

(2005) 11 KL CK 0022

In the High Court Of Kerala

Case No : Death Sentence Ref. No. 1 of 2005

Arayakkamdy Sukumaran and Others

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 16-11-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 110, 157, 161, 354(3), 366(1)

Evidence Act, 1872 — Section 155, 27, 32

Penal Code, 1860 (IPC) — Section 108, 109, 143, 147, 148

Citation : (2006) CriLJ 976 : (2006) 1 ILR (Ker) 61

Hon'ble Judges : K.R. Udayabhanu, J;J.B. Koshy, J

Bench : Division Bench

Advocate : G. Janardhana Kurup, P.K. Varghese, Surendra Singh and P.V. Surendranath, for the Appellant; Sujith Mathew Jose, PP and Noorjie Noushad, for the Respondent

Judgement

J.B. Koshy, J.—All the four appellants (accused Nos. 1 and 3 to 5 in Sessions Case No. 151 of 1997 on the file of the Sessions Court, Thalassery), were sentenced to death for offence punishable u/s 302 read with Section 149 of the Indian Penal Code. They were also sentenced to undergo (1) rigorous imprisonment for six months each u/s 143 IPC being members of an unlawful assembly; (2) rigorous imprisonment for two years each u/s 147, IPC for rioting; (3) rigorous imprisonment for three years each u/s 148, IPC for rioting armed with deadly weapons and (4) rigorous imprisonment for one month each u/s 341, IPC for wrongful restraint. Allegation of the prosecution was that due to political rivalry all the five accused together formed an unlawful assembly, and in pursuance of the common object, they killed a 38 year old person called Panniyannur Chandran in the broad day light at 4.45 p.m. on 25-5-1996 in a pathway near to his house while he was coming from the railway station along with his wife in his motor cycle after seeing off his brother-in-law at the railway station. Even though five accused were charge-sheeted, second accused was absconding and his case was split up and only four accused, the present

appellants, faced trial. Since the appellants were sentenced to death, the matter was referred to this Court for confirmation u/s 366(1) of the Code of Criminal Procedure. First accused filed CrI. Appeal No. 214 of 2005 and accused Nos. 3 to 5 filed CrI. Appeal No. 159 of 2005. Death Sentence Reference and appeals were heard together. A1 was represented by Advocate Mr. Surendra Singh and A2 to A4 were by Senior Advocate Mr. Janardhana Kurup. Shri Sujith Mathew Jose and Smt. Noorjie Noushad, Public Prosecutors, appeared for the State.

2. Prosecution mainly relied evidence of PWs-1, 2 and 3, eye-witnesses, evidence of PWs-4 and 7 who came immediately after the incident and who took them to the hospital, dying declaration, recovery of two weapons used by A1 on the basis of the disclosure statement given by him, existence of motive etc. Both sides argued much regarding the defects in the investigation. According to the appellants, various evidence were popped up and the case was made against them and actual assailants are not found out and merely because they were Marxist party activists, they were arrested and charge was made against them. It is the case of the prosecution that it is a political crime. The deceased was a BJP activist, a former candidate in the General Election in Perungalam Constituency and District President of the BJP. During the period in question, the Government was led by LDF under the leadership of Marxist party and the defects in the investigation were purposefully made. Criminal justice should not be made the casualty for the illegalities committed by investigating officers. The question is whether the Court is convinced with the evidence available in a case. If there is clear and cogent evidence, irregularities, or even illegalities, in investigation are of no consequence as held by the Apex Court in *Bikau Pandey v. State of Bihar* AIR 2004 SC 997 and *State of Rajasthan Vs. Kishore*, . Our endeavour is to find out whether there is clear evidence in a case against all the accused despite the defects in the investigation. The court has to be satisfied that the prosecution case is substantially true and guilt of the accused is proved beyond all reasonable doubt. Presumption of innocence continue till appellate court is satisfied that the accused are guilty of the charges levelled against them. We are aware of the Supreme Court dictum that even if the crime is committed in a most cruel and gruesome manner, Court should not be biased unconsciously and involuntarily on the accusation. In spite of the shocking nature of the crime, there should be dispassionate judicial consideration of evidence in a cool and detached manner. *Mundrika Mahto and Others Vs. State of Bihar*, . It was argued that many observations of the trial Court would indicate that it analysed the evidence in a biased manner. Since it is a referred trial, we are considering the evidence ourselves first and then we are considering whether conviction is possible on the basis of admissible evidence adduced in this case.

3. PW-1, wife of the deceased, deposed that the marriage was on 14-4-1990 and her husband's house is at Panniyannoor and he is an LIC agent. They have two children, aged 5 and 3. She also deposed that her husband was killed by Marxist people on 25-5-1996 at about 4.45 p.m. Her husband was a BJP candidate in the General Election in the Perungalam Assembly Constituency. He got only 10,000

votes. There was a threat that he will be killed.

