
(2002) 09 KL CK 0058
In the High Court Of Kerala
Case No : CRLA No.771 of 2000

Chack @ Aniyan Kunju and Others

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 10-09-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 157
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2002) 2 KLJ 845

Hon'ble Judges : Kurian Joseph, J;G. Sasidharan, J

Bench : Division Bench

Advocate : M.N. Sukumaran Nayar Sr and S. Vijayakumar, for the Appellant;
Ravikumar (PP), for the Respondent

Final Decision : Dismissed

Judgement

Sasidharan, J.—This appeal arises out of Sessions Case 30/95 on the file of the Court of. Session, Kottayam, in which the appellants were the accused. The allegation against the appellants was that they committed the offence punishable u/s 302 read with Section 34 of the Indian Penal Code. After trial, on an appreciation of the evidence, the trial court found that the appellants committed the offence punishable u/s 302 read with Section 34 of the Indian Penal Code and convicted them thereunder. On hearing the appellants on the question of sentence, the learned Sessions Judge sentenced the appellants to undergo imprisonment for life and to pay a fine of Rs.10,000/- and in default of payment of fine to undergo simple imprisonment for three months each. This appeal is filed challenging the order of conviction and sentence of the appellants by the learned Sessions Judge. The allegation is that on 16.6.1994 at 11 p. m., the appellants in furtherance of their common intention to cause death of Kuttappan assaulted him by beating with iron rod, handle of axe and handle of spade, and he died as a result of the injuries suffered in the above incident. The case of the prosecution is that the appellants who were having previous enmity had the common intention to cause the death of Kuttappan. The evidence available in this

case is that Kuttappan who was taken to Kanjirappally Government Hospital and the Doctor who examined him at 2.45 in the night found that he was dead. Ext. P2 intimation was sent by the Doctor to the Police Station, It was PW1 who gave the information which led to the registering of the crime against the appellants u/s 302 read with Section 34 of the Indian Penal Code. PW1 is having a provision shop at Mukkada Junction, within the limits of Manimala Police Station. PW2 and Kuttappan went to the shop of PW1 for purchasing provision and at that time, appellants 1 and 2 and CW3 and CW4 came to that shop. It is stated that appellants 1 and 2 and CW3 and CW4 purchased beedi and some other articles from the shop of PW1 and went away from that shop. When Kuttappan was about to leave the shop after purchasing rice and other articles from the shop of PW1, it was found that his umbrella was missing. Thinking that appellants 1 and 2 and others would have taken the umbrella, PW2 and Kuttappan went to see them and on intercepting them asked them whether they took the umbrella from the shop of PW1. Then they told Kuttappan that they did not take the umbrella and PW2 and Kuttappan went back to the shop of PW1. After some time, they again went in search of the appellants 1 and 2 and CW3 and CW4 to ask them whether they had taken the umbrella. On the way, they met the first appellant and CW3 and CW4 and there ensued a quarrel. There was an altercation and Kuttappan pushed the first appellant by his neck and the first appellant fell down, as a result of which he suffered injury on the back of his head. Then, PW2, PW3 and Kuttappan went away from the place where that altercation took place and PW2 told the appellants that the umbrella would have definitely been taken by appellants 1 and 2 and others and they went again to ask the appellants to return the umbrella. On the way at the place of occurrence, the appellants assaulted Kuttappan. The allegation is that the second appellant beat Kuttappan with an iron rod and then Kuttappan ran away from there towards north and he crossed the channel. Since the second appellant on showing the iron rod asked PW2 to go away from there, he ran away from the place where the second appellant assaulted Kuttappan by beating with an iron rod and he came back again. The case of the prosecution is that the appellants chased Kuttappan, who ran towards north and crossed the channel and again assaulted him by beating with weapons mentioned above. Overt acts are alleged against the appellants 1 and 3 and the allegation against the 4th appellant is that he lit a torch, so that the other appellants could assault Kuttappan in the light of the torch. On being assaulted, Kuttappan suffered injuries and he fell in the channel. The allegation is that after falling in the channel also, Kuttappan was beaten up. PW2 ran away from the place of occurrence and he did not tell anybody about the incident in the night.

