 11 have identified M. O. 13 as belonging to the accused and as washed by them for him. M.O.13 bears the mark, "N" in black though somewhat faintly and it clearly bears the mark, "3" in red.

36 M. O 13 is now nothing more than a blood-stained brownish rag, and it is difficult to recognise it as the red and white chequered bed-sheet described in the inquest report, Ext P. 58, and in the list, Ext. D16, with which it was sent to court. Its condition could have been not different at the time of the trial, and we do not think that it would have been possible for P.Ws. 10 and 11 to have identified it from its more appearence with the bedsheet they clain to have washed for the accused. But then there are the marks, "N" and "3". Now, neither of these marks is a distinctive mark-see the photographs P.26 and P 27 repectively of these marks in M. O. 13—so that with regard to them we think it would be altogether unsafe to accept the theory that a dhobi can always tell his own marks. In particular the mark "3" is a thick smudged marks somewhat different in its formation from the marks put by P. W 11 on some of the clothes seized from the accused's person on his arrest on 1-8-1966 and in the course of the search of his room in the orphanage on 2-8-1966 (of the photograph Ext. P.27 of the mark in M O 13 with the photograph Ext. P. 33, Ext. P. 35 and Ext.P 37 of the mark in M. O. 15, M.O. 18 and M.O.19 respecti-

vely) and bearing a marked resemblance to the red mark, "3" found on M Os. 29 and 30 seized from the house of the other suspected priest to which it looks suspiciously as if a, "1" has been added to make the mark "13 instead of "3". The mark "N" in M. O. 13 is rather faint—one limb is practically invissible—and although it looks like the similar mark on some of the clothes admittedly belonging to the accused in some others the formation is slightly different. (cf. Ext. P 26 the photograph of the mark in M. O. 13 with Ext. P34 and Ext. P 36, the photographs of the marks on M. O. 18 and M. O. 19 respectively). It is difficult to come to any definite conclusion on the basis of a comparison of the marks, but then the fact that the dhobies themselves have identified their marks and improbability of some other person having such a combination of marks on his clothes, namely, a black "N" in marking nut paste, and a red "3" in marking ink might have persuaded us to accept the evidence of P.W. 10 and 11 regarding the identity of M. O. 13, despite the accused's denial that M. O. 13 belonged to him or was ever in his hands, were we sure that the mark 'N' was on it when it was found on the body.

37 But this seems to us a matter of some doubt owing to certain suspicious features Both Ext. P58 and Ext. D16 refer only to the mark, "3" in M. O 13, and the investigating officers P. Ws. 40, 41 and 42 have said that they noticed

only this mark at that time. It might well be that the mark "N", if it was there, escaped their notice, for it is a faint mark and the bedsheet was dirty and bloodstained, although we must observe that a careful examination of M. O. 13 (and the steps taken by P. W 42 in the course of the investigation makes it quite clear that he was fully alive to the fact that much depended on establishing the ownership of M O 13 since it did not belong to the deceased – he had questioned P. Ws. 2 and 3 on the 19th and 20th June whereas M. O. 13 was sent to court only on the 21st) such as is expected of an officer of the rank of P. W. 42 should have revealed the mark if it was there then However that might be, P. W. 42 questioned the dhobi, P. W. 10, on 23 6-1966 and must at least by that date have gathered that, "N" was the dhobi mark of the accused who had already been questioned the same day on suspicion. One would have expected him to take P. W. 10 to the court straightway for the purpose of having the articles, if any, of the accused identified by P. W. 10 before the Magistrate. This he did not do. What he did instead was to get back M. O. 13 from the court on 27-7-1966 for the purpose of investigation. It was shown to the dhobi, P. W. 10 at the police club, Quilon on 31-7-1966, and the evidence of P. W. 10 is that he then recognized it as the bedsheet of the accused by the mark, "N" which he was able to find on it. When the magistrate ordered the handing over of M. O. 13 to