Therefore, police aid post was established about 150 metres near their house. On 25-5-1996 between 2-30 and 3-00 p.m. she and her husband went to the railway station in the motor cycle owned by her husband for seeing off her brother at the railway station who was going to Madras as he was working in Madras. By 3-15 p.m. they reached the railway station. After seeing him off at 3.45 p.m. they returned. On the way they purchased some fruits. While they were nearing to the house, they saw CW1, father of the deceased. They slowed the motor cycle and asked CW1 where he was going and he stated that he was going to purchase ration rice. While proceeding and nearing the house, they saw five persons with weapons on the middle of the road at a curve and they obstructed the motor cycle. One person was carrying an axe and other four had billhooks in their hands. Though her husband tried to bypass them, the motor cycle became off. Immediately she got down. The motor cycle fell down. Husband also got down. She cried aloud. One among the ever said persons hacked her husband with billhook. Husband defended it with his left hand and his left hand was wounded. Husband ran towards the house and the ever said five persons ran after her husband with weapons. She ran towards the place where they met CW1. Hearing her cry, CW1 also was coming towards the place. It is stated that A5 Purushu hacked her husband with billhook. She also deposed that out of five, four persons ran after her husband one in the Court. She ran to her husband's house through canal road thinking that her husband might have reached house. Finding that her husband did not reach there, she again came back along with the sister of her husband to the spot. At that: time, they saw her husband lying with his head on the lap of CW 1 in blood and he had injuries all over the body. The road where her husband and herself was waylaid was south to north. When she cried embracing her husband, somebody forcefully took her to the house and she was told that her husband was taken to the hospital and by night she came to know that her husband had died. Her husband was attacked at about 4-45 p.m. She further stated that she was not aware of the names of the accused at that time. The names were revealed to her by C.W. 1 after three days of the incident. She also identified MOs 1 and 2 and stated that similar weapons were used in the crime. She also identified MOs 3 to 5. She further stated that they were waylaid at a place 215 metres from their house and distance from the house to the place where her husband was lying was 200 metres. She can identify the assailants in sight and she identified the accused in Court. She also stated that she is seeing the accused persons after the incident for the first time in Court only. To a definite question, she stated that her husband tried to turn the motor cycle to the road. The motor cycle fell down. She further stated that she ran to the house not through the very same road where her husband and assailants ran; but, through the canal road. She very clearly stated that she saw the very same faces who injured her husband and she is clearly remembering them. She answered as follows:

(Vernacular text is omittedEd.)

4. P.W. 2 stated that the deceased was an LIC agent and he promised him to get a loan sanctioned from the LIC to him. For that purpose he came to the house of the deceased along with C.W. 4 (P.W. 3). When they went there C.W. 1 stated that the deceased with his wife went to the railway station for seeing off his brother-in-law. Asking him to wait there C.W. 1 went with a bag to the ration shop after telling that he was going to the ration shop for buying ration rice and he went through the canal road. After four or five minutes, after telling the sister of the deceased that they will meet the deceased on the way, they left the house. While walking for about 100 metres, they heard a cry of a woman. They heard other cries also. Then, they saw that deceased was being chased by five persons and he identified the accused. He also gave their names and also described the injuries inflicted by them. They saw the incident within a distance of 10 metres and when C.W. 1 was coming, accused left the place. He also heard a sound of explosion. C.W. 1 came running to the place where the deceased was lying. He took the head of the deceased in his lap. The deceased was asking for water. Two policemen came there running. One policeman (P.W. 7) who wiped off his face asked the deceased who did it. Then he replied grumbling with severe pain Suku and others.

(text in Vernacular omitted.. .Ed.)

Policeman ran to get a vehicle. By the time, a woman from a neighbouring house came with water and the policeman gave water. P.W. 1 as well as the sister of the deceased also came there. By the time, police brought a jeep and the injured was taken in the backside of the jeep. C.W. 1 and P.W. 7 policeman sat in front of the jeep. Another policeman, P.W. 4, and one Rathish sat in the rear side of the jeep. They took him to the hospital. Since there was no space in the jeep he and his friend (P.W. 3) did not enter the jeep. Next day, for the funeral also, they went to the house. He revealed the names of the accused to the police at that time. Almost similar version was given by P.W. 3.

5. P.W. 4 is a neighbour. According to him, by 4-45 p.m., he heard a sound of explosion near the house of the deceased. Immediately, he went there along with some others and they saw the deceased in blood lying in the lap of C.W. 1. Near that, there were two Police Constables and P.Ws. 2 and 3 and C.W. 6 (working in Gulf at the time of incident) etc. After wiping out the blood from the face, the policeman asked who did it and he murmured.

(text in Vernacular omitted.. .Ed.)

He further stated that he also went to the hospital in the jeep brought by the police. On the way, he again requested for water. The jeep was stopped in front of a shop and the Police Constable who was sitting in front of the jeep lumped and brought a soda. At that time, the deceased was murmuring with pain. He dripped soda by hand to Chandran's mouth. Even after drinking soda, Chandran was crying with pain and was calling father and mother. Thereafter, he did not speak. When the jeep reached the hospital, they took Chandran to the casualty

and within five minutes a sister came and told that he was dead. He also stated that the deceased was facing murder threat after the murder of one Marnmen Vasu at Chokly. He further stated that he saw in the newspaper that Marxist people had made satyagraha in their office at Chokly demanding inclusion of Chandrettan (deceased) also as an accused in the Marnmen Vasu murder case. He further stated that he also heard in a public meeting that they will assassinate Chandran. He deposed as follows:

(text in Vernacular omitted.... Ed.)

In cross-examination, he stated that he is a BJP activist and deceased was the Kannur District Secretary of BJP. He further stated that he told the doctor that he saw the deceased lying injured all over the body at the road.

6. P.W. 5 is an attestor to Ext. P2 scene mahazar. P.W. 6 is the photographer who took Ext. P3, 16 photographs of the body. P.W. 7 is another important witness. He deposed that he was posted in the picket post near the house of the deceased who is the BJP District Secretary and the picket post was established there because of the murder threat to the deceased. He and C.W. 13 were on duty. The picket post is 150 to 200 metres away from the house of the deceased. On 25-5-1996 between 4-30 and 4-45 p.m. while they were on beat they heard a sound of explosion. Then, he and P.W. 13 rushed there and some women told them that somebody was stabbed. When they reached the place of incident, they saw the deceased was lying with blood in the lap of C.W. 1. He wiped of the blood in his face and identified that it was the deceased. He asked Chandran who did it. He stated a name. He was not able to understand. People who gathered there bandaged Chandran and he asked for water. He was given water. C.W. 13, by the time, brought the jeep. C.W. 1, P.Ws. 2 and 3 etc. took him to the rear side of the jeep. He and C.W. 1 sat in front of the jeep. C.W. 13, P.W. 4 and others and the deceased were in the rear side. On the way, again, he asked for water and he jumped and brought a soda. After drinking the soda, he had no memory. He was taken to casualty. After five or six minutes, they were told that he passed away. Ext. D15 contradiction was marked. In chief examination he stated that:

(text in Vernacular omittedEd.)

