**1969 KHC 181**
**Kerala High Court**
**V. R. Krishna Iyer, J.**

SIVAPRASAD v. STATE OF KERALA
Parallel citation(s) : 1969 KHC 181 : 1969 KLT 862
CaseNo : Crl. A. No. 192 of 1969, Cal. R. 16 of 1969
Date : 11/11/1969

***Criminal Trial -- Evidence -- Witness -- Appreciation of evidence -- The duty of the prosecution is only to unmask the actual facts and not to manipulate them so as to paint a plausible picture -- The sooner the investigation staff gets out of the probability conscious obsession, the better for the administration of justice -- What worries a judicial mind is not minor variance in versions, of witnesses but symptoms of police tampering to make the evidence too perfect to be true***

**Important Para(s):4, 5, 6, 8**

***Criminal trial -- Accused absconding -- Ambit of reliability -- One should never exaggerate the importance of the abscondance of the accused and if at all, it should ordinarily be relied upon as a rather feeble factor which lends assurance to the mind of the Judge when there is other evidence inculpating the accused***

**Important Para(s):9**

***Criminal Procedure Code, 1898 -- S.287 -- Plea of alibi by accused in committing Court -- If the accused pleads alibi, and there is no evidence to accept it, it has to be discarded, but the very plea of alibi cannot be read as evidence against him -- An accused cannot be convicted out of his own mouth based on false pleas he puts forward***

**Important Para(s):9**

***Criminal trial -- Clear evidence of stabbing -- The circumstance that some injury or other remains unexplained by itself is of little moment when there***

***is clear evidence in the case about the stabbing which constitutes the gravamen of the charge***

**Important Para(s):10**

***Criminal trial -- Acquittal based on benefit of doubt -- The benefit of doubt rule is not a legal bogey but a potent principle operative where reasonable vacillation rocks the judicial mind about the veracity of the prosecution, viewed in the***
***light of commonsense and common experience of the world and the totality of facts***

**Important Para(s):11**

***Penal Code, 1860 -- S.307 -- Attempt to murder -- Ingredients to constitute the offence -- Intention does not necessarily involve expectation; intention is the foresight of a desired issue, however improbable, not the foresight of an undesired issue, however probable -- Expectation does not in itself amount to intention. If any consequence comes about that was not desired, the act is not intentional as to that consequence -- Absence of motive and premeditation contra indicate a murderous intent. It is not proper to derive the intent of the accused in a criminal case solely from the natural and probable consequences of his act -- It cannot also be said that the desire to bring about the consequences is not necessary to constitute intention within the meaning of S.300***

**Important Para(s):12**

***Criminal trial -- Sentence -- Defects in Indian penal system -- A major deficiency in the Indian system of criminal trials is that the complex but important sentencing factors are not given sufficient emphasis and materials are not presented before the Court to help it for a correct judgment on the proper, personalised, punitive treatment suitable to the offender and the crime -- Nor are there in our law enough progressive strides or flexible and imaginative alternatives for correctional treatment of the miscreant as the more refined, sensible, scientific, human,***

***individualised and successful processes adopted in other systems of sentencing may suggest***

**Important Para(s):13, 15, 16, 17**

Referred: AIR 1954 SC 695; Referred to

**Advocates:**

F. N. Rajan; For Appellant
Public Prosecutor; For State

JUDGMENT

1. On 2nd February 1968 at about 3 p. m. a youngster, by name Sivaprasad, knifed his first cousin Sathyavrithan, the venue of the attack being the market place at Vilabhagom in Vettur Village. The stab on the chest ran the blade into the pleural cavity and Sathyavrithan's survival was fortuitous and fortunate. This criminal episode gave rise to a prosecution under S.307 of the Indian Penal Code against Sivaprasad and his brother who had also participated in the attack but did not live to face the trial, having died earlier. The Trial Court convicted the accused not under S.307 but under S.326 IPC. & sentenced him to rigorous imprisonment for two years and to a fine of Rs. 300/- out of which Rs. 200/- wereto be paid to the wounded Sathyavrithan (Pw. 2) under S.545(1)(b) of the Code of Criminal Procedure. The accused, aggrieved by the conviction and sentence, has appealed against both and a notice has been issued to him under S.439, Criminal Procedure Code, to show cause why the sentence should not be enhanced.

