
(2011) 06 KL CK 0039

In the High Court Of Kerala

Case No : Criminal A. No. 2216 of 2010 and Criminal R.P. No. 734 of 2011

Lakshmana, K., I.P.S.

APPELLANT

Vs

C.B.I. and Another

RESPONDENT

Date of Decision : 14-06-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 162, 174, 174(1), 313
Evidence Act, 1872 — Section 120, 122, 21, 30, 32(3)
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2011) 2 ILR (Ker) 929 : (2011) 3 KLJ 274

Hon'ble Judges : Thottathil B. Radhakrishnan, J; S.S. Satheesachandran, J

Bench : Division Bench

Advocate : P. Vijaya Bhanu, M. Revikrishnan, Sangeetha Lakshmana and Vipin Narayan, for the Appellant; Radhika Rajasekharan P., S.C. for C.B.I. and R. Lakshmi Narayan, Public Prosecutor, for the Respondent

Judgement

Thottathil B. Radhakrishnan, J.—The appeal and the revision in hand, arise from a sessions case tried by the Special Judge (SPE/CBI).

2. Three persons were arrayed as accused in a case registered, investigated and final report submitted by the CBI. The proceedings against the first accused abated as he died during inquiry. The other two were tried. The second accused was found guilty of offence punishable u/s 302 read with Section 34 I.P.C. He stands convicted and sentenced to undergo imprisonment for life and to pay fine of Rs. 10,000 with default sentence of simple imprisonment for six months. The third accused was acquitted.

3. The appeal is by the second accused, challenging his conviction and the sentence imposed. The revision is by the brother of the victim. He challenges the acquittal of the third accused and pleads that the sentence imposed on the second accused be enhanced from life imprisonment to death.

4. The prosecution case is as follows:

(i) Varghese, a leader of a naxalite gang, was involved in a number of murder and dacoity cases in Wayanad area of Kannur District in the early 1970. He was wanted as an accused person in crime numbers 22/70 to 25/70 of the Mananthawady Police Station for commission of offences of murder and dacoity in Thirunelli in the night intervening 9/10-2-1970.

(ii) Various parties of different police forces were involved in combing operations in the forest areas to apprehend the naxalites in Thirunelli area.

(iii) One unit of the 19th battalion of CRPF, headed by Subedar N.V. Peedikail was stationed in Thirunelli Vishnu Temple. Sub Inspector A.K. Achari (of the Kerala State Police Force) who was then posted at Chokkli Police Station, was attached to that unit of CRPF for liaison and guidance for that CRPF unit. He is now no more.

(iv) Keshwan Moseeth of Thirunelli informed Subedar N.V. Peedikail and Sub Inspector A.K. Achari, in the morning of 18-2-1970, at Thirunelli Vishnu Temple, about the presence of Varghese in the hut of Shivaraman Nair at Thirunelli.

(v) On the basis of the aforesaid information, Subedar N.V. Peedikail, Sub Inspector A.K. Achari and Ors. CRPF personnel including P.W. 21 - Mohammed Hanifa (a CRPF Constable) and the first accused - Constable Ramachandran Nair, rushed to the hut of Sivaraman Nair, duly armed.

(vi) The aforesaid police party broke open the door of that hut and apprehended Varghese.

(vii) They brought Varghese towards the main road, with his hands tied behind his back.

(viii) On the way, the police got Varghese identified by the villagers, in order to ascertain his identity.

(ix) While Varghese was being taken in a police jeep to the Mananthawady Police Station, by the CRPF personnel, including first accused Ramachandran Nair, P.W. 21 - Mohammed Hanifa and Sub Inspector A.K. Achari, they were stopped at Kattikulam Bridge and were ordered to return to Thirunelli Forest with Varghese in the custody of the second and third accused, namely, K. Lakshmana, Dy. S.P., Tellicherry and P. Vijayan, D.I.G., Northern Range, Calicut.

(x) Varghese was interrogated in Thirunelli Forest by the second and third accused, namely, K. Lakshmana and P. Vijayan.

(xi) After the interrogation of Varghese, the second and third accused, namely, K. Lakshmana and P. Vijayan, ordered the first accused Constable Ramachandran Nair of CRPF to shoot Varghese dead in Thirunelli Forest, in furtherance of their common intention to eliminate Varghese in police custody.

(xii) Accordingly, first accused Ramachandran Nair fired a single shot from a service rifle and shot Varghese dead at 6.55 p.m. on 18-2-1970 in Thirunelli

Forest.

(xiii) After Varghese was killed as above, a case was got registered as Crime No. 28/70 of the Mananthawady Police Station, u/s 174(1) Code of Criminal Procedure, on a complaint by the second accused K. Lakshmana, who was then the Dy. S.P., Tellicherry, against the deceased Varghese for having fired at the police party.

(xiv) In connection with the aforesaid crime, P.W. 17, V. Vasudevan Nair, the then Revenue Divisional Officer, Tellicherry, conducted inquest proceedings on 19-2-1970 u/s 174 CrI. P.C. and statements of witnesses were recorded. Subsequently, the police had sent the inquest papers to him, which he filed, being the RDO/SDM, as he did not suspect any foul play in this regard.

(xv) After the inquest proceedings, post-mortem examination of Varghese's dead body was conducted on 19-2-1970 by Dr. A.M. Lazar at the Government Hospital, Mananthawady, assisted by K.K. Gangadharan, nursing assistant. Dr. A.M. Lazar noticed a firearm injury on the left side of the chest of that dead body and the cause of death was due to injury to the lungs and heart and bleeding. K.K. Gangadharan, the nursing assistant, noticed a firearm injury on the chest and back of the dead body of Varghese. The injury on the chest was small whereas the injury on the back was larger. There were blackening signs on the legs and hands of the dead body.

(xvi) After post-mortem, Varghese's dead body was handed over to his relatives and was cremated at his native place on 19-2-1970.

(xvii) The first accused, Constable Ramachandran Nair and P.W. 21 - Mohammed Hanifa were promoted as Officiating Lance Naiks (L/NK) w.e.f. 18-2-1970 by the Commandant of the 19th Battalion of CRPF on account of killing of Varghese at 18.55 hours on 18-2-1970 in Thirunelli Forest and both of them were also awarded Rs. 75 each for the said alleged encounter.

(xviii) P.W. 3 - Prabhakar Waryar, Vella @ Adyati and P.W.7 - Jogi, all residents of Tirunelli, had seen Varghese in police custody, of 10 to 15 policemen, at about 10/10.30 a.m. on the day of the alleged encounter. They saw Varghese, his hands tied behind his back, being taken on foot towards the main road at Thirunelli. According to the prosecution, these witnesses had discredited the claim and contents of the complaint made by the second accused K. Lakshmana, Dy. S.P. in Crime No. 28/70 of Mananthawady Police Station, wherein he had alleged that Varghese was killed in a police encounter on 18-2-1970.

(xix) In 1977, first accused Ramachandran Nair, while working in Malabar State Police, made an extrajudicial confession, before his colleague P.W.22 -M.K. Jaidevan, that he shot dead Varghese in police custody on 18-2-1970 on the orders of superior officers, namely, the second accused K. Lakshmana, Dy. S.P. and the third accused P. Vijayan, D.I.G.P.W. 22 contacted his friend K. Vellaiudhan in Calicut, who in turn, arranged a meeting with A. Vasu at Calicut.

First accused Ramachandran Nair repeated his confession during that meeting with Vasu in the presence of P.W. 22 and K. Vellaiudhan. On being asked by Vasu to give details of his confession in writing, the first accused Ramachandran Nair, dictated his confessional note after a few days to P.W. 22 under the pretext that his handwriting was not good and that Vasu may find it difficult if the first accused were to write it down. P.W. 22 wrote down the detailed confession of the first accused Ramachandran Nair in Malayalam and delivered it to Vasu at Calicut. A similar confession was made by the first accused Ramachandran Nair, also to P.W. 10 - K.K. Suguna Prasad. Vasu contacted P.W. 22 in 1998 over telephone, informing that the confessional note of the first accused Ramachandran Nair, kept by him earlier, has been located. The confessional note was released to the Press and news reports appeared in the newspapers/magazines, about Varghese being killed in police custody on 18-2-1970, by a police constable Ramachandran Nair (first accused) on the orders of superior officers, namely, K. Lakshmana, Dy. S.P., Tellicherry (second accused) and P. Vijayan, D.I.G., Northern Range, Calicut (third accused).

(xx) The aforesaid acts of the then CRPF constable Ramachandran Nair (first accused); the then Dy. S.P., Tellicherry K. Lakshmana, (second accused) and the then D.I.G., Northern Range, Calicut, P. Vijayan, (third accused) constitute offence punishable u/s 302 read with Section 34 I.P.C.

5. As already noted, proceedings against the first accused abated on his death pending enquiry. That was recorded. Charges were framed against the second and third accused on counts punishable u/s 302 read with Section 34 I.P.C. They pleaded not guilty. At trial, oral evidence of P.W.1 to P.W. 31 and documents Exts.P-1 to P-43 were marked on the side of the prosecution and Exts.D-1 to D-47, were marked at the instance of the defence, through the prosecution witnesses. A copy of the service book of the first accused was marked as Ext.D-48 and its original was marked as Ext.D-48A at the instance of the defence.