But, in the statement u/s 161, Cr. P.C. it is recorded as follows:

(text in Vernacular omittedEd.)

But, he is very sure that he has stated that the deceased gave the name of some person even though it was not clear and statement u/s 161, Cr. P.C. was recorded wrongly.

7. P.W. 8 is a signatory to the seizure mahazar to MOs 1 and 2. In cross-examination, he deposed that he can go to his house through mud road and canal road. PW. 9 doctor issued Ext. P6 wound certificate. He has brought by P.W. 4 Santhosh and the history and alleged cause of injury shown in Ext. P6 is that

on hearing a sound of explosion, P.W. 4 went to the place and saw the injured lying with bleeding injuries in a cut road.

(text in Vernacular omitted.. .Ed.)

8. P.W. 10 is the doctor who conducted post-mortem and issued Ext. P7 certificate. He certified that the body of a well-built minimum height man of 38 years was examined by him and the following injuries were noted:

1. 4 c.m. x 2 c.m. gaping linear wound on upper scalp (R) side incised.
2. Transverse linear incised wound on top of scalp 8 c.m. x 3 c.m. from (L) top parietal region to past the midline of the middle of the scalp cutting the bone.
3. A slashed (RY) eyebrow hanging over the eye with a piece of underlying bone, 7 c.m.
4. (R) side of the nose is cut open and hanging (flesh) incised "U" shaped inverted.
5. (L) ear is transversely slashed from the tragus and through the middle of the pinna into two, 7 c.m. incised wound gracing occiput bone and mastoid.
6. 13 c.m. x 6 c.m. transverse incised wound on the neck at the level of the (L) ear lobe gracing on the mastoid.
7. On the back, (L) side below neck, gaping 7 c.m. x 5 c.m., transverse wound and its tail extends superficially, 8 c.m. more laterally and downward (in L shape).
8. A linear incised wound 4 c.m. x 3 c.m. just below this wound.
9. 4 c.m. x 3 c.m. incised transverse wound 12 c.m. below the neck.
10. 2.5 c.m. long incised wound on skin over (L) shoulder blade.
11. Four linear slashed incised wounds on the back of head with marks on the skull from above downwards from R to L 10 c.m. x 3 c.m., 8 c.m. x 2.5 c.m., 4.5 c.m. x 2.5 c.m. and 7 c.m., x 6 c.m.
12. 11 c.m. long x 8 c.m. deep transverse incised cut on the back of neck at the level of the 5th cervical spine and cutting it and the spinal cord.
13. 12 c.m. long transversely oblique incised wound cutting open the posterolateral left thigh and knee joint, 7 c.m. deep exposing the femoral condyle and cutting it.
14. 15 c.m. oblique gaping incised wound on (L) lateral thigh middle, cutting part of the muscles and 4 c.m. deep.
15. 9 c.m. linear cut exposing the (L) shoulder 5 c.m. deep and cutting the (L) humeral head incising and exposing it.
16. Superficial transverse 5 c.m. long wound on back of (L) upper forearm

(incised).

17. 6 c.m. long incised slash separating the ulnar metacarpals of the (L) hand from the wrist 3.5 c.m. deep and oblique.

18. Superficial incised 2.5 c.m. transverse wound over the (L) wrist over the radial styloid.

19. The right cubical fossa is slashed open 7 c.m. oblique incised and 4 c.m. deep.

20. 6 c.m. long through and through cut of (R) wrist on its back with opening of skin 2.5 c.m. on the ventral aspect in the corresponding oblique direction.

21. Oblique wound 6 c.m. incised exposing the M.C.P. tendons of (R) little ring and middle fingers on the back of the (R) palm, transverse.

22. Linear contusions dark and in two number 68 c.m. each in length on (R) shoulder and transverse dark linear contusion on (R) arm 6 c.m. long and 4 c.m. long linear contusion (R) mid-forearm back.

23. Minor contusion, abrasions three in number on (L) shoulder; two transverse and one linear.

24. Dark patches (L) flank abdomen (contusion) and on (L) knee, (L) leg, (R) shin, (R) knee and (R) side abdomen.

25. Skull is cut from midline to (L) parietal region transversely reaching the durra, but without bleeding or injury to the brain.

26. Another 4 cuts on (L) occiput obliquely and over (L) mastoid.

27. Abdomen contains partially digested food materials.

28. Internal viscera pale, intact, including brain matter, liver, lungs, stomach, spleen, viscera and heart.

His opinion as to the cause of death is due to bleeding and irreversible shock, neural and vascular. He also stated that injury Nos. 1, 4, 6, 7, 10, 15, 16, 17 and 21 can be caused by a weapon like MO1. Injury Nos. 2, 3, 5, 8 and 9 can be caused by with MO1 or a similar weapon like MO1 and injury Nos. 11, 13, 14, 18, 19 and 20 can be caused with MO2. Injury No. 12 can be caused by cutting with a sharp-edged weapon like an axe and other injuries can be caused by fall on the ground and injury No. 25 is the corresponding injury No. 2. He also stated as follows:

Is it possible that even after sustaining the injuries mentioned in Ext. P7, the victim could speak for some time and drink (Q). It is possible (A).

Immediately after sustaining injury No. 12, the victim must have gone with neural shock for sometime, say for about five (5) minutes and thereafter he could have talked and drank. Approximately for another twenty (20) minutes, the

victim could have talked and drank.

Looking at the injuries mentioned in Ext. P7, do you think that those injuries were inflicted by trained hands (Q). Yes, by persons trained in killings. (A).