2. I will briefly set out the salient facts. Sathyavrithan (P. W. 2) and Sivaprasad (the accused) have an uncle Vasudevan who is now making good in Singapore Before leaving the country he had put pw. 2 in possession of his property for management in his absence. It is stated by the prosecution that the accused had a grouse on this score against his cousin who was appropriating the whole income from the property although both were nephews of Vasudevan and this, according to the prosecution, is the motivation for the commission of the offence On the date of the occurrence at about 3 p. m. pw. 2 was watching a game of

"Parial" played by others in front of the shop of one Chandrahasan. The accused, who is said to be doing a petty vegetable business in the market, came up to the scene with his brother from behind and stabbed pw. 2 on the chest. The contribution of the brother was to fist the injured on his back. A scuffle ensued in which the assailant was caught by his cousin but he purchased his release from the hold of the victim by a bite on the shoulder and thereafter made good his escape. A crowd collected and the bleeding pw. 2 was put in a taxi summoned by pw. 1, who had by then reached the 'spot, and was taken to the government hospital at Varkala and then on to the Medical College Hospital, Trivandrum. pw. 1 eventually gave the First Information Statement, Ext. P1, to Pw.6, the Head Constable attached to the Pettah Police Station, who had hastened to the hospital on a requisition from the Medical Officer on duty, pw. 4. The investigation was carried on by pw. 7, the head constable attached to the Varkala Police Station since the place of occurrence fell within the jurisdiction of that station. The Sub Divisional Magistrate, Attingal, before whom the charge sheet was laid, committed the accused to the Sessions Court, Trivandrum his brother having died when the case was pending before the Magistrate. According to the Police, the accused was absconding for over two months from the date of the occurrence till he surrendered before the Court on 6-4-1968. The latter unsuccessfully set up a plea of alibi before the committal Court but abandoned it, in vain, in the Sessions Court in favour of a blank denial of the charge framed against him in that Court.

3. I shall now deal with the evidence adduced by the prosecution in the light of the principal criticisms levelled against it by the appellant. His counsel went to the extreme extent of stating that the most serious of the three injuries, the incised wound 2 cm. long, directed transversely over the 6th inter coastal space on the left side of the chest penetrating into the left pleural cavity, was itself caused by a fall in a place strewn with glass pieces and not by a stab with a knife as urged by the prosecution. It is not unusual for an accused person, finding himself in such a situation, resourcefully invoking the grizzly and guilty presence on the scene of broken glass bits or other sharp objects as the villain of the piece. But the condemnation of this recondite suggestion by the accused in this case springs not merely from the very desperate nature of the plea but also from the poverty of testimony to prop it up. Counsel for the accused ventured the argument that injury No. 3 was but an abrasion which might have been caused

by a fall and assumed conveniently that the injured must, therefore, have fallen and, from this facile assumption, jumped to the conclusion that the incision on the chest has to be blamed on the glass pieces which perhaps lay strewn about in that place. If wishes were horses, beggars would be riders, and if every 'may be' were to harden into a "must be" at the bidding of the accused, then many a naked possibility can be transformed into a probability and a probability, in turn, equated with proof. However, it needs no shrewdness to discern that the deep wound which dangerously cut into the pleural cavity of Pw.2 was the handiwork of a human agency wielding a cruel knife and not the unkind consequence of a chance fall on the ground accidentally planted with glass pieces. Without further discussion, I agree with the conclusion of the learned Assistant Sessions Judge that pw. 2 had sustained a stab wound on his chest as alleged by the prosecution. The more serious question, however, is whether the accused inflicted the wound on pw. 2; for, only in that event can the case end in a conviction. Our system of trial is concerned only with the limited question as to whether the accused before the Court has committed the act complained of and does not extend to a more socially purposeful enquiry into how, by whom and under what circumstances the crime had been committed. In our accusatory system there is this basic deficiency which blinkers the whole forensic pursuit with the result that when an accused is acquitted of a charge, the crime goes altogether unpunished, justice fails and society looks on helplessly but demoralised. There is ordinarily no chase for the real culprit thereafter. The law reformers in our country, I hope, will remedy this drawback. Be that as it may, I have to examine the evidence adduced in this case to find out whether there is criminal nexus between the appellant and the offence.