2. PW I who was sleeping in his shop in the night, at about 1 0" clock went out of the shop for passing urine and then he heard somebody crying in a feeble voice "mother mother", Then he did not go to the direction from where that feeble cry was heard. He went to inform the neighbours that somebody was crying by lying near to his shop. He went to the house of PW3 also to inform him about what he

heard from the direction of the channel. PW 1 and CW6 to CW8 went to the place from where the cry was heard and PW3 also went there. Then, according to the prosecution, Kuttappan said that appellants 1 and 2 and the children of the second appellant assaulted Kuttappan to the point of killing him. After that, Kuttappan was taken in a Jeep to Kanjirappally Government Hospital. The Doctor who examined him in the hospital said that he was dead.

3. At 5.10 a. m. on 17.6.1994, PW1 went to Manimala Police Station and gave Ext.PI first information before PW9, the Sub Inspector of Police-On the basis of Ext. P1 first information, PW9 registered Crime 93/94 u/s 302 read with Section 34 of the Indian Penal Code. Ext. P1 (a) is the first information report prepared by PW9 at the time of registering the crime. The further investigation of the crime was conducted by PW 10, the Circle Inspector of Police. He held inquest on the dead body of Kuttappan, which was kept in the mortuary of the hospital and prepared Ext.P12 inquest report. Ext.P10 is the scene mahazar, M08 umbrella was taken into custody by the Circle Inspector of Police. M02 handle of axe was also taken into custody by the Circle Inspector of Police when preparing the scene mahazar. Appellants 3 and 4 were arrested by PW9, they were produced before PW10 and they were questioned by PW 10. When the third appellant was questioned, he gave the information which led to the recovery of the handle of spade, lunky and dothy and on the basis of that information, those articles were taken into custody on preparing Ext.P8 mahazar. He identified MO3 as the handle of spade taken on the basis of the information given by the third appellant. When PW10 questioned the 4th appellant, he gave the information which led to the recovery of the iron rod, lunky and torch and those material objects were taken into custody from his house. Ext.P9 is the mahazar pre-pared by PW10 at the time of taking into custody the above material objects. M04 is the iron rod and MOI is the torch. PW10 proceeded with the investigation of the crime and filed final report in Court.

4. On hearing the Public Prosecutor as well as the counsel appearing for the appellants in the trial court, charge was framed against the accused. The trial of the case commenced. After the evidence was adduced, the trial court found that the charge had to be revised. On 6-10-2000, the learned Sessions Judge framed a revised charge and that was read over and explained to the appellants. They denied to have committed the offence. Since revised charge was framed, the learned sessions judge gave opportunity to the prosecution as well as the appellants to adduce evidence. No evidence was ad-duced by the prosecution and the appellants. It was after that the learned sessions Judge proceed to dispose of the case by appreciating the evidence which had already been adduced.

5. PW5, the District Police Surgeon, Kottayam conducted Post mortem examination on the dead body of Kuttappan at 2 p. m. on 17.6.1994. Ext.P7 is the post mortem certificate prepared by PW5 in which ante mortem injuries are mentioned. PW5 says that his opinion as to cause of death is that Kuttappan died

of head injury sustained by him. PW 5 was referring to the injury No.9 noted in Ext. P7 post mortem certificate. He went on to say that injury No.9 is sufficient in the ordinary course of nature to cause death. It is clear from the above evidence of PW5 that Kuttappan died as a result of injury No.9 shown in the Ext.P7 post mortem certificate. There are other injuries also suffered by him as noted in Ext.P7 post mortem certificate.

6. The prosecution relies on the evidence of PW2, the only witness who says that he seen the occurrence. There is also evidence of PW1 and PW3 regarding the dying declaration alleged to have been made by Kuttappan when he was lying in the channel on sustained injuries. PW1 says that he is running a provision shop at Mukkada Junction and that on 16.6.1994 in the night, he was sleeping in the above shop. At about 1 O'clock in the night, he went out of the shop for passing urine. He says the provision shop is in the house in which he was residing. He passed urine and at that time, he heard somebody crying by calling mother. The version of PW-1 is that CW9 Kuttappan was at that time sleeping in a small hut situated near to his shop and he went there and told CW9 that he heard somebody crying. Thereafter, PW1 went back to his shop and then he saw that the provision purchased by Kuttappan was there beneath the table in the veranda of the shop. When PW1 heard somebody crying, he thought that it must be Kuttappan, who was crying. PW1 woke up his father and told him that somebody was crying. Then the father told PW1 to inform in the house of Kuttappan about the fact that somebody is crying at a place near to the shop. PW1 proceeded on to say that he along with CW1 went to the house of PW3 and told him about what he heard. PW3 went to the house of Kuttappan and enquired whether Kuttappan was there. On knowing that Kuttappan was not in the house, CW5 called CW6, CW7 and CW8 and all of them together went to the direction of the shop of PW 1. When they reached near the shop, The cry of somebody was heard. All of them together went to the place where somebody Was crying. When they reached a place on the northern side of the shop of PW1, Kuttappan was seen lying in a channel. Then PW1 says about the dying declaration alleged to have been made by Kuttappan. PW1 also went in the Jeep in which Kuttappan was taken to the hospital.