Many of the bones or joints through which arteries and veins pass, were cut. The artery around the shoulder, wrist, elbow, knee etc. were affected. Injury No. 12 is the result of single cut.

In cross-examination, he deposed as follows:

I suggest to you that after sustaining the injuries mentioned in Ext. P7, the victim will not be able to speak even for few seconds (Q). He will be able to speak because, a gasping patient with intact trachea, oesophagus and diaphragm can be speak till he died or went into moribund condition.

9. P.W. 11 is the village officer who prepared Ext. P8 plan. He did not mark the canal road. He also stated that he marked in Ext. P8 plan only the places which were asked to be marked by the Circle Inspector of Police. P.W. 12 was the Circle Inspector of Police, Thalassery. Death intimation was given from the Government Hospital, Thalassery. He went to the hospital and took Ext. P1 first information statement from C.W. 1. He sent that first information statement to the Station House Officer, Panoor. Covering letter is Ext. P10. Death intimation was marked as Ext. P9. P.W. 13 who prepared the FIR was stated that he entrusted a copy with PC 3841 for giving the Additional Chief Judicial Magistrate's Court. He gave the FIR to the Court and other officers on the next day. Ext. D17 was marked as the copy given to the accused. Name of the first informant was seen as Gopi. He clarified that in the original it is written as Govindan. While copy was taken for the second time with carbon a spelling mistake was committed by him in writing as Gopi and first information was given by Govindan, father of the deceased. P.W. 14 was the Sub-Inspector of Police, Panoor. He stated that in view of the Special Branch report that there is a murder threat to the deceased, a police picket was established about 150 metres away from the house of the deceased. He also stated that the murder threat was there from CPI (M) group people. In cross-examination by the accused, he also stated that for village beat duty, nobody was sent on the date of incident. No police was entrusted with the work of village beat duty on 24th and 25th because of the absence of Police Constables though it was done till 23rd. He again stated that on 25-5-1996 it was his duty joining time and he was not on duty as he was transferred. He also stated that the police picket was established about 10 to 20 days before the incident, because of the murder threat against the deceased. P.W. 15 is the subsequent SI who handed over the records to the Circle Inspector who joined duty from August, 1995.

10. P.W. 16 is the Circle Inspector of Police at Kuthuparamba and he was holding additional charge of Panoor Police Station. He has conducted the initial investigation of the case. He also stated that he did not question P.W. 1 on the date because of her condition due to the death of her husband. He deposed as

follows:

(text in Vernacular omittedEd.)

He further stated that on 26-5-1996 Circle Inspector was not there and he was in the additional charge. Sub-Inspector was transferred and ASI was in charge and GD was opened by ASI. He said that on the date of incident, Circle Inspector of Police, Panoor was on medical leave. He did not rejoin the place and later new CI joined. He further stated that the above ASI Shri Balan was a man interested in CPI (M) leaders and Nayanar Government and his relatives are CPI (M) workers. One of such name is Dhananjayan.

(text in Vernacular omitted.. .Ed.)

11. P.W. 17 is the Crime Branch Detective Inspector. Due to the complaint of C.W. 1, the matter was entrusted to the Crime Branch and he was the Detective Inspector of Crime Branch during the relevant time who conducted investigation from 12-6-1996. He has recovered MOs 1 and 2. On the date when he took over the investigation A1 to A5 surrendered in the Court. He also stated that there are lot of corrections in the final report submitted. He also stated that he was able to understand that he was entrusted with the investigation as there were defects in the investigation conducted by the police. He further stated that he is not aware what is the reason in not sending Police Constable for village beat duty on 24-5-1996 and 25-5-1996. He again stated that he was able to understand that after the murder of Mammen Vasu, there was murder threat on Chandran. Deposition of P.W. 17 shows that his investigation was namesake as he was not interested in finding out the truth.

12. Branch Manager, LIC, Thalassery Branch was examined as D.W. 1. He stated that P.W. 3 had many insurance policies. First policy is for Rs. 17,000/- and another one is for Rs. 15,000/-. Again, another policy was taken for Rs. 25,000/- and another for Rs. 50,000/-. Ext. X1 file was handed over. He also stated that loans will be granted not only for house but for purchase of plot and house on the recommendation of the Branch Manager and Agents may help the policy holders in obtaining the loan. D.W. 2, a Police Constable was examined by the defence to show that the deceased was involved in three political cases which included a murder case and he was proceeded u/s 110 of the Code of Criminal Procedure. But, he also stated that he was not able to find out any CD files.

13. Ext. P1 first information statement was given by the father of the deceased C.W. 1 who died before trial. In Ext. P1 first information statement it is also stated that the incident occurred while his son was returning from the railway station together with his wife (P.W. 1) after seeing off his brother-in-law and he rushed to the place of incident. He further stated that three persons reached his house by about 3 o'clock and asked about the deceased and he stated that he went to see off his brother-in-law and he will return only by 4.30 p.m. and they sat there and he went for buying ration. He saw his son returning to his house in his motor cycle together with his wife. Seeing him on the way, he told that he is