the police on 27-7-1966 he had directed that it should be returned to court before 30-7-1966, and, since whatever information P.W. 10 had to give had already been gathered on 23-6-1966, there should have been no difficulty whatsoever in complying with this direction of the magistrate if all that had to be done was to show M. O. 13 to P W. 10 and have it identified by him. Actually, however M. O. 13 was returned to court only on 4-8-1966 after the arrest of the accused at 10 P. M on 1-8-1966 and the seizure of the clothes, M Os. 14 to 17, worn by him and bearing the dhobi marks "N" and "3" and after the recovery of the clothes, M. Os. 18 and 19, bearing the same marks, from his room on 2-8-1966. It was on 5-8-1966 when P Ws 10 and 11 were put up for examination by the magistrate, P. W 17, under section 164 of the criminal procedure code and had been so examined that for the first time there was a record in court showing that M. O. 13 bore the mark "N". Even so the evidence of P. W. 17 is that though he was satisfied that P. Ws 10 had gone to him voluntarily it did not appear to him that his statement was cent percent voluntary. There is no evidence to show in whose hands M O 13 was between 27-7 1966, when it was taken from court, and 4-8-1966, when it was returned to court —it is clear that it passed through many hands—and while we are not holding affirmatively that the mark, "N" was put on it during this period we find it impossible to exclude

that possibility. That being so, we are unable to hold that it has been satisfactorily established that M O· 13 belonged to the accused. For, we do not think that, merely from the appearance of the article and the mark "3" thereon, it is possible even for a dhobi to identify it beyond doubt.

38 That brings us to the fifth and sixth of the six circumstances on which the prosecution founds it's case namely, the discovery of the knife, M. O· 20, and the bag, M· O. 26, both of which, as chemical examination disclosed, were stained with human blood.

39. The accused was arrested by P·W· 42 at 10 P. M. on 1-8-1966 at the Police Club, Quilon where he had been taken the previous night for interrogation. At half past nine the following morning he was produced before P· W· 35, sub-magistrate, Quilon, who handed him back to P· W 42 for production before the Sub-magistrate, Pathanamthitta, the magistrate having jurisdiction. (P· W· 35 could not have thought that further detention was unnecessary, and, therefore, in terms of section 167 (2) of the code he should really have ordered the detention of the accused in custody · In answer to P. W. 35's question on the point, the accused replied that he had no complaint to make against the police·

40 The accused was produced before P.W.

17, the sub-magistrate, Pathanamthitta at 12·30 P. M. the same day with the report Ext. D17 (the whole of which has been marked although it embodies in great detail the confession alleged to have been made by the accused to P. W. 42) which contained the prayer that the accused be remanded to police custody for five days so that he might be taken to the scene of offence for the recovery, pursuance of information already gathered from him, of the knife used for the commission of the offence, and to Changanacherry for the recovery of the bag he was carrying, and for other purposes. In connection with this request P. W 17 seems to have put the accused the usual question whether he had any complaint to make, and there upon, the accused made the statement, Ext. D13, in which he said that he had been taken on the night of the 31st to the Quilon Police Club, that he had been questioned with reference to Mariyakutty's death, that he had protested his innocence and said that he knew nothing about it, that he had been beaten and subjected to torture, and that finally, for the safety of his person, he had admitted the crime. This notwithstanding, P. W. 17 made an order remanding the accused to custody till 15-8-1966, for the first five days to the custody of P W 42 for purpose of investigation and recovery of material objects, with the direction that the accused should be produced before him again on the expiry of these five days.

41. P. W. 42 straight way took the accused

to the spot where the body was found and from there the accused took P. W. 42 westwards along the road, a distance of two furlongs and pointed out a place by the side of a thodu, a place evergrown with shrubs. P. W. 42 and four others from the large crowd that had followed them, among them P. W. 22, got down from the road to the place pointed out by the accused and searched for the knife, the precaution of search the bodies of all the five persons who embarked on the search being duly taken. After a while P. W. 22 found the knife, M. O. 20, lying with its handle exposed, and with about three-quarters of its blade embedded in the earth, at a spot by the side of thethodu, near the water line, about 1½ feet away from the road and 3½ feet below it. On P. W. 22 crying that the knife was lying there P. W. 42 went and had a look at it and seized it. This was at about 1 50 P.M. within about an hour after the accused had been handed over to P. W. 42's custody by the Sub-Magistrate, P.W. 17

42) From there, P. W. 42 took the accused to Changanacherry, and taking the local sub-Inspector, P .W. 34, with him (Changanacherry being outside his own jurisdiction) went to the orphanage and opened the accused's room with the key he had seized from the accused on his arrest, and, through P. W. 34, effected a search of the room from which various articles including the cassock,

M. O. 18, and the baniyan, M. O. 19, were seized. It is, however, the seizure of the blue plastic bag, M. O. 26, that is of relevance. This was produced by the accused himself from one of the drawers of a dressing table which the accused opened.