4. The lower Court appraised the testimony of pws. 2, 3 and 5 and chose to believe them. It was urged before me that pw. 3 had himself been convicted on a former occasion and was not entitled to credit. Counsel drew my attention to the fact that although this witness had stated on oath that he had kept aloof at the time of the occurrence, the evidence of pws. 2, 5, 6 and 7 disclosed that he had been involved in the occurrence. It was further pointed out that pw. 5 was a market contractor and was, therefore, an interested witness. Other discrepancies of sorts were also placed before me. The overall effect of all this, according to the counsel for the appellant, was that the witnesses were unreliable and their testimony could not be the foundation for a conviction. I am not impressed with

the materials so marshalled against the pws. and I am not disposed to disbelieve the prosecution case on the ground of the discrepancies and unreliability put forward. Certainly, the discrepancies are minor and the interestedness, if any, flimsy. The credit of the witnesses has not been shaken to the point of disbelief. I am aware that a defence lawyer at the trial stage is defenseless before a perfectly tutored perjurer who adroitly adjusts himself accurately to every detail spoken to by his predecessors or desired by the prosecution aided, as he sometimes is, by a sort of human telecommunication agency which operates between witnesses examined and to be examined. I am also aware that even a court is sometimes helpless against cunning performers in the witness box who simulate truth and rubberise the facts to tit neatly into any mould. Certainly, Courts have to be careful when dealing with the oral evidence glibly given by unscrupulous witnesses and to avoid acting upon treacherous testimony resulting in miscarriage of justice. Imperfect as the human machinery of administration of justice is, we cannot push these frailties to a point where every witness should be discarded as untrustworthy merely because there is some discrepancy or taint. In such cases, the observations of the Supreme Court to the effect that hardly one comes across a witness whose evidence doss not contain a grain of untruth, exaggeration, embroidery or embellishment and that, confronted by such difficult situations, the Court has to scrutinise vigilantly the evidence placed before it and try to separate the grain from the chaff as best as it may, lay down the correct guide line. If the basic fabric of the prosecution case is sound, on these tests, the story must be believed.

5. The non examination of natural, neighbourly witnesses in the place of chance or partisan witnesses is a criticism which often times deserves careful scrutiny although sometimes is mere platitude. The proneness of the police to procure pliable persons to perjure even in true cases and the readiness of many people to make no bones about forswearing as means to an end are disquieting trends offset by the cowardly disinclination of otherwise honest folk to subject themselves to the teasing and dilatory forensic processes for which Courts and the profession must bear part of the blame. In these circumstances discovery of the truth becomes difficult and the best of a bad job is done. In this light counsel's criticism that neighbours have not been examined does not impress me.