going to buy ration. Later, he heard cries from the daughter-in-law and he came and saw Arayakandi Suku and others inflicting injuries on him. People gathered and police gave some water and brought the jeep. He also stated in Ext. PI that the incident occurred due to the political rivalry. At the outset, defence has got a case that the Court has considered Ext. PI first information statement as a substantial piece of evidence to corroborate the prosecution witnesses which should not have been done. FI statement and FIR are very important in the investigation as investigation itself formally starts with the same. It is settled law that first Information statement is not a substantial piece of evidence. It can be used either to contradict or to corroborate the evidence of the author of FI statement. Merely because first informant died, its evidentiary value will not increase. Harkirat Singh Vs. State of Punjab, and George and Others Vs. State of Kerala and Another, . Father of the deceased, C.W. 1, gave the first information statement. After the untimely death of the deceased in a cruel manner, he did not live till the date of trial. Therefore, he was unable to be examined. The first information statement given by him cannot be used to corroborate the evidence given by other witnesses. Ext. PI first information statement was given by C.W. 1 on the basis of which the FIR was registered as deposed by the police officer who registered the FIR. First information statement is the earliest version of a witness regarding the incident. Prosecution cannot give a different story. It was argued by the learned Counsel for the appellants that even in the first information statement, name of the accused is mentioned as "Suku of Arayakandy House" (Vernacular text omitted). But, name of first accused is Suku (short name for Sukumaran). There is no case for the accused that in Arayakandy house there is another person called "Suku." Since FI statement is not a substantial piece of evidence, spelling mistake in FI statement is of no consequence. C.W. 1 is not responsible for a spelling mistake committed by a Constable.

14. Another serious argument made, at the outset, was that there was delay in forwarding the FIR to the Magistrate's Court and, therefore, the entire case is based on suspicion. It is the obligation of the investigating agency to send the FIR to the Magistrate forthwith. The seal of the Court on the FIR is seen affixed on 29th. But, it is initialled by the Judicial First Class Magistrate on 26th itself even though seal of the Jurisdictional Court of the Additional Chief Judicial Magistrate is seen affixed on 29th. The incident occurred around 4.45 p.m. on 25-5-1996 and the injured was brought to the Government Hospital at Thalassery by 5.40 p.m. He died immediately. Circle inspector of Police, Thalassery, P.W. 12, recorded the FI statement from the father of the deceased at 7.00 p.m. and it reached Panoor Police Station at 9.00 p.m. and P.W. 13 Head Constable registered the same. FIR reached the residence of the Judicial Magistrate of the first class, Thalassery at 11.30 a.m. on 26th. It is argued that even the signature of the Judicial Magistrate of the first class is also not proved. Genuineness of the signature was not questioned by the accused at any time. In The State of Rajasthan Vs. Shri Teja Singh and Others, delay of two days in

sending FIR to the Magistrate was held to be fatal in the absence of any explanation. In *Bijoy Singh and Another Vs. State of Bihar*, , the Apex Court observed as follows:

7. Sending the copy of the special report to the Magistrate as required u/s 157 of the Criminal Procedure Code is the only external check on the working of the police agency, imposed by law which is required to be strictly followed. The delay in sending the copy of the FIR may by itself not render the whole of the case of the prosecution as doubtful but shall put the Court on guard to find out as to whether the version as stated in the Court was the same version as earlier reported in the FIR or was the result of deliberations involving some other persons who were actually not involved in the commission of the crime. Immediate sending of the report mentioned in Section 157, Cr.P.C. is the mandate of law. Delay wherever found is required to be explained by the prosecution. If the delay is reasonably explained, no adverse inference can be drawn but failure to explain the delay would require the Court to minutely examine the prosecution version for ensuring itself as to whether any innocent person has been implicated in the crime or not. Insisting upon the accused to seek an explanation of the delay is not the requirement of law. It is always for the prosecution to explain such a delay and if reasonable, plausible and sufficient explanation is tendered, no adverse inference can be drawn against it.

It is further argued that even if delayed FIR is not fatal. Court should consider the evidence for a closer scrutiny. But, we note that 26th was a Sunday. The Judicial First Class Magistrate made an endorsement that it is received by him at his residence on 26th. The Investigating Officer was not questioned regarding the authenticity of the signature of the Judicial First Class Magistrate. However, it contained the seal of jurisdictional Magistrate's Court (ACJM) only on 29th after a holiday on 28th for Muharam. In this case, FI statement was given without delay. FIR was registered without delay. Investigation was also started without delay. FIR recorded in the evening at Panoor Police Station after 9.00 p.m. on 25-5-1996 reached the Judicial First Class Magistrate's Court at 11.30 a.m. at Thalassery and on the facts of the case, there is no uncondonable delay. Further, if the FIR was concocted and it was given only on 29th after questioning P.Ws. 2 and 3 as contended, the names of all the accused could have been mentioned in the FIR. But, only the name of the first accused was mentioned in the FIR. It shows that it was not concocted. It was given without delay. So, there is no unexplained delay in lodging the FIR and forwarding the same to the Magistrate and no prejudice is caused to the accused.

15. With regard to the recovery of MOs 1 and 2 also, it is stated that it is unacceptable u/s 27 of the Evidence Act. On going through the disclosure statement (Court) it will not connect the accused with the crime. There is no authorship of concealment. In this connection, we refer to the Apex Court judgment in *Pohalya Motya Valvi Vs. State of Maharashtra*, . Further, disclosure and recovery effected after three days of custody is of no value. There is no

evidence to show that A1 used two weapons and the weapons recovered had no blood stains. So, we discard the alleged recovery. Such recoveries are effected to help the accused indirectly and, at the same time, to make believe the public that investigation is being done with seriousness. In any event, considering the nature of the investigation conducted, such a possibility cannot be ruled out. We are not accepting the recovery of MOs 1 and 2 as a corroboratory evidence to convict A1.

16. Several arguments were advanced regarding the admissibility of the dying declaration said to have been made by the deceased immediately after the incident to the effect that Suku and others did the crime. Presence of P.W. 4 cannot be questioned. It is he who took him to the hospital along with P.W. 7 as can be seen from the evidence of P.W. 9 doctor and Ext. P6 wound certificate. P.W. 7, a Police Constable, who came there immediately after the incident, asked who caused this and his answer was that he made some name. But, it was not discernible to P.W. 7. P.W. 4 was able to understand the name as Suku. P.Ws. 2 and 3 who were present at that time also heard the same and deposed that the injured grumbling with pain said that it is "Suku and others" who inflicted the injuries. It is contended that because of the serious injuries inflicted as can be seen from the post-mortem certificate, it would not have been possible for him to speak. According to the counsel for the accused, it is not proved that he was having sufficient mental capacity to say like that. It was held by the Apex Court in K. Ramachandra Reddy and Another Vs. The Public Prosecutor, as follows:

The dying declaration is undoubtedly admissible u/s 32 of the Evidence Act and not being a statement on oath so that its truth could be tested by cross-examination, the Court's have to apply the strictest scrutiny and the closest circumspection to the statement before acting upon it. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person yet the Court has to be on guard against the statement of the deceased being a result of either tutoring prompting or a product of his Imagination. The Court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour.