43) It is clear from the evidence of P. W. 42 and from his report Ext. D17, that it was by questioning the accused soon after his arrest at 10 P. M. on 1. 8. 1966 that he obtained information as to where the knife and the bag were It was as a consequence of this information gathered from the statement the accused then made, and not by reason of any subsequent statement made by the accused, that these articles were discovered and it is this statement alone that can be relevant under section 27 of the Evidence Act. Yet surprisingly enough, or, perhaps, not surprisingly having regard to the way in which the prosecution was conducted, it is of this statement that there is no evidence what so ever. P W. 42 does not speak to the contents of any such statement made to him by the accused, and the subsequent statement, amounting to a confession, alleged to have been made to P. W. 42 at the spot where the body was found, and spoken to not by P. W. 42 but by P. W. 22, is inadmissible in evidence Even the pointing out of the spot in pursuance of the previous statements alleged to have been made by the accused is little more than a repetition by sign language of

the first statement, which alone, as we have seen, can be regarded as having led to the discovery and which alone is admissible under section 27 of the Evidence Act, and of which there is no evi- dence. (See in this connection Bamkishan v. Bombay State 6 where it was held the pointing out of a pers on by a wintness to a police officer at an identification parade amounted to a state- ment to a police officer falling within section 162 of the Criminal Procedure Code)- So it would appear that, on a strict view of the matter, even the evidence that the accused pointed out the place where the knife was subsequently discovered is inadmissible.

44) There is another reason for which we think that the evidence that the accused pointed out the place where the knife was discovered and that he took and produced the bag, M. O. 26, from the drawer of the dressing table in his room is inadmissible. At 12-30 P. M on the 2nd the accused had told the magistrate, P. W. 17, that he had protested his innocence to the police and told them that he knew nothing ab out the crime, and that they tortured him and compelled him to make a confession. This was in the context of the request made by P. W. 42 that the accused be remanded to his custody for the purpose of recovering certain incriminatnig objects. Now, the necessary implication of the accused's statement to the magistrate was that he was innocent and

knew nothing whatsoever with regard to the case, and whether that statement be true or false, it certainly shows that the accused was in no mood to assist the police in the investigation, even if he could, in order to unearth pieces of evidence that would incriminate him. For we cannot conceive of a man, pretesting that he is innocent and knows nothing about the crime being yet willing to incriminate himself by showing the police where he had concealed the incriminating objects. And yet, if the prosecution case be true-- the accused's case is that he pointed out nothing and that the evidence of the recovery is completely false (a case he put forward in the affidavit, Ext.D14, he filed when he was produced before the magistrate on 6-8-1966 this was probably protesting overmuch and too soon)-an hour of P. W. 42's company was sufficient to change his mood into one of complete co-operation for the purpose of discovering evidence that would incriminate him. What was responsible for this swift and remarkable conversion ? Is it too much to any that it could only have been compulsion of some kind or other ? And, if that be so, in pointing out where the incriminating knife, M. O. 20, lay, and in taking out and producing the incriminating bag, M. O. 26 was not the accused, who was even at that time a person accused of the offence of murder, being compelled to be a witness against himself so as to attract article 20 (3) of the Constitution ?

45 In this connection reference may be made to the following observation in *State of Bombay v. Kathi Kalu*(7)

> "If the self-incriminatory information has been given by the accused person without any threat, that will be Admissible in evidence and that will not be hit by the provisions of C1. (3) of Art. 20 of the Constitution for the reason that there has been no compulsion. It must therefore be held that the provisions of S.27 of the Evidence Act are not within the prohibition aforesaid, unless compulsion had been used in obtaiaing the information."

Surely this means that where compulsion has been used. the prohibition in article 20(3) is attracted.

46 It is argued that the allegations of police torture, and of extortion of a confession, made by the accused in Ext. D13 must be false having regard to the fact that when he was questioned by P. W. 35, the magistrate before whom he was first produced, he said that he had no complaint against the police and the fact that he refused P.W. 17's offer to send him to a doctor. Also that there are indications that Ext. D13 was made under legal advice for the purpose of laying a foundation for repudiating the statement he had already made and any discoveries in pursuance thereof. We shall assume that that is so. The point, as we have already indicated

is not whether or not the accused was tortured to make a confession - there is no confession in evidence—but whether a person who had thought fit, whether under legal advice or not, to make a self exculpatory statement like Ext. D13, false let us assume, would soon thereafter have voluntarily assisted in the discovery of evidence against himself.