6. Following due procedure, the Special Judge found that the first accused had committed the act of murder on the command of the second accused, whose intention he shared. It was also held that the third accused is entitled to the benefit of doubt. Accordingly, the Court below convicted the second accused and, after duly hearing him on the question of sentence, imposed on him the punishment to undergo imprisonment for life and to pay fine of Rs. 10,000 only with the default sentence of simple imprisonment for six months.

7. In support of the appeal of the second accused against his conviction and the sentence imposed on him, we heard Sr. Adv. P. Vijayabhanu. He also argued in opposition to the revision petition, insofar as it seeks enhancement of the sentence imposed on the second accused. We heard Adv. Radhika Rajasekharan on behalf of the CBI. Adv. Swathy Kumar argued on behalf of the revision Petitioner, the brother of the deceased Varghese. Adv. Raja Vijayaraghavan opposed the revision petition, insofar as it is against acquittal of the third accused.

8. On behalf of accused persons 2 and 3, it was argued that there is no shred of legal evidence to enter any finding of guilt against either of them and the conviction and sentence imposed on the second accused is groundless. It was argued that the solitary material relied on by the court below, as regards the alleged incident of shooting, is the evidence of P.W.21 and that his testimony is ridden with inherent infirmities and cannot be relied upon. It was further argued that the prosecution is the result of a concerted effort by certain political groups to harm the accused persons who had zealously contributed to the protection of the State from activities of elements which were detrimental to the interest of the State. The pivotal argument was that the alleged victim, Varghese, was a much wanted offender, accused in many cases, and when he was traced out by the police team, he opened fire at the police and they had to retaliate to such aggression and, it was in that transaction that Varghese was killed in an encounter, which fact is a matter of record, maintained in the common course of official conduct and business of the police.

9. P.W. 1, the brother of the deceased gave evidence that he came to know about the death of Varghese on 18-2-1970 from the police and that he had identified the dead body in the mortuary. He spoke about the injuries seen by him on the body of the deceased. P.W.8 deposed that he wrapped the dead body with fresh cloth and appropriately placed and tied it within a fresh palm leaf mat and that he was involved in removing the body to the Mananthawady Government Hospital for post-mortem from the scene of occurrence. P.W.9, Sub Inspector of Police identified the handwriting and signature of Kunhahammed, the then Station Writer of Mananthawady Police Station, who made Ext.P-4(a) entry dated 18-2-1970 which contains the endorsement that Varghese died while police fired in retaliation when he opened fire at police, on being encircled by the force. P.W. 14, Prabhakaran stated that he was a police constable on duty at Mananthawady Police Station on 18-2-1970 and he knew the fact of Varghese having been shot dead in the occurrence. P.W. 17, Vasudevan Nair, a retired I.A.S. Officer, who was the then Revenue Divisional Officer and Sub Divisional Magistrate of Thalassery, stated that the District Collector called him one day during night and stated that naxalite leader Varghese had died in an encounter with the police, as informed by the Superintendent of Police, Kannur and in the morning, a police jeep would be sent to P.W. 17 and he had to go to Mananthawady to conduct the inquest. The District Collector, according to that witness, had insisted that P.W. 17 himself should go, as the deceased was a high naxalite leader. He stated that accordingly, the next morning, he went to Mananthavady in a police jeep and that the second accused Lakshmana, who was the Dy. S.P., Tellicherry was present in the Rest House at Mananthawady. He stated that it was he who conducted the inquest; that the body was seen lying on the top of a rock and it was stated that the dead body was that of Varghese. These materials categorically show that the identity of the person who died in the incident in question is established as Varghese, who was a naxalite leader about whose death Ext.P-4(a) entry dated 18-2-1970 is also recorded by the Mananthawady

Police, which entry is proved through P.W.9, and that the said deceased was the brother of P.W.1. Though there is serious controversy about the credibility of the evidence of P.W.21 Mohammed Hanifa on certain other aspects, the fact that he was a constable on duty in the combing operations and that he saw Varghese, as also Varghese dying in the incident as a result of a bullet shot fired by police, is established by his oral evidence, which, to that extent, is not at all shaken by cross-examination. While the evidentiary value of the other aspects of his deposition would be scrutinized as we follow, we are clear in our mind that the identity of the deceased person being Varghese, has been spoken to by P.W.21, and his testimony, to that extent, is impeccable. In fact, the identity of the deceased person and the allegation that he died in the incident in question are not in dispute. There is also no serious dispute, even before us in this appeal, that the person who died in the incident on 18-2-1970 was Varghese, a naxalite leader and the brother of P.W.1. Therefore, by legal evidence, it has been proved beyond doubt that deceased Varghese died on 18-2-1970 as a result of having received a bullet shot fired by the police and the identity of the said deceased person has been established by such evidence. The statement of the second accused u/s 313 Code of Criminal Procedure is also to this effect.

10. Leaving aside the plea of P.W.1 that the surviving accused persons ought to have been handed down capital punishment, the thrust of the rival arguments advanced before us on behalf of the second and third accused, on the one hand, and those on behalf of the C.B.I. justifying the conviction and sentence, as also, the arguments in support of the revision by P.W. 1, revolves around the question whether there was legal evidence to hold that the death of the deceased was caused by the first accused Ramachandran Nair shooting Varghese, while the said person was in police custody; and, if he had done so, was it on the orders of the second accused and/or the third accused? The question ultimately boils down to the issue as to whether Varghese died in an encounter or whether he was a defenseless victim, who was killed while in the custody of the police; he being shot down by the first accused, on the orders of accused persons 2 and/or 3.

11. Ext.P-1, allegedly, the confession statement of the first accused Ramachandran Nair, was not acted upon by the court below for any purpose in the light of the provisions contained in Section 30 of the Evidence Act. There are some materials including depositions, as part of the record, on the basis of which it is attempted to be shown that the first accused Ramachandran Nair had made certain statements to different persons, including some of the witnesses, of whom one is his widow. For the present, I keep aside all such materials and proceed to consider the other evidence on record.

12. Ext.P-4(a) entry dated 18-2-1970, in the records of the Mananthawady Police Station, that Varghese died while police fired in retaliation when he opened fire on being encircled by police, is the version recorded on behalf of the police, immediately following the incident. P.W.12, the then Sub Inspector and Station House Officer of the Mananthawady Police Station proved, among other things,

Ext.P-7(a) entry dated 14-2-1971, to the effect that the accused was shot dead on 18-2-1970 in an encounter with police in Thirunelli forest in North Wayanad. He identified that entry as one made by the second accused Dy. S.P. Lakshmana, in connection with a case in which deceased Varghese was wanted. He also proved the entry at serial number 28/70 in Ext.P-9, showing the second accused Lakshmana as the complainant. The said entry is to the effect that while the police encircled to apprehend Varghese, he opened fire at police and therefore the police fired in return and that Varghese died in that encounter.

13. P.W.7 Jogi deposed that he last saw Varghese after tea in the shop of Ibrahim. He was sitting on the road after having tea. He said that policemen came there and asked him and Ors. to see if they wanted. He and Ors. saw Varghese wearing trousers and baniyan and that his hands were tied behind his back. He deposed that the policemen were leading Varghese towards the forest, by walk. He said that P.W.3 was also present at that tea shop. The court below did not find P.W.7 unworthy of credence and appreciated his testimony, taking into consideration that he is an illiterate Adivasi coolie. The cross-examination of P.W.7 did not shake the credibility of that witness, though as noticed by the court below, it had come out that he had not specifically stated to the investigating officer, the name of the tea shop keeper, the kind of dress that Varghese was wearing, etc. P.W.7 appears to be one who adored the support given by deceased Varghese to the poor. He had stated that till the intervention of Varghese, wages were paid only in the form of paddy, to be de-husked to make gruel, as food. Though P.W.7 grieved over the death of Varghese and also had hostile attitude towards the police, on the whole, there is no reason to reject his evidence in toto, more particularly because of the corroboration it finds in the testimony of other witnesses, as would be noticed hereinafter.

14. P.W.3, Prabhakar Waryar, a farmer and a classmate of Varghese, stated that he saw Varghese on 18-2-1970 from the tea shop and that Varghese was being led by the police with his hands tied behind his back. He said that this was at about 10 to 10.30 in the morning and he was in the tea shop of a Muslim, to have tea. He said that the policemen asked the people there as to whether the person with them was Varghese or not and whether they knew him. He said that they replied in the affirmative. He admitted that he was an accused along with Varghese in the murder case in which one Chekku was allegedly killed. The said witness stated that his father had a gun and on 9-2-1970, Varghese had asked for it. He also spoke of having love and respect for Varghese, which grew with the attitude to save the poor. He stated that the police were seen in their uniform and asserted that he had actually seen policemen taking Varghese to the forest. He denied the suggestion that Varghese had obtained a gun from him and it was with that weapon that Chekku was killed.

