

(1999) 07 CAL CK 0011

In the Calcutta High Court

Case No : Criminal Appellate Jurisdiction Criminal Appeal No. 275 of 1996 and
Crl Appeal No. 274 of 1996 with Death Reference No. 10 of 1996

Md. Ayub alias Md. Ayub Ali

APPELLANT

Vs

State of West Bengal
 Md. Kayoom Vs State of West
Bengal
 State of West Bengal Vs Md. Kayoom

RESPONDENT

Date of Decision : 21-07-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 218(1), 232, 313, 323
Evidence Act, 1872 — Section 137, 138, 25, 27, 3
Explosives Act, 1884 — Section 3, 5
Penal Code, 1860 (IPC) — Section 120B, 148, 149, 302, 379

Citation : (1999) 2 CALLT 619 : (1999) 2 CHN 532 : (1999) CriLJ 3995

Hon'ble Judges : Moloy Kumar Basu, J;Gitesh Ranjan Bhattacharjee, J

Bench : Division Bench

Advocate : Mr. Balai Roy, Mr. Ashimes Goswami and Ms. Minoti Gomes, for the
Appellant;Mr. Sudipta Maitra, Mrs. Krishna Ghose and Mr.Usuf Ali Dewan, for the
Respondent

Judgement

G.R. Bhattacharjee, J.—The aforesaid two criminal appeals and the death reference are being disposed of by this Judgment and order as they arise out of the same trial. By his Impugned Judgment Sri Milan Chatterjee, Addl. Sessions Judge, Hooghly convicted both the appellants u/s 148/149/302 1PC and sentence the appellant-accused Md. Ayub to Imprisonment for life and appellant accused Md. Kayoom to death. The present appeals and the death reference arise out of orders of conviction and sentences passed by the said Addl. Sessions Judge, Hooghly. It is also to be mentioned here that the Addl. Sessions Judge framed charge against 22 accused persons including the present appellants under various sections, such ss. 148,149,302 , 120B, 379, 427 IPC and sections 3 & 5 of the I.E. Act, but In course of trial at the stage of examination of the accused persons u/s 313 Cr.PC the Addl. Sessions Judge by his order dated 29.8.95 acquitted as many as 20 accused persons u/s 232 Cr.PC and proceeded with the trial in respect of the remaining 2 accused persons who are the present

appellants.

2. One surprising aspect of the case which we should mention at the very outset is that the Addl. Sessions Judge framed the charge in a peculiar manner which is quoted below :

"I Sri Milan Chatterjee. Addl. Sessions Judge, Hooghly hereby charge you 1. Muktar Khan 22. Samim Aktar as follows :

That all of you on 9.12.92 at about 7-30 a.m. formed unlawful assembly being armed with deadly weapons like bombs etc. having common intention and motive of causing riot and murder and In pursuance of your common Intention you had hurled live bombs on Anuj Kumar Thakur, son of Chandra Kishore Thakur and caused his instant death there and by you In pursuance of your common Intention committed therefrom different shops and houses and damages to different shops and houses and set fire on different shops, houses of the said area and thereby committed an offence punishable under sections 148,149,302 , 120B, 379, 427 With sections 3 & 5 of the I.E. Act.

And I hereby direct that you be tried by the said court on the said charge. The charges are read over and explained to the accused persons who plead not guilty and claim to be tried."

3. We are really surprised at the manner in which a senior officer like Addl. Sessions Judge could frame a composite charge under one head In respect of a wide range of offences punishable under different provisions of law. Section 218(1) Cr.PC inter alia says that for every distinct offence of which any person is accused, there shall be a separate charge. It is therefore evident and it is also a matter of common sense and established practice that a large number of offences punishable under different provisions of law should not be jumbled up under one head of charge covering all the offence under such different provisions of law as has been done by the Addl. Sessions Judge in the present case. The Addl. Sessions Judge, we are painfully constrained to observe, has no basic conception about the manner in which charge is required to be framed under the provisions of law. The question whether such error or Irregularity in the matter of framing of charge vitiates the trial or whether the accused is prejudiced by reason of such error or Irregularity in the matter of framing of charge, is indeed a different question.

4. The prosecution case as disclosed in the FIR lodged by one Chandra Kishore Thakur, the father of the victim Anju Thakur is that on 9.12.92 at about 7-30 a.m. a procession of BJP was coming from G.T. Road towards the P.B.M. Road and on seeing the procession Anuj instructed his younger brother to close the saloon shop and come back home and thereafter Anuj took a rupee from his father Chandra Kishore Thakur and went out of the house for taking a cup of tea in the tea stall and when he was taking tea at Subal Pustak's tea stall, suddenly the appellants Md. Ayoob, Md. Kayoon and others named in the FIR came out from the Dalhousie Lane being armed with bombs, machines, swords etc. and

launched an attack and kept on throwing bombs at random targeting AnuJ Kumar Thakur and that on hearing the sound of bomb explosions the informant Chandra Kishore Thakur came out of his house and saw the miscreants throwing bombs and at that time Deep Narayan's wife came and said that his son AnuJ had sustained bleeding injuries, and had fallen down, and on hearing the same the informant Chandra Kishore Thakur rushed there and found that his son Anuj died of bomb injury and after that those miscreants exploded more bombs in the locality and they ransacked and looted the grocery shops and many other shops and houses and also set fire to them. Ext. 1 Is that FIR purportedly written by Monoj Kr. Thakur in Bengali and signed the informant Chandra Kishore Thakur in Hindi. The endorsement on the body of the written FIR shows that the police officer of the Bhadreswar P.S. received the same on 9.12.92 at 1-05 p.m. and started the Bhadreswar P.S. case No. 242 dated 9.12.92 under various provisions of law including section 302 IPC.