47 That the accused had blue bag in his room on the inside of which chemical examination discovered patches of human blood is, in any case, not a very incriminating circumstance. So far as the knife, M O. 20, is concerned, the report of the chemical Examiner is that patches of human blood were detected on both sides of the blade of the knife. Apart from the improbability of the accused not having washed the knife in the thodu, and of chosen a spot so near the road for discording it, we must confess to some degree of scepticism as to whether the smooth surface of the blade of the knife, lying exposed, even if partly buried in the earth to monsoon from the 15th June to the 2nd August could have retained any traces of blood. The knife looks very much like a new knife It is clean and sharp, with hardly any traces of rust on it, and it does not seem to us to be a knife that has weathered the south-west monsoon at it's very height for over six weeks. And, although this might not be of much importance, it does not seem to be a weapon with which the well-nigh decapitating incised wound on the neck of the deceased could have been caused.

48 It seems to us that none of the circumstances relied upon by the prosecution has been satisfactorily established. It is needless to say that they add up to nothing.

49 There is no eye-witness to the murder, nor so far as the evidence goes, is there any confession by the accused. It was therefore by no means incumbent on the prosecution to present a complete picture of the crime; it should have sufficed for it to prove the incriminating circumstances and to leave it to the court to decide whether they connected the accused with the crime in such a manner as to establish his guilt. But doubtless influenced by the confession reproduced in Ext D 17, at the trial, the prosecution, rather unwisely, committed itself to the case that on a night three nights before the new moon, the accused took the deceased a distance of 30 miles from Changanacherry on the pretext that they could make love in the open, pitched upon a locality where he had served before and therefore knew but where by the same token, he was likely to be known and recognised, took no steps to disguise himself even by the simple process of removing his cassock, could choose no better place for the ostensible purpose of making love than the hard, rough and stony surface of a road which, though lonely, was by no means guaranteed against the passage of men or vehicles, spread the bedsheet M.O. 13, for the deceased to lie on and that, after she had lain down on her back, first battered her head with two cell electric torch with which he had provided her thus causing her to raise the cry which P.W.

4 heard (hence the importance of the damaged two-cell electric torch, M. O. 12, found near the body which all the witnesses so well remembered having seen in the hands of the deceased) and then, remembering he had a knife with him which he had brought on purpose, decided to use it by cutting the deceased's throat with it and stabbing her on her chest and abdomen. Not to be behind handed the defence has thought fit to trot out a rival theory that the deceased must have gone that night, or earlier, to some house in neighbourhood in connection with what it conjectures to be her profession, that she must have been done to death there by more than one assailant with the aid of more than one weapon and that the body must then have been carried and thrown at the spot where it was found. And reference has been made to several features of the case—which in our view it would be idle to recount—which, according to the defence, makes its theory the more probable of the two. We think it quite unnecessary to canvass the merits of either theory or to embark on any speculation of our own.

50 We set aside the conviction and sentence recorded against the accused, acquit him of the offences with which he was charged, and direct that he be set at liberty.

Sd/— P. T. Raman Nayar, Ag. C. J.
Sd/— V. P. Gopalan Nambiyar,
Judge.

[TRUE COPY]

7th April, 1967. Sd/—
17th Chaitra 1889. Assitant Registrar.

APPENDIX

What Price Justice?

By A. C. Sequeira, M. A., LL. B., Advocate of the Supreme Court, Bombay Civil Serivce, Judicial (retd.), Bangalore–25.

Reverend Fr. Benedict Onamkulam, 37, a Roman Catholic priest and Manager of the St. Joseph's Orphanage, Changanacherry, Kerala, had stood trial in the Quilon Sessions Court on charges of abduction and murder of one Mariyakutty under sections 364 and 302 of the Indian Penal Code, in Nov. 1966.

Under a plaster of blood-curdling headlines, full publicity was given by the Press to this conviction and the sentence of death passed on him by the Sessions Judge. On appeal, a Division Bench of the Kerala High Court, consisting of the acting Chief Justice, Mr. P. T. Raman Nair, and Mr. Justice V. P. Gopalan Nambiyar, has reversed the decision of the Sessions Judge. The grounds on which the High court reversed the decision were that the prosecution was unable to provide any evidence that would connect the

crime with the accused and furthur that all the witnesses who had identified the accused at an identification parade held at the Quilon Police Club had hardly known the accused, the description about whom had been given to them in one and the same form by the Police.