15. The evidence of the aforesaid two witnesses namely, P.W.7 and P.W.3, could only be treated as credible versions of those persons, one of whom was an Adivasi coolie and the other, an educated person. Though certain discrepancies

brought out during the cross-examination of both those witnesses, the reliability of those witnesses, as speaking the truth is, in no manner, whittled down by such omissions or discrepancies which are not material in nature. Their versions corroborate each other. It needs to be remembered that the passage of time after the incident would, obviously, disable the witnesses from speaking with specificity on the finer details of the incident of which they are called upon to testify. Though they may have adoration for Varghese and, may be, prejudice to the police as a lot, no personal prejudice or animosity as against the accused persons, or any reason for such personal prejudice is shown or, put to them. The crux of their version in the form of oral evidence, tested on the touchstone of cross-examination, is that both of them saw the police leading Varghese to the forest, with hands tied behind his back. As rightly noted by the court below, their testimonies are only to the effect of having seen Varghese being led by the police, with his hands tied behind his back, and nothing more. These witnesses do not stand to charge the accused persons of any overt act. The relevance of their evidence is as regards certain events in the chain of allegations, forming part of the prosecution case. In fact, the court below was justified in taking the view that there is nothing on record that persuades the acceptance of the discrepancies in their depositions as so vigorous as to reject their evidence, which supports the core of the prosecution case, as stated by those witnesses. I find no element of artificiality or improbability as to their presence in the tea shop at the relevant time. Their version is natural, reliable and truthful. On a re-appreciation of the evidence of P.W.7 and P.W.3, I do not find any infirmity in the conclusions arrived at by the court below on the basis of such evidence. The evidence of P.W.3 and P.W.7 clearly establish that deceased Varghese was in police custody in the morning of 18-2-1970 and he was led by the police with his hands tied behind his back and that he was taken into the forest. If P.W.21 Mohammed Hanifa's deposition is found to be credit-worthy as I proceed, the version of that CRPF Constable who was, indisputably, a member of the combing team which encircled Varghese's hide out, would further corroborate the version of P.W.3 and P.W.7 on this aspect.

16. As already noted, the evidence of P.W.8, who said that the police required his help to pack a dead body and that he did so after seeing the body lying with an injury on its left chest and transported to the Mananthawady Government Hospital; the evidence of P.W.1, the brother of Varghese, that he was informed by the police about the death of Varghese at about 11 a.m. on 19-2-1970; and, the evidence of P.W.17, who conducted the inquest, categorically establish that Varghese died of a bullet shot, fired by the police. I may also recall that it is the uncontroverted testimony of P.W.1, the brother of the deceased that it was the police which informed the family of the death of Varghese and he was asked to go and collect the dead body from the hospital. He stated that the police had told that Varghese died in an encounter with the police. He also stated that the dead body was not released when the post-mortem examination was over at about 5 p.m. on 19-2-1970 since there was fear of tension in the locality and that the

body was released only after influential pressure by one A.K.K. Nambiar and Narayanan Nair, following which, the dead body, with an injury on its left chest, was carried with police escort and buried in the house compound since the church authorities refused burial. Having accepted the evidence of P.W.3 and P.W.7, we do not find any missing link yet to be established, to be satisfied that Varghese was in police custody at and after the time at which he was seen by P.W.3 and P.W.7, in the morning of 18-2-1970, till Varghese died on account of a bullet fired by the police; and also that, Varghese was taken to the forest, unarmed and his hands tied behind his back, as spoken to by P.W.3 and P.W.7.

17. In my view, the court below was justified in holding that, it having been sufficiently established that Varghese was caught alive in the morning of 18-2-1970 by CRPF men and that he was found dead on the immediately following day; the short span of time between his being captured alive and his death lends sufficient ground to compel presumptuous inference that the death of Varghese, may in all probability, be the result of intentional murder at the hands of the police. This affirmation of the view of the court below in that regard is not on the basis of any assumption that the police had enmity towards Varghese on account of his being involved in, and accused of, several serious offences including murder; but because of the evidence on record that he was last seen by the P.W.3 and P.W.7 in the company of police, with his hands tied behind his back; he was unarmed and that he was found dead the next day. The cause of his death is a bullet injury. That bullet was fired from a police rifle. There is, and can be, no dispute on this. This aspect of the case cannot be ignored while appreciating the evidence in the case.

18. Now, I have the testimony of P.W.21--Aliyar Kunju Mohammed Hanifa, the sole witness who speaks as an eye witness to the incident of Varghese being shot dead by the first accused, the late Ramachandran Nair, on the instructions and directions of the second and third accused. At the outset, I may note that the evidentiary value of his deposition has been subjected to serious criticism at the hands of the learned Counsel appearing for the accused persons. They argued that he is one who had accepted award for his duties in connection with the combing operations, including the alleged encounter and had, at no point of time before, made any whisper about this incident. I also remind myself that the court below has acquitted the third accused because it noted that P.W.21 had inculpated that accused for the first time in the course of his testimony, without making any such disclosure before the investigating officer of the CBI. He also stands accused by the defense counsel, of not having been able to identify the second accused in the course of his examination, when his deposition was recorded in his residence by the Chief Judicial Magistrate, as he was unable to go to the court to tender evidence, owing to his failing health. Bearing this in mind, I proceed to consider the trustworthiness and consistency of his testimony as well as its evidentiary value.

19. P.W. 21 was 70 years old while he tendered evidence, which was recorded by

the Chief Judicial Magistrate by visiting him at his residence, following the request/directions of the Special Judge, on account of P.W. 21's illhealth. He was a CRPF constable at the relevant time. He stated that he was a member of the combing team which traced out Varghese. In fact, his involvement in the police action in question cannot be disputed because he was rewarded in that connection and the fact that he was so rewarded is itself part of the defence of the accused persons when they impeach the credibility of his testimony as amounting to making the accusations after accepting such reward. Therefore, his presence as part of the combing team is proved by his testimony as P.W.21, corroborated by the other materials on record, including that which proves the conferment of reward on him.

20. The aforesaid witness, P.W.21, spoke about his involvement in the combing operation, being a member of the team that camped in the Thirunelli temple on duty in February 1970. He stated of having witnessed the occurrence of Varghese being shot down. He stated that the said incident occurred at about 6.15 or 6.30 p.m. on 18-2-1970. According to him, when he was sleeping in the camp, one person came in the morning and informed the Officer that Varghese was present in a house, whereupon the officer instructed all the team members to get ready and, following that, at about 7.30 a.m. he and about 8 to 10 other personnel moved from the camp and surrounded the house, which was found locked. He further stated that the Sub Inspector ordered him to keep position in front of the house and the Sub Inspector and a police man broke the lock of the house open, following which the Sub Inspector and the policemen entered that house. He said that Varghese raised both his hands and the police tied his hands behind him using the chilling of the rifle, which is a canvas strap used for fastening the rifle, for appropriately hanging it on the shoulder of the soldier.

21. P.W. 21 further stated that Varghese was walked down to the road and the fact that he was caught was passed on through a walkie-talkie to Mananthawady. After so walking with Varghese for about 6 to 7 furlongs, a police jeep came that way with only its driver and Varghese was boarded into that jeep. He categorically stated that he, the first accused and two other policemen also got into that police jeep apart from the Sub Inspector, who sat in the front seat of that jeep, while the others sat in the rear. He said that the jeep proceeded as if it was moving towards Mananthawady. He further stated that when they travelled in that jeep for about half an hour, another jeep came from Mananthawady towards Thirunelli and the people in the two jeeps interacted. He said that "Lakshmana sir" (second accused) and "DIG Vijayan sir" (third accused) were in the jeep that came from Mananthawady. He further said that instructions were passed on from the jeep that came from Mananthawady to the driver of the Jeep in which P.W.21 and Ors. were travelling, to go in the opposite direction. He said that the other policemen who had come from the camp were remaining in the spot from where he and Ors. boarded the jeep. He said that the Jeep in which they were travelling and the jeep that came from Mananthawady came to the place where the other policemen were standing. He went on to say that

"Lakshmana addeham" ("addeham" is a highly respectful way of addressing) who was in the jeep that came from Mananthawady, directed that Varghese be taken up walking and Varghese was, accordingly, strolled up and made to sit on a rock.

22. That witness, P.W.21, further said that thereafter "Lakshmana addeham"--the second accused and "Vijayan addeham"--third accused spoke face-to-face for quite some time and thereafter they called Varghese and spoke to him for about 1 to 1½ hours and thereafter, Varghese was brought back to the point where he was made to sit earlier. P.W.21 further said that thereafter "Vijayan sir" (third accused) and "Lakshmana sir" (second accused) called the four of them including P.W.21 and the first accused and spoke to them, telling them that they (accused 2 and 3) have decided that Varghese shall be killed. He said that the four of them including him and the first accused were asked as to who among them was ready to kill. To a question by the prosecutor, he said that the said query was made by the second accused. He deposed that two among them lifted hand to some extent and he, the third among them lifted the hand a little more. He stated that the first accused did not respond either by word or by lifting his hand and thereupon, even when the second accused asked the first accused as to whether he has nothing to say, the first accused did not respond. P.W. 21 further deposed that thereupon the second accused told the first accused that "you have to kill him; otherwise you will not see the sunrise tomorrow" and that "if you do not do so, there will be a report in the newspapers that in an encounter, Varghese and a police man were killed". He further stated that, hearing this, the first accused, half-heartedly, proceeded towards Varghese. He stated that he and two other policemen who were with him went along with the first accused. He further stated that, at that point of time, accused persons 3 & 2 and "SI Sir" were present.