6. Two circumstances which disturb my judicial conscience must be mentioned

here. P.W.5 had deposed before the committal Court that the accused and his brother had been bound to a tree after the stab was delivered. In the Sessions Court, however, he went back on this version. I have a hunch that the accused was probably tied up to a tree by the enraged crowd that gathered shortly after the stab, as an instinctive reaction to the grievous and dastardly act and to prevent the escape of the culprit. May be that some one on the prosecution side has persuaded the witnesses to play down the tying up of the accused by the time the case reached the Sessions Court, fearing that that might have an adverse impact on the chances of a conviction. It is not uncommon to find police prosecutions attempting uniformity of unveracity, touching up and rubbing off of militating details, apprehending that if the unvarnished truth, which may rouse skepticism here and there, were presented before the Court, the case may fail. This is absolutely wrong. The duty of the prosecution is only to unmask the actual facts and not to manipulate them so as to paint a plausible picture. The sooner the investigating staff gets out of the probability conscious obsession, the better for the administration of justice. Stabbing is not any the less a crime because the offender is restrained subsequently, even if wrongfully.

7. Ext. P1 is stated to be the First Information statement on the strength of which the investigation proceeded and the case built up. But it is seen in the testimony of P.W.2 that the injured had admitted before the lower Court that he had given an earlier statement before the Varkala Police prior to his departure for the Medical College Hospital. Rightly, therefore, counsel for the accused argued that there is a clear suppression of the earliest document revealing the nature of the actual occurrence. Of course, the prosecution has not hesitated to deny that such a statement had been made before the Varkala Police. The lower Court has dealt with this evidence thus:

"It has come out in evidence that P. Ws. 1 and 2 and others stopped in front of the police station on their way to the hospital. They talked to a person in mufti and probably P. W. 2 mistook the information so conveyed as a statement before the police. PWs 7 and 8 the Head Constable and Sub Inspector clearly depose that no such statement was given and they knew about the occurrence only when the first information statement recorded by P.W. 6 was forwarded to them. P.W. 1 would also swear that no statement was given by P.W.2 before Varkala Police. Exhibit P1 too is silent about it."

I am afraid that the police are not speaking the straight forward truth in this

matter. It is probable that the injured person while passing along the Varkala Police Station would have mentioned to some one in charge there what had taken place and would have hurried to the hospital for immediate medical attention. This should have been entered at least in the General Diary. It is now seen that no trace of such statement, oral or otherwise, is borne out by the records kept in the Police Station. This, according to the counsel for the accused, is a suppression of a vital document and he blames it on the habit of the police who keep back inconvenient though important evidence or withhold recording statements till they make up their mind as to how the case should be shaped. Of course, the recording of Ext. P1 could not be avoided as the constable was sent for by the Medical Officer and the statement taken down in the hospital. There is force in this suggestion and it is unfortunate that sometimes the investigator resorts to this kind of device.

8. When the police lay a charge sheet they do not impliedly undertake to procure a conviction and towards that end to harmonise all the evidence by skilful manipulation. They only assure that the investigation has been thorough and straight forward, not perfunctory or partisan, that the evidence gathered has been intelligently and impartially collated and considered at its level and placed unreservedly before the Court and the witnesses examined are not perfect parrots repeating a prefabricated story but witnesses of truth who speak to what they have observed, it being quite natural that the same event seen by many persons may make divergent impressions in their minds. And discrepancies are not necessarily the badges of untrustworthy testimony and even a partisan is not necessarily a perjurer. What worries a judicial mind is not minor variance in versions of witnesses but symptoms of police tampering to make the evidence too perfect to be true. It is from this angle that I view with suspicion and disapprobation the elimination, in the later stages of the case, of the tying up of the accused and the information alleged to have been given to the Varkala police. Even so, every flaw of the investigator cannot end in the failure of the prosecution and every falsehood of a prosecution witness should not always lead to the rejection of the whole case (See AIR 1954 SC 695 para 10). Justice is to be done not merely to the accused but also to the victim and the community, and miscarriage of justice may be as much due to unjust acquittals as to unfair convictions.