No Direct Evidence

A significant feature of the case was the total absence of direct evidence relating to murder. The prosecution, therefore, sought to infer guilt from "circumstantial evidence," during which all charges were bandied about by the prosecution which can only be considered as irresponsible and procured evidence.

It is noticeable that Sir Norman McLeod, a distinguished former Chief Justice of Bombay, in a murder trial before him spoke of circumstantial evidence led by the prosecution in that case as "admittedly a jig-saw puzzle consisting of several wooden pieces with bits of a picture painted on them. The puzzle consisted in fitting all the pieces together so as to produce a complete picture. If a single piece was missing, or did not fit into the picture, or even if any essential piece was required to be forced into the pattern, the picture must remain incomplete and unsatisfactory."

Whether the prosecution had presented a clear and complete picture of the crime was also the question raised in the Sessions Court, Quilon.

The judgement of the Sessions Judge (Mr. P. Kunjuraman Vydiar) has been proved utterly wrong. One recalls in this context that before passing the sentence of death the learned Sessions Judge, according to press reports, brought the palms of his hands in close juxtaposition and raised them and also his eyebrows, thus unburdening his soul to God He did not realise that such dramatisation, compounded of insult and mockery, would bring grief and pain to the accused. Such conduct was hardly in keeping with judicial decorum. Law is a cold thing and should be administered as such

There are also emotional and religious tones and even overtones in his judgement. Before he tolled the bells for the accused (subject to confirmation by the High Court), there was a studied attempt to pat the Catholic Church on the back against the background of the heinous crime alleged to have been committed by the accused All this was designed to heighten the effect of his judgement. Speaking of the Catholic faith he wrote:

"... A representative (the accused of an ancient religion that stands for everything noble and pure an alleged follower of that great Apostle of love and votary of peace who sacrificed His mortal remains for the suffering humanity, the accused was masquerading in the garb of a Reverend Father and leading the life of a modern Jekyll and Hide."

Real Culprit Shielded

The evidence unmistakably showed that the police shielded and screened the real culprit or murderer and that there was sinister developments in the investigation *in limine*. In halting and embarrased language, the learned Sessions Judge paid a striking tribute to the Deputy Superintendent of Police in these terms:

"It must also be said that even though the lower rung of the investigation staff had made some mistakes here and there which were fully exploited by the defence counsel, the investigation by and large has been quite satisfactory for which the Deputy Superintendent of Police, Adoor, Shri K. V. Ramanathan has to be complimented"

In its exact meaning, the implication is that the Deputy Superintendent of Police plugged the legal loophole and played a providential role—*dues ex machina*. Calling a spade a spade, it amounts to saying that he did not hesitate to victimise an innocent priest. One must, therefore, express concern over clear indications of pressure and torture over witnesses to give false evidence. In the end, truth has triumphed over palpable untruth.

The prosecution story, so improbable in its outline, so uncertain in its details and shown to be false and irreconcilably conflicting from the mouths of the prosecution witnesses, had only to be read to be discredited.

The learned Sessions Judge ignored and brushed aside every point made by the defending counsel and did not endeavour to find out so far as was humanly possible what the truth of any particular allegation was.

The evidence disclosed that on the morning of 16-6-1966 Witness Mathai Mathew *alias* Unni Writer found the dead body of a woman lying on a road to the west of the Government Reserve Forest. According to his evidence he "woke up at 11-45 p. m. hearing cries that somebody was being killed" and he thought that the cries emanated from "the carpenter's house." Thinking that the carpenter was beating his wife he flashed his torchlight and asked aloud "who was that?" and there was no response.

Police Turn Blind Eye

What is amazing is that the police turned a convenient blind eye on this vital information. That circumstance should have been the starting point of the Police investigation. The probability was that Maryakutty was done to death in the vicinity of the carpenter's house, and the body thrown away later on a road near the Government Reserve Forest. Another thing was that though the post-mortem was conducted "from the place itself where the dead body was found," the medical officer failed to take note in regard to "the nature of the soil, the position of the body, blood stains, footprints and in regard to

traces of any struggle." The Police investigation was also silent on the point.