7. PW3 is the brother-in-law of Kuttappan. His version is that on 16.6.1994 at about 1 O'clock in the night, PW1 and CW9 went to his house and informed him that the provision purchased by Kuttappan from the shop of PW 1 was not taken away from the shop by Kuttappan and that there was a quarrel which took place between Kuttappan and the first appellant. PW1 told PW3 that he heard somebody crying from a place near to his shop. PW3 says that he went to the house of Kuttappan and enquired whether Kuttappan was in his house. Since Kuttappan was not in the house, PW3 called CW6, CW7 and CW8 and all of them together went to Mukkada Junction. Then they heard a cry and they went to the place from where they heard the cry. The version of PW3 is that the cry was heard from the direction of a plantation, PW3 says that they saw Kuttappan lying In a channel. Then PW3 says about dying declaration Kuttappan made to them.

8. The submission made by the learned counsel appearing for the appellants is that the evidence of PW1 regarding the dying declaration does not mention about the appellants. What PW1 said in Court was that Kuttappan said when he was lying in the channel on sustaining injuries that those from Kambilayam killed him. In the cross-examination PW1 says that the employees in Cheruvally. Estate were the persons who were residing in Kambilayam and there are about 10 to 36 houses in Kambilayam. The argument advanced by the learned counsel appearing for the appellants is that since PW1 said that what Kuttappan (old him was that those who from Kambilayam assaulted him and that there are about 10 to 36 houses there, it is not possible to gather from what PW1 said in Court that the appellants were the persons mentioned by Kuttappan at the time of giving dying declaration. Ext. PI is the first information given by PW1 and on going through Ext. PI, it is seen that PW1 said about the dying declaration made by Kuttappan. In Ext. PI, the statement is that Kuttappan told him that appellants 1 and 2 and their children assaulted him. It is true that in the chief-examination PW1 did not mention the names of appellants 1 and 2 when speaking about the dying declaration made by Kuttappan. It is not necessary that at the time when giving evidence regarding dying declaration, witness will have to reproduce the words spoken by the declarant at the time of giving dying declaration. When PW1 was saying that it was those from Kambilayam who assaulted Kuttappan, what he meant was that the appellants were the assailants is clear from the statement given by PW1 even in the chief-examination. After saying that Kuttappan said that those from Kambilayam killed him, PW1 says that by saying that those persons were from Kambilayam what he meant was that the appellants were the persons who assaulted Kuttappan. The learned counsel appearing for the appellants would say that what PW1 understood on hearing the dying declaration cannot be the evidence in the case and what actually the declarant said has to be the evidence regarding dying declaration. Since it is an accepted proposition that the witness who is giving evidence regarding dying declaration need not reproduce the words spoken by the declarant when he is giving evidence in Court, it is not at all correct to say that the evidence of PW1 that those from Kambilayam assaulted Kuttappan was the statement given by Kuttappan has to be discarded. So, the statement of PW1 in the cross-examination that there are about 10 to 36 houses in Kambilayam cannot be pointed out as a fact, which would indicate that PW 1 was not certain about the persons who assaulted Kuttappan at the time when he was speaking about the dying declaration given by Kuttappan. When a question was put to the witness during cross-examination, how many houses are there in Kambilayam he gave the answer that there are 10 to 36 houses. But, he is definite in saying that by saying those who from Kambilayam assaulted Kuttappan what he meant was that the appellants were the persons who assaulted Kuttappan.