9. Counsel for the appellant criticised, as a legal error, the reliance placed by the

Sessions Court upon three circumstances. It has been brought out that the accused was absconding for two months. 'This circumstance tends to cast the gravest suspicion on the innocence of the accused, and the testimony of pws. 2, 3 and 5 has to be appreciated in this background" is the comment by the Assistant Sessions Judge on this conduct. Certainly, the accused, in making himself scarce from his normal haunts, acted suspiciously. However, Courts must be careful to remember that even innocent persons are scared into disappearance from their locality when they come to know that their name is mentioned as involved in a serious crime. Thus, we should never exaggerate the importance of the abscondance of the accused and, if at all, it should ordinarily be relied upon as a rather feeble factor which lends assurance to the mind of the Judge when there is other evidence inculpating the accused. (See in this, connection 1968-II SCWR 155 para 6, 1965 3rl. LJ 789, 1953 (3) SCR 239). Again, counsel sought to expose the fallacy of the Court relying upon the accused's plea as an incriminating evidence, as the lower Court is. alleged to have done. It is true that the Assistant Sessions Judge has observed that the accused's plea of alibi before the committing Court disables him from relying upon the plea of private defence in the Sessions Court. This is clearly wrong. The other observation that "under S.287 of the Criminal Procedure Code the examination of the accused recorded by the committing Magistrate shall be read as evidence and so the plea of alibi made by him has to be used as evidence against him" is also not beyond reproach. If the accused pleads alibi, and there is no evidence to accept it, it has to be discarded, but the very plea of alibi cannot be read as evidence against him. May by that, technically, a statement under S.287 of the Criminal Procedure Code is evidence, but it is moot whether an accused can be convicted out of his own mouth, based on false pleas he put forward. I think not. To hold that setting up a false case will, by itself, boomering on the accused is to rewrite the law harsher fashion. It is pertinent to remember the following observations of the Supreme Court in 1967-11 SCWR. page 396:
"The first argument is correct. No doubt under the Code of Criminal Procedure the statement of an accused may be taken into consideration in an inquiry or trial but it is not strictly evidence in the case. An accused when he makes his statement under S.342 does not depose as a witness because no oath is administered to him, when he is examined under that section. The recent amendment of the Code, however, enables an accused to give evidence on his own behalf under S.342A and this is only when an accused offers in writing to

give evidence on his own behalf that his statement can be read as evidence proper."
I do not dwell longer on this point since the learned Assistant Sessions Judge has not rested his conclusion on this material.

10. A minor point, on which considerable argument was made by the accused, was that the abrasion on his person had not been explained by the prosecution witnesses. I am afraid, the circumstance that some injury or other remains unexplained by itself is of little moment when there is clear evidence in the case about the stabbing which constitutes the gravamen of the charge. A practical approach, and not a technical view, is the right one. The correct law has been laid down in 1963 KLJ 309 and AIR 1961 Raj. 24.

11. Counsel finally urged that his client was entitled to purchase his acquittal, the infirmities shown being sufficient to attract the benefit of the doubt in his favour. Acquittals are not easy "buys'" at the price of unimportant weaknesses and improbabilities, where, on the whole, the core of the case of the prosecution has been made out clearly. The benefit of doubt rule is not a legal bogey but a potent principle operative where reasonable vacillation rocks the judicial mind about the veracity of the prosecution, viewed in the light of commonsense and common experience of the world and the totality of facts. So viewed, the argument of counsel against the prosecution case and evidence has not shaken the soundness of the judgment of the lower Court although some of the points made therein are open to doubt or are obviously erroneous.

12. Having come to the conclusion that the accused is guilty of the overt acts complained of, I may consider briefly whether an offence under S.307 IPC. has been made out. The lower Court thought that an attempt to murder had not been proved and gave the following grounds in support thereof:
"In the first place the conduct of the accused before and immediately after the occurrence rules out the possibility of an intention to kill Pw. 2, much less an intention to murder him. He came on the scene armed with a knife which reveals an intention to do some bodily harm, but not necessarily murder, for a person having an intention to murder would be armed with a deadlier weapon than a knife. The accused was accompanied by his brother Thulasidasan who was unarmed. Had they any intention to cause the death of pw. 2, both of them would be armed. The fact that Thulasidasan was unarmed is a clear indication that they