23. Though P.W. 21 stated that it was the third accused who directed the first accused to shoot Varghese, he corrected himself and stated that it was the second accused who told to shoot. He deposed that, following such order of the second accused, the first accused shot Varghese. He further said that Varghese then shouted some slogan which was not clear to him. He said that the first accused shot Varghese with a 303 service rifle and Varghese died of that bullet shot which he got on his chest. He stated that the other three policemen, including him, were standing very near to the first accused when he shot Varghese. He said that "Lakshmana addeham" (second accused) was the Dy. S.P. at the time of the incident.

24. Proceeding further, P.W.21 deposed that thereafter, the second and third accused directed that a country rifle has to be brought and placed near the dead body. He has not seen as to who brought and placed it. He also does not know as to what was done with Varghese thereafter. He states of having walked back along with others by about 7 O'clock to Thirunelli camp after other policemen had come to be incharge of the place where Varghese was killed.

25. I find that P.W. 21 was subjected to a searching cross-examination, which in

my view, has not yielded any result to demolish the credibility of his testimony or debasing the evidentiary value of his words. Though many contradictions are marked, they do not, in any manner, materially affect the credibility and acceptability of the testimony of P.W. 21. I am inclined to think that the testimony of that witness is not motivated by any malice towards any of the accused persons, including the deceased first accused. He has no axe to grind against any of them. The fact that he did not blow a conch by himself, in relation to the incident which is the subject-matter of this trial and appeal, in my view, adds credibility to his testimony. At the relevant point of time, he was none but a soldier, who was duty-bound to answer the calls of his duties, including the ever owed responsibility to abide by the directions of his superiors. That is nothing but part of the discipline that is expected of him. He had nothing but his bread-and-butter and the sustenance of his family, assured only by adherence and obedience to the orders of the superiors in the hierarchy of a disciplined and uniformed force. This is the reason why he, obviously, for reasons discernible with reference and relevance to common course of human conduct, had never made any statement at any point of time, regarding the incident. As a soldier, he did his job. He had no business to inquisitively assess the pros and cons of the orders of his superiors. His evidence shows that he, after leaving the CRPF service, explored better pastures, including abroad. When he gave evidence at the age of 70 years regarding an incident to which he says that he was an eyewitness, that too, as regards the killing of a person who was in police custody, I find no ebb of reason to disbelieve him.

26. In fact, though P.W. 21 states in his evidence that he has receding eyesight and is unable to identify the persons who are in the room where he was examined, I am of the view that he cannot be saddled with the responsibility to identify the second accused in his physical form after more than two decades of the alleged incident and when he is not expected to identify any officer by face, but only to abide scrupulously by the dictates of the superiors. Throughout his evidence he makes reference to the second and third accused as "Lakshmana sir" and "Vijayan sir", with respect and reverence. He has nothing to gain by tendering any evidence against his erstwhile superior officers. I may note that he left the service, essentially, may be, as a deserter. Yet, I do not find any concept of privy intruding the thinking of that witness, which would motivate him to make a false statement against his erstwhile superiors, namely, the second and third accused. It is not as if the said witness is unaware of the consequences of the allegations and the penalty to which his erstwhile superiors would be exposed in the event of their being found guilty. This witness was abroad for quite some time before he was ultimately questioned by the CBI in connection with the incident in question. As already noted, he was 70 years old when he gave evidence. He has feeble eyesight, going by his deposition. The investigating officer had to go to his house to record his statement. His evidence was recorded from his residence through the Chief Judicial Magistrate, in terms of the order of the Special Judge. No malice whatever, is attributed to this witness at his age of

70 years, particularly, in the setting in which he is placed in the backdrop of the fact that he has nothing to lose or gain depending upon his allegiance, or otherwise, to the persons accused in this case, or any constitutional or extra-constitutional power that may be, which could bestow any benefit or prevent any loss to this witness. In my assessment, the legal evidence tends to indicate that he is above any such aspiration and his evidence is creditworthy. I find no ground to dissuade myself from the confidence reposed by the trial court on the testimony of this witness.

27. The aforesaid evidence of P.W. 21 is creditworthy and acceptable legal evidence in connection with the combing operations leading to the apprehension of Varghese and the fact that Varghese's hands were tied using the chilling of a rifle and that he was paraded to the forest; that on the way, Varghese was taken by him and other police men in a police jeep which later moved in a different direction on the instructions of the police personnel and reached the spot where Varghese was shot down. His evidence regarding the sequence of events in the scene of occurrence, including that Varghese was made to sit there and that accused persons 2 and 3 came over, discussed among themselves and later told the police men, including P.W. 21, of their decision to shoot down Varghese, is creditworthy and I do not find any ground to treat it as artificial or unacceptable for any other reason. The continuity of events leading to the first accused Ramachandran Nair being ordered by the second accused to shoot Varghese, as spoken to by P.W. 21, is clearly established by his testimony. I find absolutely no reason for P.W. 21 to make any false statement in relation to the incident, for reasons already noted by me earlier. The testimony of P.W. 21 is creditworthy in the setting in which the said incident is proved to have occurred. Such evidence, by itself, is sufficient to sustain the conviction of the second accused even in the absence of any corroboration, as regards the last lap of the transactions, to wit, the shooting down of Varghese and matters connected with that, including the directions by the second accused, as found by the court below.

28. On the basis of the materials discussed above, the prosecution case as against the second accused stood established by the legal evidence rendered before the court below and the conviction of the second accused stands.

29. In so far as the revision against the acquittal of the third accused is concerned, as already noted, the court below sieved out the statement of P.W. 21 in court, inculcating the third accused. This was done on the ground that even going by his evidence in court, P.W. 21 had not stated to the investigating officer of CBI about the presence of the third accused in the scene of occurrence. The evidence of P.W. 21 is undoubtedly legal evidence. The credibility and evidentiary value of his testimony depends upon the confidence that it gets at the hands of the court. The judicial function of accepting and acting upon such evidence is guided by the requirement that the testimony of the witness is trustworthy. The contradictions that may be shown on the basis of the prior statements made to the investigating officer, by themselves, do not make the testimony of the

witness unacceptable. There was no legal or procedural objection on the basis of which the evidence tendered by P.W. 21 could not have been accepted by the court below, including as regards the inculpatory statements as against the third accused. If that were done, the third accused would have also been convicted. The court below was, however, not prepared to accept the testimony of P.W. 21, as regards the third accused, in all confidence. Such finding of the court below is one rendered on appreciation of evidence and rests in that realm. There is no legal infirmity in the court below having done so. It is not a case where the court below had eschewed any legal evidence. It is not as if it had come to any perverse conclusion while considering the evidence, leading to injustice. There is no jurisdictional error, illegality or impropriety in the acquittal of the third accused. The appreciation of evidence cannot be treated as perverse, warranting exercise of revisional jurisdiction in that regard. In the absence of any appeal by the CBI against the acquittal of the third accused and having regard to the scope and limits of the revisional jurisdiction u/s 397 Code of Criminal Procedure, I do not find any ground to interfere with the acquittal of the third accused.

30. Having found that the verdict of the court below stands on the strength of the evidence discussed above and for the reasons aforesaid, I shall now consider the submissions made on the basis of certain other materials on record; whether they constitute legal evidence and, if so, their evidentiary value and effect.

31. P.W. 5, the widow of the first accused Ramachandran Nair stated that she noticed a change in his conduct and he told her after about two or three weeks of the incident that he killed Varghese by shooting him down. She stated that the first accused had told her that he had shot dead someone on the instructions of the higher officials. She also said that the first accused took to alcohol and cigarettes thereafter.

32. Section 120 of the Evidence Act provides, inter alia, that in criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness. Therefore, even if the first accused was alive and was standing trial in the criminal proceedings in hand, his wife would be a competent witness in such proceedings.

33. However, any statement that might have been made by the first accused to his wife is a communication immune from disclosure in view of Section 122 of the Evidence Act. This embargo does not apply to proceedings between the parties to the marriage or in prosecution for any crime committed by one against the other. The case in hand does not fall under any of those two categories of exception, and therefore, the embargo from disclosure applies, unless there is waiver of that privilege by "consent".

34. P.W.5's statements that after the incident, the first accused showed change in his conduct and there was a shift in his behaviour, are not disclosures of any communication, but only of conduct and are, therefore, not barred by Section 122 of the Evidence Act.