In his cross-examination by the accused, the doctor stated that before he fell down in the state of Coma, he was able to speak. He was not influenced by anybody. Within minutes after he got the injury, he gave the alleged declaration. He was conscious and able to speak though he was having severe pain. As held by the Apex Court in Munnu Raja and Another Vs. The State of Madhya Pradesh, , "oral statement of the victim in a precarious condition need not be given full account of the incident." In Habib Usman Vs. State of Gujarat, , the Apex Court considered the question of admissibility of a dying declaration and observed that great weight must naturally and necessarily be attached to a dying

declaration recorded very shortly after the incident. In that case, stabbing occurred at 8.00 a.m. He was immediately brought to the hospital. Medical Officer examined the injured and sent an intimation to the police station. Within half an hour Sub-Inspector, Police came and recorded the dying declaration in the presence of medical officer and relatives and he died shortly at 9.15 a.m. In this case also, oral dying declaration was made within a short time of the incident. Merely a statement that Suku and others did it may not connect A1 because there may be many Sukus in the locality. As held by the Apex Court in *Gopalsingh and Another Vs. State of Madhya Pradesh and Another*, a dying declaration which does not contain complete names and addresses of the persons charged with the offence, even though may help to establish their identity, cannot be the sole base for conviction. So, dying declaration in this case cannot be taken as the sole basis for conviction. It can be considered for corroboration of evidence of others.

17. It is true that when five members imposing fatal injuries with deadly weapons, it may be difficult to say which weapons caused which injury etc. It was observed by the Apex Court in *Harshadsingh Pahelvansingh Thakore Vs. The State of Gujarat*, as follows:

...When a murderous assault by many hands with many knives has ended fatally, it is legally impermissible to dissect the serious ones from the others and seek to salvage those whose stabs have not proved fatal. When people play with knives and lives, the circumstances that one man's stab falls on a less or more vulnerable part of the person of the victim is of no consequence to fix the guilt for murder. Conjoint complicity is the inevitable inference when a gory group animated by lethal intent accomplish their purpose cumulatively.

18. P.W. 1 is the widow. She was coming along with the deceased and they were travelling in a motor cycle. It was come out in evidence very clearly that there was threat to the life of deceased. In fact, police picket was also made near his house and they were apprehending danger at any time. They saw five persons standing with weapons. They blocked the motor cycle. It was stated by P.W. 1 that the deceased tried to turn the motor cycle so that they can escape and in cross-examination, the motor cycle fell down in that process and both the deceased as well as P.W. 1 got down from the motor cycle and It shows that there was sufficient time to see the assailants. According to the evidence of P.W. 1, a. cut injury was inflicted on his hand. The deceased ran away immediately fearing his death towards his house and accused followed him. P.W. 1 cried and saw C.W. 1 coming and she also ran towards through the canal road. It is true that she was afraid. She went to the home by running thinking that her husband should have reached the home. She found that only Savithri, sister of the deceased, was there in the house. Husband had not reached home. By the time she returned, she saw her husband lying in a pool of blood. She identified all the four accused facing trial in Court. She is a most natural witness who was coming with her husband on the motor cycle. Her evidence can be discussed as an

interested witness. Apex Court in State of Rajasthan Vs. Smt. Kalki and Another, held as follows:

...True, it is she is the wife of the deceased; but she cannot be called an "interested" witness. She is related to the deceased. "Related" is not equivalent to "interested." A witness may be called "interested" only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye-witness in the circumstances of a case cannot be said to be "interested." In the instant case P.W. 1 had no interest in protecting the real culprit, and falsely implicating the respondents.

The same is applicable in this case also.

19. Major argument put forward is regarding the identity of the accused. It is argued that no test identification parade was conducted and it has been repeatedly held by the Apex Court that if accused persons are identified for the first time in the Court without a test identification parade by a witness who has seen them for the first time at the time of incident, such identification is doubtful State of Maharashtra Vs. Sukhdeo Singh and another Vs. State of Maharashtra Through C.B.I. Vs. Sukhdev Singh alias Sukha and others, ; Mohd. Abdul Hafeez Vs. State of Andhra Pradesh, and Rameshwar Singh Vs. State of Jammu and Kashmir, identified the accused before the Court only after nine years. She had no previous acquaintance with him. She was facing death at the time. There was threat to the life of the deceased and when she and her husband came, they were stopped. She has seen them face to face for sometime. It was in broad day light. She can never forget faces from her mind. It will be improper to jettison the testimony of such witnesses on the mere ground of delay. It is unlikely to fade out the canvass of her mind till her death. Further, on going through the evidence, we are of the opinion that P.W. 1 has given very truthful evidence. It has come out in evidence that A1 was residing very near to the house of the deceased. If she was not giving truthful evidence, she could have stated that she had acquaintance with him earlier. She clearly deposed that C.W. 1 gave the names of accused after two days of the incident and we find that she was not aware of their names though she is remembering their faces very clearly. It shows that she was giving a very truthful evidence. We fully believe that evidence of P.W. 1. Her evidence is creditworthy. Trial Court rightly believed the version given by her after proper scrutiny. She withstood the cross-examination. There is no necessity for any further corroboration. In this case, her version is corroborated by the evidence of P.Ws. 2, 3, 4 and 7.