9. first information is not substantive evidence. First information can be used only for corroboration and contradiction of the person who gave it at the time when he is being examined in Court. It is not necessary that the first information

will have to contain all the details regarding the commission of the offence. An Officer-in-charge of a Police Station who gets first information regarding the commission of the offence, if he has reason to suspect the commission of cognizable offence has to send a report forthwith to the Court which is competent to take cognizance of the offence. First information is given for the purpose of setting the law in motion and what all things necessary for the Officer-in-charge of the Police Station to suspect the commission of a cognizable offence which he is empowered to investigate need only be there in the first information. Even though the first information given by PW1 cannot be treated as substantive evidence since that is admitted in evidence as Ext. PI, we can look into the first information or see what was stated by PW1 at the time of giving first information. In the first information PW1 says that Joykutty (second appellant), Aniyankunju (first appellant) and children who are from Kambilayam assaulted him for killing him. It is such a witness who when giving first information mentioned the names of the first appellant and the second appellant and also said that their children assaulted Kuttappan when saying about the dying declaration made by Kuttappan who says before Court that those who from Kambilayam assaulted Kuttappan was the statement regarding dying declaration. At the time of giving Ext.P 1 first information, immediately after the death of Kuttappan, i.e., at-5.10 a.m. on 17.6.1994, PW1 says about the dying declaration and his version regarding dying declaration is that the declarant said that first appellant and the second appellant and the children were the persons who assaulted him. If it is true that when giving evidence, this witness only says that the dying declaration made by Kuttappan was that those from Kambilayam assaulted Kuttappan. As stated earlier, PW 1 said that by saying those from Kambilayam what he meant was that the appellants were the persons who assaulted Kuttappan. The fact that the words spoken to by PW1 at the time of giving first information as what the declarant said was riot reproduced at the time of giving evidence, is of no consequence because it is not necessary that the same words will have to be spoken to by the witness at the time when he is being examined in Court.

10. PW3, the other witness who speaks about the dying declaration made by Kuttappan says that what Kuttappan said was that Aniyankunju, Joykutty and children who were from Kambilayam assaulted him. In the cross examination, this witness says that at the time when he was questioned by the police, he told the police that the dying declaration given by Kuttappan was that Joykutty, Aniyankunju and children who were from Kambilayam assaulted Kuttappan whereas he said when he was questioned by the police that Joykutty, Aniyankunju and their children assaulted Kuttappan was the statement given by Kuttappan. At the time of examining before Court he said that Aniyankunju, Joykutty and children from Kambilayam were the persons who assaulted Kuttappan was the dying declaration given by Kuttappan. Of course, there is a contradiction and that cannot at all be treated as material contradiction which would render inadmissible the evidence given by PW3 regarding dying -

declaration alleged to have been made by Kuttappan. There is no reason, not to accept the evidence of PW3 for the mere reason that there is such a minor contradiction.

11. PW5, the Doctor who conducted post mortem examination and prepared Ext. P7 wound certificate said, when he was examined in Court that taking into account the entire ante mortem injuries noted in Ext. P7, the victim may not have survived for more than an hour. He went on to say that voluntary act of the victim was always there and he would cry and talk on sustaining injuries. The version of PW5 is that the time and duration for that may vary from few minutes to half an hour or one hour. All these facts were brought out during examination of PW5 by the learned Sessions Judge putting questions to him. But on pointing out the version of PW5 that he can give the opinion that the victim may not have survived for more than an hour, the learned counsel appearing for the appellants would submit that the evidence regarding dying declaration cannot be believed for the reason that there was no possibility of Kuttappan giving dying declaration after X O'clock in the night since as per the version of the Doctor he would have died within one hour after sustaining the injuries. The case of the prosecution is that the assault was made at 11 O'clock in the night. Even if it is assumed that the assault was made some time after 11 O'clock in the night, if the version of Doctor is taken as true it could be said that at the time when Kuttappan is alleged to have made the dying declaration, he would not have been alive. The case of the prosecution is that Kuttappan died by 2.45 in the night on the date of occurrence. Ext. P2 intimation given by PW4, the Doctor to the police says that at 2.45 p.m., the Doctor examined and found that Kuttappan was dead. What the Doctor says in Ext. P2 is that Kuttappan was brought dead in the hospital. The statement of the Doctor in Ext. P2 that Kuttappan was dead has to be appreciated in the light of the fact that the Doctor would have found that Kuttappan was dead only at the time when he examined him. The other evidence available in this case also has to be taken along with the above evidence of the Doctor.