The yardstick to judge the situation was also the circumstance that the house where witness Mathai Mathew lived was 451 feet to the south of the alleged scene of occurance. Consequently sound energy, physically considered, after transmission had to travel through the atmosphere under certain conditions and variants such as wind and other obstacles. Based on this principle, and considering the fact that the human ear forms a natural and a most convenient receiver, the irresistable inference is that the pitch of the cries or sound which witness Mathew heard at 11.45 p.m. was from a source in the immediate vicinity of the carpenter's house. In the circumstances, the statements of witnesses that the acused abducted the woman, travelled in a car in her company in a taxi and that she was murdered on a road near the Government Reserve Forest cannot stand a moment's scrutiny.

The story of the "blood stained bed-sheet" is a disgrace to the police because the technique used by the Police was not different in this case. The bed-sheet was one of the items found near the alleged scene of offence. It was produced before the Sub-Magistrate. It was subsequently taken back from the Court for "purposes of identification on a request made by the Sub-Inspector of police."

The Chemical Analyser's report mention that

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,'the bedsheet is extensively stained with human blood" It is noticeable that the Inquest report did not take mention of any blood as having been found on it· The presence of blood stains is later sinister development after the Police designedly came into possession of the bedsheet. The number 3 was marked on the sheet·

Lending Colour and Tone

Colour and tone was sought to be lent to the Prosecution case by the theory that the letter on the bedsheet appears to be the letter 'N" and that the bedsheet with 3 and N marked thereon belonged to the accused·

The assistant Director, Forensic Science Laboratory, Trivandrum, was called to give expert evidence to establish that the letter on the bedsheet "look like N·" The learned Sessions Judge, without the slightest hesitation reached the conclusion that the letter really "look like N' and must therefore, be taken to be "N"· And finally the learned Sessions Judge proclaimed in his judgement that this witness examined to elucidate the letter N as an expert", despite the "elaborate cross-examination to which he was subjected," had "come out with flying colours." No wonder in the High Court his judgement was torn to pieces by the defending Counsel, Mr. A·S·R· Chari·

The inference of guilt was also drawn by the Sessions Judge from the alleged discovery of the blood stained knife. The story is that the accused had been taken over to the place by the police, that he showed the area where the knife could be found, that four persons searched for the knife and that one of them "found the knife at a place undrneath a Murukku tree where there are thickets nearby".

Not content with the theory that a knife was used to inflict injuries on her, suggestions were made in the course of medical evidence to show that certain injuries could have been inflicted by the "striking the head of the victim against a hard and rough substance like a stone and by hitting her with an electric torch."

So rapidly did the Police brain act that a powerful "motive was suggested that Maryakutty came by her death because she had lived on terms of intimacy with the accused and that she had given birth to an illegitmate offspring, "Joy" aged 2 years, by the accused.

In the course of the trial things got curiouser and curiouser and the prosecution case was that the accused was able to supply wheat and milk powder to the deceased. There was a second and stronger string to the bow, namely that the husband of the deceased was laid up with paralysis and therefore access to the wife was im-

possible. The learned Sessions Judge made the prosecution case most meaningful and real by his finding that the delivery of milk powder and wheat had brought about illicit intimacy and that Joy was an illegitimate offspring. There was no shred of evidence in proof of the version and evidence available was to the contrary.

Total Disregard of Section 112

In total disregard of the provisions of Section 112 of the evidence act the Sessions Judge gave finding against the accused.

The law is that when a child is born in lawful wedlock as in this case, Section 112 of the evidence Act presumes that there was access to each other. The principle underlying the rule is that on grounds of public policy it is undesirable to enquire into the paternity of a child when parents have access to each other.

Paralysis is nothing more than the loss of function of a muscle or groups of muscles consequent on an injury to the nervous system. In the absence of a detailed examination by a medical specialist, it could not be possible to infer from the mere term "paralysis" that access to the wife was impossible, which is a condition precedent in a case were the paternity of the child is questioned.

The Judgment of the sessions Judge amount to special pleading. It is perverse. There was specific information that the sound of cries was

heard from the area in the vicinity of the carpenter's house. But there was sinister development into the Police investigation in that they tried to shield or screen the real culprit. The untold story of this murder remains therefore as The Untold Story.

The police have done the accused grievous wrong with the aid of the powerful weapons in their armoury—physical pressure and torture. The evidence was cooked up throughout.

The classical image of justice—eyes blindfolded, a pair of scales in one hand, and the sword in the other,—has been distorted in sessions Court.

It is comforting to read the judgement of Their Lordships of the Kerala High Court. It is said that sun has set on the British Empire. But it is equally true that it has never set on the white wigs of their wise lord Justices. May it also never set on the white wigs of our Lord Justices in India.

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