20. Evidence of P.Ws. 2 and 3 cannot be brushed aside as chance witnesses. Deceased was an LIC agent. P.W. 2 wanted to take a loan from the LIC for construction of house and wanted to meet the deceased who is an LIC agent for that purpose. Even though prosecution did not give much details regarding the loan etc. deposition of D.W. 1 Branch Manager of LIC shows that P.W. 2 was a policy holder of LIC and loan will be given to the policy holders for purchasing

land and house on the recommendation of the Branch Manager. Therefore, we cannot brush aside evidence of P.Ws 2 and 3 on the ground that they are mere chance witnesses. It was held by the Apex Court in Sachchey Lal Tiwari Vs. State of Uttar Pradesh, as follows:

Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passerby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses." The expression "chance witness" is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsustainable an expression in a country where people are less formal and more casual, at any rate in the matter of explaining their presence.

It is argued that P.Ws. 2 and 3 are partisan witnesses. Merely because they are partisan witnesses, their evidence cannot be discarded completely. The Supreme Court in Hari Obula Reddy and Others Vs. The State of Andhra Pradesh, held that partisanship by itself is not a valid ground for discrediting or rejecting a sworn in testimony. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny. In Badri and Others Vs. The State of Uttar Pradesh, , the Apex Court observed as follows:

...The learned Sessions Judge overlooked the fact, which he himself took great care to emphasis in his judgment, that there were two factions in the village bitterly opposed to each other and their enmity had already taken a toll of twelve lives and, therefore, it would be idle to expect independent persons to come forward to give evidence and only partisan witnesses would be available, as they would even otherwise be natural and probable witnesses to the incident. It would not be right to reject their testimony out of hand merely on the ground that they belonged to one faction or another. This Court pointed out in Raghubir Singh Vs. State of U.P., that in this connection the general reluctance of an average villager to appear as a witness and get himself involved in cases of rival village factions when spirits on both sides are running high has to be borne in mind." The learned Sessions Judge was, therefore, plainly and indubitably in error in rejecting the evidence of....

In State of U.P. Vs. Ballabh Das and Others, , the Apex Court observed as follows:

3. ... There is no law which says that in the absence of any independent witness, the evidence of interested witnesses should be thrown out at the behest or should not be relied upon for convicting an accused, What the law requires is that where the witnesses are interested, the Court should approach their evidence with care and caution in order to exclude the possibility of false implication. We might also mention that the evidence of interested witnesses is not like that of an approver which is presumed to be tainted and requires

corroboration but the said evidence is as good as any other evidence.

It was further observed as follows:

Once it is found by the Court, on an analysis of the evidence of an interested witness that there is no reason to disbelieve him then the mere fact that the witness is interested cannot persuade the Court to reject the prosecution case on that ground alone.

Therefore, merely because P.Ws. 2 and 3 are BJP sympathisers, their evidence cannot be brushed aside. In this case, evidence of P.Ws. 2 and 3 were summarised by the trial Court and found that their evidence is reliable.

21. Minor contradictions in the evidence given by the witness in the statement u/s 161, Cr. P.C. are of no serious consequence. It is, of course, true that all the witnesses were giving deposition after nine years of the incident. There is likelihood that there will be some contradictions here and there. The contradictions are not in material particulars and because of the minor variations, they cannot be disbelieved. The Apex Court in *Rammi @ Rameshwar etc. Vs. State of Madhya Pradesh*, observed as follows:

24. When an eye-witness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant detail. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But Courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

25. It is a common practice in trial Courts to make out contradictions from the previous statement of a witness for confronting him during cross-examination. Merely because there is inconsistency in evidence it is not sufficient to impair the credit of the witness. No doubt Section 155 of the Evidence Act provides scope for impeaching the credit of a witness by proof of an inconsistent former statement. But a reading of the section would indicate that all inconsistent statements are not sufficient to impeach the credit of the witness.

In *Leela Ram (Dead) Through Duli Chand Vs. State of Haryana and Another*, , it is further observed as follows:

9. Be it noted that the High Court is within its jurisdiction being the first appellate Court to reappraise the evidence, but the discrepancies found in the ocular account of two witnesses unless, they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be

used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefore should not render the evidence of eye-witnesses unbelievable.

22. We also note that even the deposition of P.W. 7 and Ext. D15 show that though he is a Police Constable, when he asked the name of the assailant, the injured named somebody which was not clear to him. Even his statement was not recorded as spoken to by him. It is true that further investigation was conducted from the inception till final report was filed with lot of corrections. Even the statement of P.W. 7, Police Constable, u/s 161, Cr.P.C., was recorded wrongly. On going through the evidence one would suspect the role of Investigating Officers in this case and observation of the Sessions Judge regarding investigation has to be considered in this angle. In any event, as stated at the outset, illegality in investigation will not affect the case of the prosecution if there are clear and cogent evidence. Here, in spite of defective investigation, there are clear and cogent evidence to prove the charges. Each case has to be decided on the facts and circumstances of each case. As a whole, we believe the evidence of P.Ws. 1, 2, 3, 4 and 7 and on the basis of evidence adduced in this case, we sustain the conviction imposed by the Sessions Court.