12. PW1 and PW3 say that they along with others took Kuttappan in a Jeep to the hospital. The evidence of PW1 is that when Kuttappan was being taken in the Jeep, he was making some voice and he was crying. He even went to the extent of saying that Kuttappan asked them, not to touch his leg. That shows that according to PW1, Kuttappan was even talking at the time when he was taken to the hospital in the Jeep. PW3 says that till Kuttappan reached the hospital, he was talking. There is evidence of PW1 and PW3 that Kuttappan was alive when he was being taken in the Jeep to the hospital. That version of PW1 and PW3 is not at all challenged in the cross-examination. There is nothing to show that PW1 and PW3 have any reason to falsely implicate the appellants in the crime. Hence, we do not find any reason for not accepting the version of PW 1 and PW3 regarding the fact that till he was taken to the hospital in a Jeep, he was alive.

13. The learned counsel appearing for the appellants on pointing out the decision

in Banka Nayako and Others Vs. State of Orissa, argued that when considering the question of accepting the dying declaration alleged to have been made by a person, the opinion given by the Doctor assumes much importance. That was a case in which the Doctor stated that he found on post mortem examination that there was congestion of the brain of the deceased due to head injuries and that having lost consciousness, the victim might not have regained consciousness. In the light of such an evidence given by the Doctor, the Court found that it was not possible to say with any amount of certainty that the deceased made the dying declaration as stated by another witness examined in the case. There was also evidence in that case given by two witnesses that they found the injured lying unconscious in the bed of the river and he came to his senses temporarily when water was poured into his mouth. Even though that was the evidence of the other witnesses, the Supreme Court found that in the light of the evidence of the Doctor that the injured might not have regained consciousness the evidence regarding dying declaration could not be accepted. In Kake Singh alias Surendra Singh V. State of Madhya Pradesh (1981 S. C. C. (Cri.) 645), the Supreme Court said that the dying declaration recorded by a Head Constable could not be accepted for the reason that the medical evidence available in the case was that there was possibility of the deceased becoming unconscious on sustaining the injuries. That was a case in which there was no other evidence and the Supreme Court said that the declaration being the solitary evidence in the case, conviction could not be solely on the basis of that declaration in the light of the fact that there was medical evidence to show that there was possibility of the deceased becoming unconscious on sustaining the injuries. The submission made by the learned counsel appearing for the appellants on citing the above decisions is that even though those were cases in which there was medical evidence only in the form of opinion that the injured would not have been conscious at the time when the alleged dying declaration was given the court refused to accept the evidence regarding dying declaration. This is a case in which the Doctor is definite in saying that the injured Kuttappan would have died within one hour of sustaining the injuries. It is true that the Doctor says that Kuttappan would have died within one hour of sustaining injuries. But, that is an opinion given by the Doctor on finding the injury on the dead body at the time of conducting autopsy. The above evidence of the Doctor has to be taken along with the evidence of PW1 and PW3 which has been adverted to above. The direct evidence of PW1 and PW3 would clearly show that at the time when Kuttappan was taken in a Jeep to the hospital, he was alive and he was also talking. There is no reason for discarding the above evidence of PW1 and PW3. We are inclined to accept the evidence of PW1 and PW3 that Kuttappan was alive and was talking at the time when he was being taken to the hospital. The evidence available in this case is that dying declaration was given by Kuttappan even at the place of occurrence even before he was taken to the hospital. So, the evidence of PW1 and PW3 regarding dying declaration, according to us is credible.

14. One of the points urged by the learned counsel appearing for the appellants

is that there is delay in the first information report reaching Court. What is seen from Ext. PI is that the first information was given by PW 1 at 5.10 a.m. on 17.6.1994. In Ext. PI(a), the first information report, there is initial put by the Magistrate in token of his having received the report. There, the time of receipt of first information report is shown as 6.35 p.m. on 17.6.1994. When a Police Officer who is empowered to investigate a cognizable offence, about the commission of which he gets information has reason to suspect the commission of such an offence, he has to send a report forthwith to the Magistrate. Provision is made making it necessary that a report has to be sent by the Police Officer forthwith to the Court for the purpose of avoiding the possibility of embellishment as a result of afterthought. The delay in first information report reaching the Court by itself is not a ground for throwing out the case of the prosecution. When the delay in first information report reaching the Court is explained by the prosecution, the delay cannot be a ground for not accepting the case of the prosecution.