35. The immunity from disclosure, enshrined in Section 122, applies to all communications, confidential or otherwise. That privilege is not to the witness, but to the spouse who made the communication and therefore, the witness cannot waive it at his or her will; nor can the Court permit disclosure even if he or she is willing to do. In terms of Section 122, it is imperative that a witness shall not be permitted to disclose any communication covered by the privilege provided for by that provision, unless the person (spouse) who made that communication, or his or her representative in interest, consents to such disclosure. In the setting in which the concept of "consent" is placed in Section 122, such consent is not to be implied or drawn as an inference from the conduct of the spouse entitled to the privilege, not objecting to such disclosure.

36. But, in this case, the first accused is no more. P.W.5 is his widow. Section 21 of the Evidence Act, which relates to proof of admissions, makes reference to "representative in interest". That provision, obviously, recognizes a representative in interest as one who represents the interest of another by virtue of inheritance, transfer etc. (See Advanced Law Lexicon P. Ramanatha Aiyar-- 3rd Edition.) The concept "representative in interest" is an expression in relation to the estate of a dead person. In that view of the matter, P.W.5 is herself the representative in interest of the late first accused Ramachandran Nair. Therefore, when the first accused person's widow, who herself is the representative in interest of the first accused, voluntarily gives evidence, the embargo to disclosure as contained in Section 122 would stand diffused because the disclosure is by the wife, who is the eligible and entitled person, to consent as the representative in interest. Her disclosure is, indisputably, voluntary and therefore, with her consent; that is, the consent of the representative in interest of her late husband. In such a situation, there is no need for the court to further search for any expression of consent by the said witness herself. I have not been shown; nor have I been able to see; any precedent dealing with the effect of Section 122 of the Evidence Act when a party to the marriage, since widowed and thereby becoming the representative in interest of the dead spouse, proceeds to tender evidence of a communication made to her/him by the late spouse. The prohibition u/s 122 is based on the ground that the admission of such testimony is likely to disturb the peace of the family and weaken the feeling of mutual confidence. Looking at the objects sought to be achieved by the provision in Section 122, I do not find any reason to hold that P.W. 5, the widow of the first accused was inhibited by the terms of Section 122 of the Evidence Act, at least after the demise of her husband, from disclosing the statement made by her husband to her during the marriage, regarding the killing of Varghese. Nor do I find in her such disclosure, any statement militating against the interest of late first accused Ramachandran Nair, which interest his widow represents after his demise. May be, by making such disclosure, she is espousing the cause of the first accused that he was forced and threatened to kill Varghese, though, had he been alive, that would not have been acceptable from him as a defence.

37. That apart, Ext.P-3 certified copy of the counter-affidavit submitted by the first accused in the writ petition seeking CBI investigation is an affidavit containing the statement of that person who is now dead. It is duly attested by P.W. 6 and filed in court. Whatever be the acceptability of the contents of that affidavit and its evidentiary value regarding the culpability of accused persons 2 and 3, and, also leaving aside the question whether that counter-affidavit could be treated as a statement of confession, the indisputable fact is that the filing of that counter-affidavit by itself discloses that the first accused himself did not, at any point of time, have an objection to disclosure of any communication by him. His conduct of filing Ext.P-3 counter-affidavit during his life time is itself sufficient material to hold that he had no objection to the wife disclosing any communication made by him during the marriage, in relation to the incident in question.

38. The testimony of P.W. 5 cannot be eschewed merely with reference to Section 122 of the Evidence Act. That statutory provision did not preclude her from making the disclosure as to any communication by the first accused. The evidentiary value of P.W. 5's statements, as to the conduct of the first accused as spoken to by her and regarding the disclosure made to her by her husband, the first accused, that he had shot down a person under threat to his life by orders of his superiors, is of fair potency, to be relied on, not as a confession, for corroboration of the testimony of P.W. 21, the eye-witness to the shooting down of Varghese, along with other oral evidence and materials and the circumstances and inferences already noted and relied on by me above.

39. The effect of the evidence of P.W. 10 and P.W. 22 is another aspect. P.W. 10, Suguna Prasad served the Malabar Special Police. He was the Malappuram District President of the Kerala Police Association and P.W. 22 was the Secretary of that organisation. Their evidence is to the effect that the first accused Ramachandran Nair had informed them that he was very much worried and when asked about it, he had revealed that it was on account of the necessity to shoot naxal Varghese. Their depositions picture Ramachandran Nair having made statements of having shot down Varghese and at the same time, inculcating the second accused of having ordered the first accused to kill. They would state that Ramachandran Nair had stated of having killed Varghese at the behest of the second accused, the superior officer. The testimony of these witnesses are not in the realm of hearsay, but in relation to utterances and conduct of the first accused, since deceased. Such materials, along with other legal evidence, could be accepted and acted upon as having persuasive value, along with the other legal evidence on record; not as evidence of any confession by the first accused, but as inculcating statements by him as against the other accused persons.

40. The court below also had before it, Ext.P-3 certified copy of the counter-affidavit submitted by the first accused in the writ petition filed before the High Court seeking CBI investigation into the death of Varghese. I find that the evidence of the Advocate who attested the original of that counter-affidavit,

namely, P.W.6, is to the effect that the said counter-affidavit was prepared and brought to him by the first accused and the Advocate who was appearing for the writ Petitioner. He vouchsafed of having attested that counter-affidavit. I note this only to indicate that the credibility of the contents of that counter-affidavit may be open to challenge. But, at the same time, it is a statement made with due authority, by the first accused in a judicial proceedings. It is not a statement made to the police. It contains statement, in documentary form, which suggests the inference as to the fact that it was the first accused who shot Varghese dead. It also contains the statement by the first accused inculcating the second and the third accused of having compelled the first accused to commit that crime. Such statements in Ext.P-3 counter-affidavit are legally admissible as statements regarding facts in issue and relevant facts. If such statements amount to an admission made by a party to a judicial proceeding, it is an admission. An admission of a fact need not always result in the person making that admission, confessing to having committed a crime. A statement, which is confessional in nature, may also contain matters which go out of the pale of confessions, but yet, would continue to be legal evidence. While accused persons 2 and 3 may be eligible to the protection of Section 30 of the Evidence Act in the context of the death of the first accused, the exculpating statement made by him in Ext.P-3 counter-affidavit by saying that he did that act under the instructions of the superior officers, namely, the second and third accused, is clearly a statement by the first accused in a judicial proceeding inculcating accused persons 2 and 3. Whatever be the weight and evidentiary value of such material, it is legal evidence and cannot be ignored or eschewed from being treated to be at least of persuasive value along with the other materials on record pointing to the guilt of the second accused as found by the court below.

41. This takes me to the another crucial aspect, namely, the delay in registering the case. The incident in question is on 18-2-1970. The case is ultimately registered by the CBI only after directions were issued by this Court in O.P. No. 21142 of 1998. Going by the materials on record, different attempts were being made by the local people and P.W.1 and Ors. to have a free and fair investigation into the death of Varghese. Ultimately, when the first accused came out with his disclosure regarding the incident, as spoken to by P.W.10 and P.W.22 and also as disclosed in the first accused's Ext.P-3 counter-affidavit to the writ petition before this Court, I can only see such disclosure as the relief of one who carried with him the prick of conscience and deep sense of guilt in having shot Varghese dead. The totality of the evidence does not point any finger of accusation against the late first accused of having made any false statement to that effect, except certain suggestions that he was playing into the hands of naxalites and other persons who nurtured ill-will to accused persons 2 and 3. The defence has seriously criticized the reliability of the first accused coming out long after he retired from service and making utterances of his having shot down Varghese. The question of delay in this matter has been seriously debated. In my view, after all, the first accused was a soldier, bound by his office to follow the dictates

of his superiors. All that he said after a long interval is nothing but a fact he had carried in his mind as part of the feeling of guilt and turmoils of his conscience and mind, that haunted him. I am satisfied that his disclosure does not, in any manner, take off its credibility merely for the reason that the same has been done after a considerable lapse of time. I do not find any artificiality in that course of action by the first accused Ramachandran Nair. In the common course of human conduct, I do not expect any disciplined and orderly soldier to make any disclosure in relation to an incident in which he was intricately involved and thereby turn round and accuse his superior officers, at any rate, within a time frame well in proximity to the incident. Also, contextually, I cannot but recall the testimony of P.W.21. I, therefore, am of the view that the said circumstance also cannot be wholly eschewed. Nor can the case fail on a ground of delay.

42. On to the question of the sentence handed down by the court below to the second accused, which is one of the matters raised in the revision by P.W. 1. Apart from the fact that there is no appeal by the State, I am of the view that the discretion in a matter relating to sentencing having been exercised by the court below on the basis of the entire materials on record, I do not find any ground to invoke the revisional power to interfere with the sentence imposed on the second accused, against his interest. While it may be commendable to remember that a murder at the hands of the police under the guise that it was an encounter killing is by itself an affront to the society at large, I do not think that the sentence imposed on the second accused in this case is shockingly or grossly disproportionate to the proved offence calling for interference in exercise of revisional jurisdiction u/s 397 of the CrI. P.C. The revision fails on that count also.