had no intention to cause the death of pw. 2. There is evidence to show that Thulasidasan also took part in the incident, but he was not content with striking the victim twice or thrice on the back with his fist. After the stabbing, the accused was anxious to leave the scene as is clear from his struggle to extract himself from the hold of pw. 3. In the course of the scuffle the accused never drew his knife to deal a second blow but wanted somehow to escape from the scene of occurrence and to effect such escape, he even bit pw. 2 on his right shoulder. Though the blow fell on a vital part of the body, it was dealt at random and not aimed at a particular part of the body. This is clear from the fact that the accused stabbed pw. 2 as soon as he came on the scene without pausing to ponder over the part where the blow had to be dealt. Moreover no sane person would think of murdering another in a market place in the presence of so many people. Had the intention been to murder, the accused would have chosen a more convenient place than a crowded market and it was not difficult for him to get at pw. 2more conveniently as they were close relations likely to meet often, In deciding this issue the evidence of pw. 4, the Medical Officer, is also relevant. He has expressed the opinion that the wound inflicted by the stab endangers life, but is not sufficient in the ordinary course to cause death. Therefore, I am convinced that the accused never attempted the death of pw. 2 or that he had any intention to murder him when he aimed the knife to his chest. It follows that an indictment under S.307 of the IPC. cannot be sustained."

I am unable to agree with much of what has been said here. It is strange for a Judge to conclude that if a man comes armed with a knife, and not with a dagger or an axe or other deadlier weapon, there is no intention to murder on the part of the assailant. A knife is a lethal weapon and, in this case, the wound had proved nearly fatal. The circumstance that the companion did not carry a weapon is no reason to infer that the culprit, who buried his knife deep in the bosom of his cousin, did not possess the mens rea for murder. That Thulasidasan only fisted does not attenuate the intent of Sivaprasad who inflicted a savage and treacherous stab on a vital part. More extraordinary is the observation that because the accused bought his release by a bite without dealing a second blow that is indicative of a gentler mental state; and a perverse pitch is reached when the Court holds that a man who fathoms the chest of another with a knife had not the requisite mens rea because he delivered the stab as soon as he arrived without meditating on the exact spot in the anatomy of the injured where he should plant the sharp weapon! Nor am I convinced that because the attack was

made in a market place the intention to murder was absent; may be, it was unpremeditated. Absence of motive and premeditation contra indicate a murderous intent. On the whole, I have a feeling that the learned Sessions judge was wobbling on this aspect of the case thanks to a certain conflict of views in the Kerala High Court as to the requisite mens rea under the Penal Code for an offence under S.307, IPC., now more or less settled by the pronouncement in 1969 KLT 472 (DB). Another Kerala decision reported in 1966 KLT 677 is also instructive although the ruling of the Supreme Court reported in AIR 1965 SC 843 and relied on by the appellant may seem to strike a different note. There is in the English law in insistence on an intent to kill while in Indian law that is not a necessary requisite, according to the aforesaid Division Bench ruling, which proceeds to explain the ingredients of and evidence to prove intention. About this, for my part, lam not too sure. However, if intention under S.307 IPC. is to be inferred from the act largely with reference to the natural and probable consequences thereof, there may be something to be said in the present case for the view that an offence under S.307 IPC. has been made out. I do not quite think that it is proper to derive the intent of the accused in a criminal case solely from the natural and probable consequences of his act. Nor am I inclined to agree that the desire to bring about the consequence is not necessary to constitute intention within the meaning of S.300 IPC. It is perhaps a fallacy to posit a perfect legal equivalence between a natural consequence and an intended consequence although frequently enough intent may be usefully inferred from outward acts, subject to circumstances being present negativing such a conclusion. It is a rebuttable presumption, a case of 'may ordinarily be' and not 'must inevitably be'. There is also danger, academically speaking, in dispensing with desire and confining to foresight of consequence as constituting intention. From a jurisprudential angle "Intention does not necessarily involve expectation...intention is the foresight of a desired issue, however improbable not the foresight of an undesired issue, however probable...Expectation does not in itself amount to intention." The familiar example of the surgeon who operates on his patient, hoping to save him but expecting to kill him, brings out the distinction between intention and expectation and the flaw in the theory that a man intends the natural and probable consequences of his act or does a thing intentionally if he does it deliberately or purposely. Salmond in his Jurisprudence has assented to this approach (page 379, 10th Edn.). Paton (Jurisprudence, 2nd Edn.) also observes: "A consequence must be intended, although the chance of