15. In *Vijayakumar and others Vs. State*, , a Division Bench of this Court referred to JT 1994 3 S.C. 440 (*Mehraj Singh v. State of U.P.*) in which it was held that to see whether the first information report was lodged at the time it is alleged to have been recorded, the courts are to look for certain external checks. One of the checks is the receipt of the copy of the first information report by the local Magistrate. If the report is received by the Magistrate late, it can give rise to an inference that the first information report was not lodged at the time noted in the first information report. To get over this difficulty, the prosecution can offer a satisfactory explanation for the delay in despatching the report or the receipt of the same by the Magistrate. In the decision in *Meharaj Singh (L/Nk.) Vs. State of U.P.*, , which was relied on by the Division Bench of this Court in the decision referred to above, it was held that F.I.R. in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. According to the Supreme Court, the object of insisting upon prompt lodging of the F.I.R. is to obtain the earliest information regarding the circumstances in which the crime was committed including the names of the actual culprits and the parts played by them, the weapons if any, used as also the name of eye witnesses, if any. Making the above observations, the Supreme Court went on to say that the delay in lodging the Supreme Court went on to say that the delay in lodging the F.I.R. often result in embellishment which is a creature of an afterthought. The Supreme Court went on to say that if the report is received by the Magistrate late, it can give rise to an inference that the F.I.R. was not lodged at the time it was alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the F.I.R, by the local Magistrate. In both the above decisions, what is said is that if there is delay in the F.I.R. reaching Court, there is possibility of there being embellishment which is a creature of an afterthought. But, the Supreme Court in the above two decisions would also say that if the delay in reaching the F.I.R. in Court is

satisfactorily explained, then the delay cannot be a ground for saying that there would have been embellishment as a result of afterthought.

16. The learned Public Prosecutor would submit that it is a case in which the first information report reached the Court on the same day on which it was prepared and there is no extraordinary delay in the first information reaching the Magistrate. The submission made by the learned Public Prosecutor is that even though the first information was recorded at 5.10 a.m. on 17-6-1994, the Police Officer had to prepare the F.I.R. on the basis of the first information given by PW 1 and to take copies of the same. As per law, it is necessary that copy of the first information has to be given to the first informant. As pointed out by the learned Public Prosecutor, even if the F.I.R. was sent to the Court in the morning, if the Magistrate is presiding the Court, he would have seen the F.I.R. only after his work in the Court was, over. It is probable that some delay will be there in sending the F.I.R. to Court for the reason that the first information report has to be prepared and the copies of the same also have to be prepared. Then there is the fact as pointed out by the learned Public Prosecutor that it may take some time in the Court to place the F.I.R. before the Magistrate who has to preside the Court. So, the delay which according to the learned counsel appearing for the appellants was till 6.35 p.m. in the evening cannot be said to be an extraordinary delay or inordinate delay which would affect the case of the prosecution for the reason that the Police Officer would have got time for embellishment as a result of afterthought. In the decision in *Anil Rai v. State of Bihar* (2001 SCC. (CrI) 1009), the Supreme Court said that the delay contemplated u/s 157 of the Cr.P.C. for doubting the authenticity of the F.I.R. is not every delay, but only extraordinary and unexplained delay. In *Sarwan Singh and Others Vs. State of Punjab*, referred to in the above decision of the Supreme Court, it was held that the delay in despatch of the first information report by itself is not a circumstance which can throw out the prosecution case in its entirety, particularly when it is found on facts that the prosecution has given a very cogent and reasonable explanation for the delay in despatch of the F.I.R. As per the above decision, every delay is not a ground for not accepting the case of the prosecution and the extraordinary delay which is not satisfactorily explained alone can be taken into account for saying that the case of the prosecution may not be true because the Police Officer who registers the crime gets time for embellishment.