43. I would, therefore, dismiss the criminal appeal and the criminal revision.

S.S. Satheesachandran, J.—I have had the advantage of reading the judgment prepared by my learned brother, Justice Thottathil B. Radhakrishnan. As the case in hand presents some questions of law, which emerge from the facts established, I may advert to the same.

2. A recapitulation of the facts of the case leading to the indictment of the three accused, A-1 to A-3, for the offence of murder of one Varghese, a naxalite leader, imputing that he was a victim of custodial death and all the three accused were jointly culpable for the same, is not warranted as it has been dealt with in detail by my learned brother. However, it has to be mentioned that a bunch of writ petitions, presented as public interest litigation seeking orders of judicial enquiry over the death of Varghese, had led to the registration of the crime against the accused, the indictment of all of them for the offence of murder of Varghese, and, ultimately, the conviction of one of them (A-2) for such offence.

3. Varghese, a naxalite leader, was shot dead by the police on 18-2-1970 in the wilderness of Thirunelli Forest. The version of police, and also of the executive, that his death occurred in an encounter was doubted by many, and serious

aspersions were raised that it was a case of custodial death, which had its echo even in the Legislative Assembly of the State, leave apart gaining the attention of media, and coverage over the issue, from time to time. Two decades after the death of the victim, revelation made by A-1, a former CRPF Constable and one in the police party involved in the combing operations in Thirunelli forest, to apprehend Varghese, that it was he who had shot Varghese dead while he was in police custody, and he was compelled to do so under threat to his life, as commanded by A-2, a senior police official, in the presence of A-3, another superior police officer, and that he was prepared to face any punishment, was a volcanic eruption shaking the official version over the death of Varghese; and, that revelation, in fact, prompted some public spirited citizens, and also relatives of the victim, to move a number of writ petitions before this Court seeking orders for a judicial enquiry/registration of crime and investigation by Central Bureau of Investigation, for short, the "C.B.I.", over the death of Varghese. A-1 was impleaded as a party, additional 5th Respondent, in one of the writ petitions (O.P. No. 21142 of 1998) and he then filed Ext.P-3 counter-affidavit affirming that death of Varghese was not in an encounter, and under threat to his life he obeyed the command of A-2 and A-3, superior police officials and shot down Varghese dead while he was in custody. By Ext.P-28 judgment, observing that judicial enquiry would not serve any useful purpose, and the facts affirmed by A-1 in his Ext.P-3 counter-affidavit warrant the registration of a crime over the death of Varghese and investigation thereof, but such investigation has to be done not by the local police since involvement of senior police officials in the death of Varghese was imputed, the C.B.I., was directed to register a crime on the basis of the "facts stated" in Ext.P-3 affidavit and investigate the same. Pursuant to the directions so issued by this Court in Ext.P-28 judgment, Ext.P-27 F.I.R. was registered naming A-1 to A-3 as the accused, who had caused the custodial death of Varghese by shooting him down while he was held as a captive in police custody. All three accused, A-1 to A-3, were imputed of having committed the offence jointly and the investigation proceeded implicating all of them for the offence punishable u/s 302 read with Section 34 of the Indian Penal Code. Contents of Ext.P-3 affidavit in toto were incorporated as part of Ext.P-27 F.I.R. in registering the crime.

4. Ext.P-3, counter-affidavit of A-1, had been totally eschewed from consideration by the learned Sessions Judge, perhaps, on the premise that it is a confession made by that accused, and the embargo covered by Section 30 of the Evidence Act, for short, the "Act", prohibited the use of such confession against the other accused as there was no joint trial of them. That objection, in fact, was pressed into service before us by the learned Counsel for A-2 and A-3, to contend that Ext.P-3 is inadmissible in evidence, as its reception is interdicted by Section 30 of the Act, and the court below has rightly and correctly discarded it, though no advertance in particular was made of Ext.P-3 in the judgment for its non-consideration. A-1, the deponent in Ext.P-3 affidavit had passed away during the enquiry on the charge laid against the accused before the court. There was

no joint trial of A-1 with the other accused, and as such, if Ext.P-3 is to be treated as a confession of A-1, then the embargo u/s 30 of the Act would definitely apply. However, it needs to be stated at this stage that the applicability of the embargo under the aforesaid Section, primarily, has to be examined with reference to the question whether Ext.P-3 in fact is a confession of A-1 as to his guilt in committing the murder of the victim Varghese with the other accused. That question, it is seen, has not been looked into by the Sessions Judge and, without doing so, Ext.P-3 has been excluded from the purview of consideration in testing the merit of the prosecution case.

5. Ext.P-3 though incorporated as part of Ext.P-27 F.I.R, was not an information recorded from the maker (A-1) by the police, on which the crime was registered and investigation proceeded. It was essentially a statement given by the maker (A-1) in a judicial proceeding, wherein, he was a party. The question for determination in such proceeding was whether by judicial intervention a probe over the death of Varghese has to be ordered, and that, no doubt, emanated from the revelations of A-1 affirming that he shot Varghese dead while the victim was a captive in police custody. An investigation by C.B.I. registering a crime on the "facts stated" in Ext.P-3 counter-affidavit of A-1 was ordered under Ext.P-28 judgment, to unravel whether Varghese was shot dead in police custody, and if so, to bring to justice those who are culpable for the offence of murder of Varghese. One among the cardinal questions involved and, perhaps, the most significant one in the case in hand, was whether Varghese was a victim of a custodial death, or in a police encounter, and that fact in issue over the prosecution case, which was built on the edifice that Varghese already apprehended was a captive in police custody while he was shot dead, cannot at all be ignored for a moment in considering the relevancy and probative value of Ext.P-3 statement of A-1, in which, he had made certain admissions, before a court of law, implicating him, and also some others, for the death of Varghese.

6. The background in which Ext.P-3 statement from A-1 originated and was filed in a judicial proceeding has been adverted to. of course, a challenge had been mooted by the respective counsel for A-2 and A-3 over the manner in which Ext.P-3 statement, counter-affidavit by A-1, was filed in the writ petition referring to the evidence of P.W. 6, the counsel who had attested that affidavit. It was not a voluntary statement of A-1, but, one manufactured and brought into existence at the instance of the Petitioner in the writ petition, is the objection raised pointing out that the counsel for the Petitioner in the writ petition, Adv. A.X. Varghese took A-1 to P.W. 6 and, then got the affidavit attested through him identifying the deponent. Objection raised as aforesaid to impeach the value and worth of Ext.P-3 affidavit of A-1, to say the least, is wholly devoid of merit as it is crystal clear that the Petitioner in the writ petition was espousing the cause, which was projected by none other than the deponent, the disclosure made by him demanding a judicial enquiry/investigation over the death of Varghese registering a crime. Moreover, A-1, the deponent in Ext.P-3 affidavit was a party to the proceedings, impleaded, later, as additional 5th Respondent in the writ

petition. The Petitioner in the writ petition and also the additional 5th Respondent were, in fact, complimenting one another, to seek the judicial intervention of the court to have a probe into the death of Varghese, both asserting and affirming that it was not an outcome of a police encounter as officially projected, but, a clear case of murder while the victim was in police custody, and that too, with the deponent (A-1) making a revelation that he had shot dead Varghese at the command of his superior police official and he was compelled to do so under threat to his life. When such be the factual scenario, it is futile to attack and cast aspersion over the worthiness of Ext.P-3 affidavit, on the basis of the evidence of P.W. 6, the advocate who had attested such affidavit.

7. In Ext.P-3 affidavit, A-1 has given graphic description of the sequence of events commencing from the apprehension of Varghese from his hideout by the police party, including him, finally culminating in his shooting down Varghese dead on the command of A-2 in the presence of A-3, his superior police officials, under threat to his life. The facts in issue in the case primarily demand answer to the question whether the victim Varghese had a custodial death or in a police encounter. If he had been apprehended by police and was in custody hours before he was shot down, as is the case of the prosecution, then every material produced by the prosecution to establish that fact in issue has relevance and of material value. Analysing Ext.P-3 statement of A-1, it is found separable into three divisible parts: the first part states of the police party with A-1 proceeding to the hide out of Varghese, apprehending him and returning with the captive, and, then, of taking him in a jeep under custody; the second part, states of the stoppage of that jeep by a police convoy in which A-2 and A-3 were present, reversal and returning of the jeep carrying Varghese with the police convoy under the directions of the superior police officials to Thirunelli forest and then taking Varghese blindfolded through the forest to a spot within, and later, his interrogation by superior police officers, A-2 and A-3; and, the third part states of the summoning of the four CRPF constables including P.W. 1 by A-2 and A-3, questioning them as to who will shoot down Varghese, the reluctance of A-1 alone, who did not express his willingness while the rest did so, and then he being intimidated that he would be killed in a naxelite action, and sensing danger to his life, A-1 shooting down Varghese dead.

8. First and foremost, Ext.P-3 is a statement, in fact, a counter-affidavit presented before this Court, much earlier to the registration of the crime. Reception of such statement in evidence and its consideration irrespective of what is the probative value to be attached thereto, is the rule when no provision of the Evidence Act bars its admissibility. Such a statement cannot be shunned out as inadmissible, treating it as a confession of the maker, which it is not, and more so when this Court under Ext.P-28 judgment had ordered for registering crime on the "facts stated" in Ext.P-3 statement.