its happening is very remote...a consequence may be almost inevitable and yet not intended...intent does not necessarily involve expectation and expectation does not necessarily involve intent". Holmes, like a host of learned writers, was right when he regarded intent as made up of two factors: foresight that certain consequence will follow from an act and the wish for those consequences which determines the act. As Glanville Williams neatly puts it, if any consequence comes about that was not desired, the act is not intentional as to that consequence. In practice these niceties do not non plus the judge. I need not continue this discussion further because the lower court has held the accused guilty of an offence under S.326 IPC. only.

13. The only residuary question which I need address myself to is as to the correct sentence to be imposed on the accused in the present case. In the Indian penal system, unlike in the case of other advanced countries, we are still in the crime oriented pattern of punishment and have not moved into the correction oriented methods of sentence and the dichotomy of a criminal trial into guilt finding and sentencing stages is not seriously remembered. So much so, the necessary materials which will enable the Court to discharge its duties according to progressive notions of resocializing the criminal and individualising the punitive treatment are hardly collected or considered. This case is an instance in point.

14. The accused was around 18 when he committed the offence and is even now under 21. There is no evidence, placed before the Court nor sought by it as to the family and social circumstances of the accused, except such as have accidentally projected themselves into the record while collecting the evidence about the crime and its commission by the accused. A criminal trial in our country is largely devoted only to finding out whether the man in the dock is guilty. Of course, here there is no positive evidence of any previous conviction, but no such evidence can ordinarily be let in before ascertaining the guilt of the accused by the Court. However, the circumstances of the crime, which certainly are relevant in arriving at the proper punishment, are fairly clear from the records in the case. I asked counsel on both sides whether they could throw any light on the level of education of the accused, whether the accused has associates and what type of people they are and whether he is an earning member of the family or often times strays from the wholesome influence of the home. Nor is there any light forthcoming from counsel as to the other habits of the accused and his

haunts, whether they are sober or dangerous, whether he is a first offender or repeater. Under these circumstances, a Judge performs a blind man's buff in imposing sentence, which should really be the product of deliberation upon the many factors I have adverted to above if it were to serve the real goal of social defence through rehabilitation of the offender.

15. I cannot help observing that it is a major deficiency in the Indian system of criminal trials that the complex but important sentencing factors are not given sufficient emphasis and materials are not presented before the Court to help it for a correct judgment on the proper, personalised, punitive treatment suitable to the offender and the crime. Nor are there in our law enough progressive strides or flexible and imaginative alternatives for correctional treatment of the miscreant as the more refined, sensible, scientific, humane, individualised and successful processes adopted in other systems of sentencing may suggest. Between the eye for an eye attitude and the rehabilitatory objective, modern penal thought leans in favour of the latter; for, 'if you punish a man retributively, you must injure him. If you are to reform him, you must improve him. And men are not improved by injuries'. If crime is pathelogical, and it is sentences must be therapeutic. The belief that the severer the punishment, the fewer infringements there are likely to be is a trifle obsolete though still appealing to those untouched by the current ideas of a penal system that makes the reclamation of the offender into the community by reeducating him the role of the State. Few will now agree with Sir Robert Peel who regarded it "as a most dangerous experiment" when a stealing 5 from a dwelling house ceased to be a capital offence in England! The days of faith in the deterrent effect of long terms of jail life i.e. in the policy of "lawful terror" are vanishing everywhere for long prison terms may often become deceptive social tranquillisers. With all this, in the land of the Indian Penal Code, barring some legislation regarding youthful offenders, the law of punishment is alienated from correctional ideas. In 1965 (1) CriLJ 511, Naik J. observed:
"Emphasis is now gradually shifting from deterrent or retributive aspect of punishment to its reformative aspect. The view now gaining ground is that punishment is to be determined not only by the gravity of the crime but by the nature of the criminal."
But Newaskar J. in the same volume at p. 43 expressed the traditional view.
"The sentence awarded ought to have a deterrent effect and should prevent others from emulating the example of the guilty person with impunity".