17. The appellants have a case that injuries found on the body of the appellants 1 and 2 are not satisfactorily explained by the prosecution. PW4 is the Doctor who examined the second appellant on 17-6-1994 at 12.45 a.m. in the Taluk Head Quarters Hospital, Kanjirappally and prepared Ext.P3 would certificate, He also examined the first appellant and prepared Ext.P4 wound certificate. According to the Doctor, the injury noted in Ext.P4 in respect of the first appellant could be caused by falling on a rough surface and that portion of the body coming into contact with that surface. There is evidence of PW2 that when he along with Kuttappan went to meet the appellants 1 and 2 and CW3 and CW4

for asking them whether they took away the umbrella of Kuttappan from the provision shop they met the first appellant and CW3 and CW4 on the way and there ensued a quarrel, PW2 says that Kuttappan pushed the first appellant by holding his neck and then he fell down and as a result of that he suffered injury on his head. That evidence of PW2 has not been successfully challenged in the cross-examination and we have no hesitation to accept the version of PW2 that the first appellant suffered the injury as a result of falling down. The second appellant also suffered injuries noted in Ext.P3. No satisfactory explanation is forthcoming regarding the injuries suffered by the second appellant. What is the result of not explaining the injury suffered by the second appellant in accepting the case of the prosecution is a question which has to be considered. There was a crime registered counter to the crime in the case alleging that the second appellant was stabbed with a knife by Kuttappan. A report was filed in Court by PW10 on completing the investigation of the crime. Ext. P17 is the copy of the final report and it is seen from Ext.PI-7 that the Magistrate did not take cognizance of the offence as the charge against the accused got abated. It is a case in which PW2, the occurrence witness speaks about the occurrence and the assault made by the appellants. If we accept the evidence of PW2 regarding the assault made by the appellants on Kuttappan on finding that he is a truthful and credible witness, then what we are doing is to accept the case that the assault was made by the appellants as stated by that witness. Once the evidence of PW2 is accepted and we come to the conclusion that the occurrence took place in the manner stated by PW2, the fact that the injuries suffered by the second appellant has not been properly explained by the prosecution is of no consequence. In *Amar Malla and others v. State of Tripura* (2002 AIR SCW 3507) the Supreme Court said that non-explanation of injuries on accused persons cannot ipso facto be a ground for throwing out the prosecution case. When the case of the prosecution is supported by eye witnesses, the non-explanation of the injuries on the accused person is not a ground for throwing out of prosecution case.

18. Even if the evidence adduced by the prosecution regarding the dying declaration alleged to have been made by Kuttappan is not accepted, there is evidence of PW2, the occurrence witness. Conviction in a criminal case can be entered into on the basis of the evidence of solitary witness provided the evidence is found to be credible. In *Chandrasekharan Adithiripad v. State of Kerala* (1987 CrL. L.J. 1715), a Division Bench of this Court held that in appropriate cases, the evidence of a solitary witness by itself may be sufficient for entering conviction. But in such cases it is necessary that the evidence should be unblemished and beyond all possible criticisms! The court will have to be satisfied that a witness is speaking the truth and truth alone on facts as well as circumstances. The submission made by the learned counsel appearing for the appellants is that even though conviction can be entered on the basis of the evidence of a solitary witness, it is necessary that the witness is wholly reliable. In support of the above proposition, the learned counsel pressed into service the