9. What is prohibited by Section 30 of the Act is the use of confession of an accused against a co-accused, unless there is a joint trial. The three parts

forming part of Ext.P-3 are taken as a whole or separately, it is, no doubt, admissible as a relevant piece of evidence to decide the fact in issue involved. The only rider is that the admission made by the maker incriminating A-2 and A-3 so far as it related to the shooting down of Varghese dead under threat from A-2, that alone, cannot be used or relied on as an incriminating circumstance against A-2 and A-3, the co-accused. I say so, since Ext.P-3 is a statement, which squarely falls u/s 32(3) of the Act. Where a witness is dead or he cannot be found or has become incapable of giving evidence, or his attendance cannot be procured without unreasonable delay, statement of relevant facts by such person, which come under the eight clauses of Section 32 of the Act are themselves relevant facts and admissible in evidence. In the case of a person as referred to above, Sub-section (3) of the above Section spells out that where the statement of such person is against the pecuniary or proprietary interest of the maker, or when, if true, it would expose or would have exposed him to a criminal prosecution or to a suit for damages, his statement itself is a relevant fact admissible in evidence. So much so, where Ext.P-3 statement, counter-affidavit of A-1, would expose him, and which, in fact, had exposed him to a criminal prosecution, it is a relevant fact. Statements made by A-1 in Ext.P-3 are themselves relevant facts and admissible u/s 32(3) of the Act. So much so, the statement of A-1 as regards the first two parts in Ext.P-3 that Varghese was apprehended from his hideout by the police party, his custody was, later, under A-2 and A-3 and he was taken to the forest blindfolded, and interrogated by A-2 and A-3, are relevant facts admissible to unravel the fact in issue involved in the case. Even eschewing from consideration the admission of the maker of shooting down Varghese dead, obeying the command of A-2, under threat to his life, with his statement of threat from A-2 for doing such act, treating it as an admission incriminating the maker only, it no way impinges the evidentiary value of the relevant facts stated by A-1 under the first and second parts as referred to in his Ext.P-3 statement. In isolation, such statements may not be of much moment, but its value with reference to other pieces of evidence marshalled by the prosecution to prove the indictment levelled against the accused necessarily has to be considered, which if not done, would amount to violating and transgressing of the statutory prescriptions over the reception and appreciation of evidence in a criminal trial.

10. To establish that Varghese was in police custody, and he continued to be so for hours, until he was shot dead, prosecution relied on P.W. 21, another CRPF Constable, who was involved in the apprehension of the accused, with A-1, from his hide-out. What all transpired leading to the shooting down of Varghese dead, after his apprehension and custody, as borne out by the evidence of P.W. 21 require special mention, which I shall advert to later as it has got a decisive effect in appreciating the prosecution case over the death of Varghese as of murder from a custodial death and not in a police encounter. The prosecution has let in direct evidence, other than that of P.W. 21, to prove its case that Varghese had been taken into custody by the police, much earlier to his death, through

P.Ws.3 and 7, two residents of the place. P.W. 3 was a schoolmate of Varghese and P.W. 7 an illiterate adivasi. Both of them have asserted that they had seen Varghese in police custody on the morning of the fateful day, that is, 18-2-1970, in the evening of which, admittedly, he was shot dead. The learned Sessions Judge, after meticulous scrutiny of the testimonies of these two witnesses, P.Ws.3 and 7, found them trustworthy, convincing and reliable though some aspersions were raised to impeach the creditworthiness of those witnesses. Their assertion of seeing Varghese under the custody of police with his hands tied behind, in the morning of 18-2-1970, was found credible and worthy of acceptance. After going through the testimonies of these two witnesses, P.Ws.3 and 7, I find that the conclusion formed by the learned Sessions Judge to accept the testimonies of these witnesses as trustworthy and reliable cannot be found fault with. The testimony of P.W. 3 was sought to be assailed suggesting that he was a follower of Varghese, which, in fact, was denied by him, while admitting that he had love and respect to Varghese. No reason whatsoever was shown to doubt the intrinsic worth of his evidence that he had seen the accused under the custody of the police on the morning of the fateful day, leave alone, not even any suggestion as to why he should perjure before a court of law if it were not so, to implicate the accused falsely in the grave offence of murder. He has no ill-will or any animosity or any axe to grind against any of the accused, who faced the trial. The version given by him of witnessing accused in the custody of the police in the morning of 18-2-1970 was rightly and correctly accepted by the court below as true. Similarly, the version of P.W. 7, on a reading of his testimony would indicate that he is a rustic witness, and whatever he had narrated as to witnessing Varghese in the custody of the police was what had been imprinted on his mind years before seeing that scene which would not wither away and dissipate even after years. He has unreserved admiration to Varghese for the services rendered by him for the cause of adivasis and he still believes that whatever acts Varghese had done at that point of time were then needed, and on account of the death, he is grieved and has animosity towards the police, in fact spells out the rustic nature of this witness. If the version of the witness (P.W. 7) that he saw Varghese in the custody of police is true, then, when he admired such person as a liberator of his class, adivasis, from the tyranny of jenmies, the death of such a leader at the hands of police, that too while in custody, would certainly give vent to the expressions made by him as to his grief and animosity to police, which, under the circumstances, cannot be given unmerited consideration to doubt the worth of this rustic illiterate adivasi, who was found trustworthy by the learned Sessions Judge, who had the opportunity to watch his demeanour and deportment while recording his testimony. Statements made out as to his grief, and animosity to police, do not in any way indicate that he had any interest against the accused; and, there is no reason to doubt his version that he had seen Varghese in the custody of the police. The evidence of P.Ws.3 and 7 that Varghese was seen by them in the custody of police in the morning of 18-2-1970, finds corroboration from Ext.P-3 statement of A-1 and also from the evidence of P.W. 21. Prosecution by marshelling such evidence has established

that hours before Varghese met his death, he was apprehended and was under police custody.

11. Indisputably, the bedrock on which the prosecution built its case against the accused squarely rested on the evidence of P.W. 21, a retired CRPF personnel, who was a member of the police party with P.W. 1 when the death of Varghese took place, whether it be in an encounter or in custody. P.W. 21 is the solitary eye-witness examined by the prosecution to unfold its case how Varghese met his death, that it was not in an encounter, but a custodial death. The learned Sessions Judge appreciating the evidence of P.W. 21 had repelled the various counts of attack raised over its acceptability, but, all the same held that the contradictions brought out with reference to his previous statement u/s 161 of the Code of Criminal Procedure would enure in favour of A-3, and, thus, for ordering his acquittal. Evaluating the evidence of P.W. 21 minutely in the backdrop of the proved facts and circumstances established and also with reference to the various challenges mooted by the respective counsel appearing for A-2 and A-3, my learned brother has concluded, which I fully endorse, that he is a truthful witness and his sworn testimony before court deserves implicit acceptance. So much so, I refrain from a discussion over the evidence of this witness, except to the limited extent and that too, only, for the purpose of adverting to the challenge raised impeaching the trustworthiness of the witness on the plea that he has been contradicted by his previous statement recorded by police.

12. Banking upon the contradictions brought out in the evidence of P.W.21 with reference to his previous statement recorded by P.W.29 the worth of the testimony of P.W.21 was attacked as unreliable. Contradictions to his sworn testimony were based on his 161 statement, and that too recorded with reference to his questioning earlier by a Sub Inspector of local Police (Vithura Police Station) and a signed statement recorded from him by that Police Officer. The Investigating Officer P.W.29 questioned him with reference to such previous statement recorded by the Sub Inspector, wherein he is stated to have made statements that A-3 was not present at the scene or anywhere near the scene of crime and he affirmed such statements on such questioning and it formed part of his 161 statement, and that before the Investigating Officer his version was that death of Varghese occurred in an encounter, it is seen, was the challenge based on the aforesaid contradictions to impeach the testimony of the witness. P.W.21 has stoutly denied the recording of any statement from him by the Sub Inspector of Police, Vithura nor of stating before the Investigating Officer anything about that matter leave alone the absence of A-3 at the scene of crime which was sought to be projected by the incorporation of such statements in the 161 statement recorded by the Investigating Officer. He also denied of giving any previous version as to the encounter death of Varghese. Whether the contradictions so brought out have any merit has to be appreciated in the background that this Court has directed the investigation of the crime by the C.B.I. taking note that senior police officials are suspected to be involved and as