16. Within the structure of what is loosely called the 'tariff system' of imprisonment the Courts in India should still adopt, I imagine, a pattern of individualised punishment somewhere in the scale. The offence in this case is serious as it involves knifing by a person in a public place. Violence is on the increase in the country a tragic commentary on national trend of which we must take due note particularly during the Gandhi Centenary year. Moreover, the victim is a first cousin, and this reveals an indifference to family relationship and affection on the part of the criminal. The actual offence itself is grave because the wound had almost penetrated the lung and the life of the injured had been definitely endangered. As against these factors which justify a deterrent sentence, other circumstances, mitigatory in character, weigh the scales in favour of an individualised lighter sentence. The accused is a young man below 20. There is no record of any criminal behaviour or antecedents and no conviction for violent crimes. There is no suggestion from the Public Prosecutor that the accused is given to reckless or hooligan disposition or company. Apparently, he is a working class man, doing painting and white washing as and when such job work offers itself (vide DW. 2) and at other times vending vegetables in a small way (vide pw. 2). No premeditation is disclosed and some fancied grievance of unequal treatment in relation to his uncle's property has prompted the crime. A long term of imprisonment may, in all probability, convert this young criminal into a hardened, desperate character, which Courts should strive to avoid. For, as early as 1919-20 the Indian Jails Committee, in its report, observed that:

"Whatever improvement may be effected in prison administration, it must, we fear, still remain true that imprisonment is generally evil and that all possible measures should be taken to avoid commitment to prison when any other course can be followed without prejudice to the public interest."

The deleterious effects of life in jail impede the subsequently imperative resocialization process of the incarcerated youth and this factor must temper the Judge while sentencing. In the absence of positive light on relevant aspects I am constrained to leave the sentence as it is at the judicial level.

17. This, however, does not mean that rehabilitative measures have no scope in the Indian Penal system. The social background and the several other factors relevant to the strategy of salvaging the crime prone person can be studied by the executive and action taken under S.401, Criminal P. C. This provision is very

wide and flexible and enables the Government to grant conditional releases or long paroles, to oblige the releases to report periodically before any authority or to require a bond from some one who will watch over the behaviour of the culprit. A variety of other conditions, by way of monetary compensation or obligation to undergo anti alcoholic treatment and the like, to suit the needs of each case, may be thought of. The features of the crime and the circumstances of the offender and even the condition of the victim may well be considered before exercising this salutary power. A new content and orientation can and should be given to this old provision, a sober balance between dehumanising deterrence and rehumanising reformation In the present case, the totality of facts affecting the offender's personality, background and criminal prognosis are not available on record and I cannot make a positive recommendation. But having regard to the youth of the offender, who presumably is a first offender, and the background of the crime to the extent brought out in evidence, I feel that the State Government should apply its mind to the aspects adverted to by me, after collecting fully the socio bio data of the accused, and take action under S.401, Criminal P.C., with an awareness of the rehabilitatory sentencing policy I have outlined at length. It is awkward for the Court to leave this delicate sentencing function to the executive but it can't be helped in the present state of our criminal law.

18. The appeal and calendar revision are dismissed. A copy of the Judgment will be sent to the Government.