decision in Alil Mollah and Another Vs. State of West Bengal, . In the above decision, the Supreme Court said that-conviction can be based on the testimony of single eye witness if he is wholly reliable and that corroboration is required when he is only partly reliable. In that case, the fact that the witness did not tell anyone about the occurrence till the next day was found unnatural creating an impression that he had not witnessed the incident. That was a case in which the Supreme Court found in the circumstances of that case that the conduct of the witness that he did not tell anyone about the occurrence till the next day appeared to be rather unnatural and creating an impression that he had not witnessed the occurrence. In the present case, PW2, the only eye witness to the occurrence says that after 11 o'clock in the night on seeing the occurrence he went to his house and he remained in his house till 12 noon on the next day. He was questioned by the police in the evening by about 5 p.m. on the next day. According to the learned counsel appearing for the appellants, the above conduct of PW2 is unnatural and for that reason it has to be said that the evidence given by PW2 regarding the occurrence has to be viewed with suspicion. PW2 says that on going home, he told others who were residing in the house about the occurrence. This is not a case in which he did not tell anybody till the evening on the next day about the occurrence. He was in the house till 12 noon on the next day of the occurrence and he told everybody in his house about the occurrence. It is true that he did not go out of the house in the morning and he did not tell anybody not residing in his house about the occurrence. Different persons seeing an occurrence in which a person is assaulted may respond differently. One person seeing the occurrence may be intervening for preventing the assailants from assaulting the victim. Another person who sees the occurrence may run away from the place of occurrence because he may not like to see a person being assaulted by another. There may be persons who may stand at the place of occurrence astonished on seeing a person being assaulted by others. So, we cannot say that a person who sees an occurrence in which another is being assaulted will have to respond in a particular manner and if he does not respond in such a manner, the evidence given by him in Court regarding the occurrence has to be disbelieved. This is a case in which PW2 gives convincing reason for not going out of his house till 12 noon on the next day of the occurrence which according to him is that he was frightened and hence, he remained in the house. His evidence is that it was the second appellant who beat Kuttappan with an iron rod in his head and on showing that iron rod to PW2 asked him to go away from that place where the occurrence took place. PW2 says that he ran away from the place of the occurrence and then he went back and saw Kuttappan who ran towards the channel on the northern side and crossed the channel was being assaulted by appellant Nos. 1 to 3 whereas the 4th appellant lit a torch for facilitating the assault. So, the fact that PW2 remained in house till 12 noon on the next day of the occurrence cannot at all be said to be an unnatural conduct on his part, so as to cause suspicion on his version regarding the occurrence.

19. There is no reason for PW2 to falsely implicate the appellants in a crime. On

going through the entire depositions of PW2, we do not see anything brought out during the cross-examination of this witness to discredit his version regarding the occurrence. We find that PW2 is a witness who is wholly reliable.

20. Another point urged is that there is non-examination of material witnesses in this case. PW3 says that after 1 O'clock in the night, he along with CW6 to CW8 went to the place from where a feeble cry was heard and then PW1 also came there. It was on the information PW1 gave to PW3 that somebody was heard crying at a place near to the channel that PW3 on calling CW6 to CW8 went to that place. The submission is that even though PW3 says that CW6 to CW8 were also there at the time when the dying declaration is alleged to have been given by Kuttappan, CW6 to CW8 had not been examined in this case. The question to be considered is whether CW6 to CW8 were also there at the time when the dying declaration is alleged to have been given by Kuttappan, CW6 to CW8 had not been examined in this case. The question to be considered is whether CW6 to CW8 are material witnesses who had not been examined by the prosecution. It is a case in which PW1 and PW3 gave evidence regarding dying declaration given by Kuttappan. It is for the prosecution to decide whether the other witnesses who are also cited for proving the dying declaration given by Kuttappan have to be examined. The prosecution has complete liberty to choose its witness to prove its case. By examining CW6 to CW8 also for proving the dying declaration what is being done is in effect multiplying the evidence and that is not at all necessary in a case. So, it cannot be said that what the prosecution did by not examining CW6 to CW8 is non-examination of material witnesses. This is a case in which the evidence available would clearly indicate that by about 11 O'clock in the night on the date of occurrence, the appellants went to the place of occurrence armed with weapons. The first appellant was having a handle of axe, the second appellant was having an iron rod and the third appellant was having handle of spade with him. The 4th appellant even though was not having any weapon with him, he was having a torch light with him. The 4th appellant went along with the other appellants who were having arms with them and reached the place of occurrence where the assault on Kuttappan was made. The evidence is that the 4th appellant lit a torch light so that there will be light at the place of occurrence and other appellants could see Kuttappan, the person who was assaulted. It is true that there is no overt act alleged against the 4th appellant. The evidence would clearly indicate that there was common intention on the part of all the appellants to assault Kuttappan for causing death. The medical evidence available in this case would go to show that injury No. 9 in the post mortem certificate was a fatal injury as a result of which Kuttappan died. The medical evidence is that, that injury was sufficient in the ordinary course of nature to cause death. In this case, the evidence available would indicate that the assault was made by the appellants in furtherance of their common intention to cause death of Kuttappan. Kuttappan died as a result of the assault made by the appellants in furtherance of their common intention. All the appellants are guilty of the offence punishable u/s 302 read with Section 34 of the Indian Penal Code.

There is no merit in this appeal. We dismiss the appeal on confirming the order of conviction and sentence.