such, investigation by the local police will not serve any useful purpose. What could be seen from the evidence of P.W.29 the Investigating Officer is that during the course of investigation the whereabouts of P.W.21 was sought to be ascertained through the Vithura Police, to facilitate questioning of that witness. The Sub Inspector of Police, Vithura had no business to record the statement of P.W.21 and there is nothing on record that he was authorized by the Investigating Officer to do so. Statement purported to have been recorded by that Police Officer from P.W.21, that too stated to be a signed statement, was not produced with the records of the case, leave alone the Sub Inspector was not even cited as the witness. The evidence of P.W.29, the Investigating Officer would show that he did not know how to read, write and understand Malayalam. In all possibilities he might have questioned P.W.21 with the assistance of another police official, his subordinate, having versatility in Malayalam, and recorded the statement of the witness. Whatever that be, it has to be noted that P.W.21 was a most crucial material witness, who, perhaps, was the sole one available to depose to the real and true facts, how Varghese met his death. A Police Officer of the local Police recording the statement of such material witness and collecting a signed statement from such witness, despite the observations and directions issued by this Court in Ext.P-28 judgment cautioning and highlighting why the investigation should be conducted by the C.B.I and not by the local police, persuade me to hold that the purported statements which are incorporated as having been made in the 161 statement of this witness by the Investigating Officer with reference to the previous statement recorded by the S.I. of Police in all probabilities, are attempts to shield A-2 and A-3 from the indictment, and when that be so, the contradictions as brought out in the evidence of P.W.21 are totally devoid of any merit in testing the worth of his sworn testimony. The less need be said about the version of encounter death purported to have been stated by the witness to the Investigating Officer. P.W.21 has asserted that he was never questioned by the S.I. of Police, Vithura nor had he given any statements shown and exhibited as the contradicted portions of his 161 statement, brought out in his cross-examination. Previous statement recorded from the witness by the Investigating Officer under 161 of the Code of Criminal Procedure can be used only for the purpose of contradicting the witness as provided under the proviso to Sub-section (1) of Section 162 of that Code. Merely because some contradictions with reference to the 161 statement of the witness as recorded by the Investigating Officer had been brought out in the cross-examination it does not follow that the witness had been contradicted nor that what he had been stated before the court on oath is susceptible. It is the duty of the court to test the merit of the sworn testimony of the witness with reference to the totality of the circumstances presented and where there is no ground to doubt the intrinsic worth of the testimony of the witness and, further, reason to hold that the contradictions with reference to the previous statement brought in are tainted, no doubt, such contradictions are to be noted only for its rejection as not in any way affecting the creditworthiness and reliability of the evidence tendered by the witness.

13. After going through the testimony of P.W.21 and considering it on the various facets presented in the case with reference to other proved facts and circumstances of the case, I find that the reliability placed by the learned Sessions Judge to conclude that P.W.21 has spoken the truth, nothing but the truth, over the death of Varghese, to place implicit reliance on his testimony, was fully justified and it does not suffer from any infirmity whatsoever.

14. Even leaving aside Ext.P-3 statement of A-1, the evidentiary value of which was not considered by the learned Sessions Judge, the evidence of P.W.5 and P.W.7 and P.W.21, through the former two witnesses the custody of Varghese with the police hours before he met his death, and through the latter, the apprehension, custody and also the circumstances under which Varghese was shot dead at the command of A-2, threatening A-1 of his life to do such dastardly act, the prosecution has established the indictment levelled against A-2, in the murder of Varghese. The case of encounter death of Varghese is nothing but a false and invented story, to explain away his brutal annihilation while he was in custody. It was a clear case of custodial death and not at all an encounter, and having regard to the totality of the incriminating circumstances manacled A-2 in the custodial death of Varghese, through A-1, even by threatening him of his life, the conviction founded against him for the death of Varghese by the learned Sessions Judge deserves only to be affirmed, and the appeal against his conviction is liable to be dismissed.

15. The acquittal of A-3, which is challenged in revision by the brother of the victim, for the reasons spelt out by the learned Sessions Judge, which are given expression to, in paragraph 42 of the judgment, is based on the contradictions in the evidence of P.W.21 in relation to his previous statement purported to have been recorded by the investigating officer. The learned Sessions Judge taking note that he was a solitary eye witness on the occurrence involved felt that the aforesaid contradictions cannot be ignored in examining the culpability of A-3 in the murder of the victim. I have referred to earlier that the contradictions brought in to impeach the evidence of the witness, have no value. However, cautioned of the limitations in the exercise of revisional jurisdiction and also that there is no appeal challenging the acquittal of A-3 by the C.B.I. and as it cannot be stated that the court below had acted without jurisdiction or failed to apply proper law in the matter, interference with the acquittal of A-3 cannot be resorted to. Interference in revision against an order of acquittal has to be done with extreme care and caution and it would be justified only when the interest of justice demands interference, for which, it must be shown that there is flagrant miscarriage of justice. Such a case having not been made out to challenge the acquittal rendered in favour of A-3 by the court below, the revision against his acquittal must fail.

16. Challenge against the sentence imposed against A-2 for the indictment of murder brought home against that accused as inadequate, in as much as he was not inflicted with the graver of the two sentences for such offence, death by

hanging, but, only of imprisonment for life, under the revision, cannot also sustain since I find the discretion in the awarding of punishment, which is within the province of the learned Sessions Judge has been correctly and rightly exercised in the case. Notwithstanding the observations made by the learned Sessions Judge that the offence of murder arising from "custodial death" does not come under "rarest of rare cases", which is incorrect, it has to be noted that whatever be the gravity of the indictment established against A-2, a senior police officer, his proved culpability in the murder of the victim under his custody, awarding of sentence to him, necessarily, has to take into account that his prosecution for such offence was decades later, with the registration of the crime thereof considerably delayed. The time lag after the incident and his persecution in the media, all along ever since the death of the victim, and at present, he is an old man aged 76 years, all such circumstances deserve to be taken into consideration in the exercise of discretion over the punishment to be imposed, and when that be so, awarding of the lesser punishment to A-2 cannot be stated to be inadequate. So much so, challenge against the sentence imposed against A-2 under the revision must also fail.

17. In a case of indictment for the offence of murder emanating from, and imputing of, custodial death of a victim, the fundamental and most significant question that will arise for consideration is whether the victim was under custody at or immediately before his death, and if so, had he been subjected to torture by third degree methods, or his person abused and inflicted of grave injuries, which had resulted in his death, by his custodians. If it is established by cogent, reliable and convincing evidence from the materials produced by the prosecution, that the indictees had custody of the victim and his death arose under the circumstances as aforesaid the question is whether an explanation is warranted from them as to how the death of the victim while in custody took place. of course the onus to prove its case as a whole, not only of the custody of the victim with the perpetrators of the crime but also the taking away of his life while in custody by the acts done by the indictees, rests with the prosecution, and it never shifts. However, once custody of the victim is proved, in a case of custodial death, continuous silence or a specious plea that death of the victim was in an encounter even denying his custody, could only be taken as a false plea, and it can be taken as an incriminating circumstance with other proved circumstances if so made out, establishing the culpability of the indictees in the custodial death of the victim.

18. Encounter is often blamed as a cover for targeted killings. Colonial police strategies which followed the use of targeting killings, covertly, have no place in a Republic founded on rule of law and governed by the Constitution upholding human rights. "Right to life" of a person guaranteed under the Constitution is so sacrosanct that any intrusion into such right, leave alone the deprivation thereof, can be done only as regulated and permitted by law. The principles enshrined under the maxims "salus populi est suprema lex" (the safety of the people is the supreme law) and "salus republicae est suprema lex" (safety of the State is the

supreme law) must coexist and go together, and the one is not the less important of the other whatever be said that the welfare of an individual must yield to the interest of the State. The action of the State against the individual must be within the four corners regulated by law, it must be right, just and fair. The victim in the case, Varghese, believed in an ideology that a change of social order could be brought out through the barrel of gun by collective armed action of the peasants and working class, and had unleashed violence, committed dacoity, decapitated one or more, dubbing them as class enemies, and, perhaps, even waged war against the State, cannot justify the taking of his life by the police, after he was taken into custody. Policemen cannot be the arbiter of the wrong and wrongdoer, nor be the judge and executor of the punishment even where the worst crime is perpetrated by the offender. Any licence to the police officials, who are in fact guardians of the law, to gore the human rights to death deserves to be deprecated in the strongest terms, and any such act should be curbed, awarding the punishment called for, to uphold the majesty of law and the invaluable and inalienable rights of a human being. "Law of the jungle" where might is right or a vengeful thirst of "eye for an eye, tooth for a tooth", has no place where a justice delivery system through the instrumentality of courts prevails in a Republic governed by a Constitution insulating and safeguarding "fair trial" to an individual who is suspected of the most heinous crime. Even a terrorist once disarmed and apprehended has to be dealt with and in fact entitled as of right a "fair trial".

19. Conviction of A-2 for the offence of murder of Varghese imposed by the court below, as discussed above, is found to be unassailable, and the appeal by that accused must fail. Revision as against the acquittal of A-3, and also against the sentence imposed to A-2 as inadequate must also fail.

I fully endorse the findings and also the conclusion arrived at by my learned brother that the appeal by A-2 challenging his conviction, and, the revision by the brother of the victim, challenging the acquittal of A-3 and, also, the sentence awarded to A-2 as inadequate, are liable to be turned down.

Order by Bench For the reasons rendered above, we do not find any ground to interfere with the judgment of the court below. The criminal appeal and the criminal revision fail.

In the result, the criminal appeal and the criminal revision are dismissed.

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