23. Last question is with regard to the sentence to be imposed. It is true that the deceased, a young man and a political leader and LIC agent, was killed in a very brutal manner. His wife became a widow in a young age and two children became hapless. There were more than 24 injuries. His neck was almost cut. His skull was completely broken. There was complete disfigurement of face because of the injuries on nose and ear. Other parts of the body were also injured. At the same time, every number is brutal. Life sentence is the normal rule and death sentence can be imposed only in special circumstances. Constitution Bench of the Apex Court in Bachan Singh Vs. State of Punjab, laid down the guidelines and described the aggravating and mitigating circumstances to be considered while imposing sentence for offence u/s 302. Following the same, a three-member Bench in Machhi Singh and Others Vs. State of Punjab, observed as follows:

The following questions may be asked and answered as a test to determine the "rarest of the rare" case in which death sentence can be inflicted:

(a) is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime are such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

The principles enunciated in the above two decisions were followed in all subsequent decisions. In State of U.P. Vs. Satish, , it was observed as follows:

The following guidelines which emerge from Bachan Singh Vs. State of Punjab,

will have to be applied to the facts of each individual case where the question of imposition of death sentence arises *Machhi Singh and Others Vs. State of Punjab*, :

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime."

(iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

24. u/s 354(3) of Cr. PC. if death sentence is imposed, special reasons are to be stated. The Apex Court in *Muniappan Vs. State of Tamil Nadu*, observed as follows:

We plead our inability to understand that is meant by a "terrific" murder because all murders are terrific and if the fact of the murder being terrific is an adequate reason for imposing the death sentence, then every murder shall have to be visited with that sentence. In that event, death sentence will become the rule, not an exception and Section 354(3) will become a dead letter.

It has come out in evidence in this case that there were many political murders and crime in Kannur district during the relevant time. Deceased was a BJP leader and accused were workers of Marxist party. There was a talk among the party circles that deceased was the brain behind the murder of a Marxist party activist called Mammen Vasu. Sathyagrahas, jathas etc. were conducted for making him as an accused in that case. Even such cry for revenge were raised in public. Evidence shows that in public meetings, there was threat to the life of the deceased. Since he was having threat of death, police picket was established near his house. Soon after LDF Government came to power opponents of the deceased became stronger. Even though the place in question was a disturbed area, on the date of incident, there was no Circle Inspector in Panoor Police Station and another Circle Inspector was in charge. The Sub-Inspector of Police was asked to take leave and ASI who is a relative of Marxist leaders was put in charge and everything was done in a planned manner. The accused were poor villagers who were brain washed and became tools for committing crimes. The

leaders who called for revenge were not charge-sheeted and they are scot-free. Even their names were not revealed as they were political head-weight. Such leaders who prompts the followers to commit crimes should be chargesheeted for abetment of offence for murder. Sections 108 and 109 of the Indian Penal Code are as follows:

108. A Jbettor :-- A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

109. Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment : Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

In Major R.S. Budhwar Vs. Union of India and others, , Apex Court considered a matter where a Major in the Army was convicted for offences u/s 302 along with two other army officers. Major instigated and abetted the offence by exploiting their religious feelings and two officers committed the offence. Sessions Court and High Court imposed life imprisonment on the Major; but, death sentence was imposed on the other two officers who have done it. Apex Court was of the opinion that since the Major who instigated and masterminded the murder was given life imprisonment, hence, death sentence of the other two officers were also reduced to life imprisonment notwithstanding the fact that the Court found that two murders were committed in cold blood after diabolical planning.

25. We have already found that there is clear and cogent evidence to affirm the convictions of the accused and no interference is required in the convictions entered by the learned Sessions Judge. With regard to the sentence we have already referred various decisions of the Supreme Court wherein guidelines were prescribed. According to the Public Prosecutor, the crime was committed in a most brutal manner, that too, in the public road and the first cut injury was inflicted in front of his wife. Father of the deceased (C.W. 1) saw the bleeding body of the son in a very serious condition. It is submitted that it is a rarest of rare case and if any lenient view is taken, that will be an instigation and incentive to repeat such political crimes in the district of Kannur. It was also pointed out that in the case of life imprisonment for political crimes, past experience shows that paroles and early remissions are allowed so that public is led to believe that political murder is of not much consequence. Therefore, if any leniency is shown, it will be an incentive to commit similar offence in future. According to the counsel for the appellants, this is not a rarest of rare cases. There was no personal enmity. These poor persons were perhaps instigated or must have moved in a revengeful manner because of brainwashing of party leaders. There is time for repentance. These people are having family and this is a fit case where only a statutory minimum punishment should be imposed.

26. Every murder is brutal. But, in all murder cases, capital punishment cannot be imposed. Life imprisonment is the general rule and imposition of death sentence is an exception. It is well settled law that, death sentence can be imposed only in rarest of rare cases. Here, in the district of Kannur, both parties argued that series of political crimes occurred between the workers of BJP and Marxist parties. In fact, deceased was an accused in a murder case and involved in several political cases also. At that time he was suspected on the death of Mamen Vasu. Accused were daily wage earners having families. Wife, children and parents are depending on them. They were never involved in any crime in their life other than this. Prosecution did not adduce any evidence to show that if death sentence is not imposed, it will have repercussions in the society or the accused cannot be reformed. Poor brainwashed party workers might have carried out the instructions. Out-great country is a peace loving Nation and has the unique history of obtaining freedom through non-violence movement led by Mahatma Gandhi. By doing violence, nothing is earned except destruction of public and private property and loss of valued life of citizens. It is high time that action should be taken against those leaders who instigate, exhort brainwash and motivate followers to do violence before it reaches an uncontrolled stage. Here, real accused who masterminded the entire operation are behind the curtain and not punished. Considering all aggravating and mitigating circumstances and the modern trends in law in the matter of imposition of capital punishment, it cannot be termed as a rarest of rare cases and we are of the view that sentence of life imprisonment will suffice instead of death sentence. But, while giving parole or commutation, Government should be very care ful so that it will not give impression to others that in political crimes, accused persons can get parole or commutation easily.

In the result, appeals are partly allowed. Conviction of the accused u/s 302 and other offences are confirmed. Death sentence is set aside. It is altered to sentence of life imprisonment with fine of Rs. 10,000/-each for the offence punishable u/s 302 read with Section 149. In default of payment of fine they shall also undergo six months" rigorous imprisonment.