5. Now we proceed to discuss the oral evidence on record. P.W. 1 Chandra Kishore Thakur Is the de facto complainant who lodged the FIR. In his evidence he says that they had got one saloon by the side of P.B.M. Road. He says that accused Kayoom and his associates were giving "Nara" (slogans) and they were roaming through the area and at that time the accused Kayoom had hurled bomb towards his son AnuJ Thakur and he died on the spot. At the relevant time this witness was not at the P.O. and he was in the house. He heard about the incident from the friend of AnuJ Thakur and from Monoj Kr. Thakur in his house. He further says that before he reached the P.O. the police lifted the dead body and took the same with them. He says that Rajesh Gupta, Dwlpnarayan, Ramabatar and others were also injured as they were hit by the splinters of bombs. In his examination-In-chief he says that he had lodged the FIR at the P.S. which was written by his son Monoj Thakur. He further says that his son Monoj Thakur can write in Bengali and that the contents of the FIR were read over and explained to him by his son. He also identifies his signature in the FIR. Ext. 1. In his cross-examination he says that Monoj Thakur cannot write Bengali fluently. He further says that only his son had witnessed the incident and no other member of his family had witnessed the incident. It is evident from his evidence that he actually did not see the accused hurling bomb towards Anuj Thakur nor did he witness the incident.

6. PW2 Monoj Kumar Thakur Is the son of PW1 Chandra Kishore Thakur and brother of the deceased AnuJ. His evidence is that on 9.12.92 at about 7-30 a.m. when he was cleaning his teeth inside No. 7 gall near one ration shop and his brother Anuj was standing in front of Subal Kusti's shop in that lane, there was one halla (now) near the gate of Dalhousie Jute Mill on PBM Road and on hearing the same he began to run away from that place and other persons also tried to flee away and at that time suddenly he saw that one bomb hurled by accused Kayoom struck his brother AnuJ and AnuJ suffered fatal injury and died on the spot. He further says that out of fear he rushed to a nearby place and after some time all their family members assembled at the P.O. and thereafter

they went to Bhadreswar P.S. and lodged the FIR. He further says that he gave verbal information to the P.S. In his examination-In-chief he says that he does not know who actually had written the FIR but some one of the office had written the FIR and after preparation of the FIR he was asked to sign as the scribe and he signed with his address. He also identifies his signature with address (Ext. 1/1) in the FIR. He however says that he cannot write Bengali and the contents of the FIR are not in his handwriting. He further says that after some time they went to Chndannagore S.D. Hospital and after post mortem they took delivery of the dead body of his brother AnuJ. He says that police did not allow them to burn the dead body in or around Champdanl area and as such they went to a ghat at Chandannagore where the dead body was burnt. His evidence is that the dead body was removed to the hospital by the police from the P.O. it has been submitted on behalf of the appellants that his evidence shows that the FIR was not written by him and this is a positive set back to the prosecution case. it is however submitted on the other hand on behalf of the State that both P.W. 1 and P.W.2 have proved their signatures in the FIR owing responsibility of the FIR version and that being so the question as to whether the FIR was actually written by P.W.2 or not, loses practical significance.

7. P.W.3 Smt. Anita Thakur @ Munni is the sister of the deceased AnuJ. Her evidence is that at about 7-30 a.m. on hearing a row she came out of her house and saw that a large number of persons were running away and at that time "Kallash Kaka" informed her that Anuj had died by reason of hurling of bomb. She also claims to have seen the accused Kayoom flee away through their Mahalla having one revolver in one hand and one bomb in the other hand. She says that Kayoom is known to her. it has been submitted on behalf of the appellants that the evidence of Anita shows that she had already heard that Anuj had died as a result of hurling of bomb and thereafter saw the accused Kayoom fleeing with a revolver in one hand and a bomb in the other hand which would falsify the prosecution case that AnuJ died because of hurling of bomb by Kayoom. On the other hand it is submitted by the learned Advocate for the State that it is quite possible that after hurling one bomb Kayoom took another bomb in his hand either from his own pocket or from some other source, such as his associates. P.W.4 Ashok Thakur is a younger brother of the deceased Anuj. His evidence is that on hearing row he came out of his house and saw that muslim people of the locality were moving with deadly weapons like Talawar, bomb etc. and police had also appeared, and that his mother had asked him to take information about his brothers and when he went there his brother Monoj informed him that someone had murdered his brother Anuj, and then he returned home and took his sisters and others to the P.O. He of course then says that his elder brother (meaning Monoj) had informed him that Kayoom had murdered his brother Anuj. P.W.5 Rajendra Kr. Mali's evidence is that on that day at about 7-30 a.m. when he was coming back to his house from his factory for tiffin purpose, bombing was going on in No.7 gall and then he entered inside his brother's house in that gall and subsequently when he came out of that

house he came to learn that Anuj Thakur was murdered. Of course he then says that he was at that time going to his brother's house from his house. He also says that there was lock out of his mill i.e. Dalhousee Jute Mill. He does not know what was the reason of bombing. He further says that he went to the roof and saw that police took the dead body of Anuj, and he does not know anything else. In his cross-examination he says that in course of passing through No.7 Gall he did not see Md. Kayoom there. The evidence of P.W.6 Ram Abatar Gupta is that on that date he was taking tea in the tea stall of Subal just by the side of G.T. Road at about 7-30 a.m. and at that time one procession of B.J.P. was proceeding from the side of Dalhousee Jute Mill and the inhabitants of No. 9 lane began to hurl bombs aiming at the procession and that deceased Anuj was standing near that place and one bomb had struck him and he fell down sustaining injury and died. This witness claims to be an eye witness to the hurling of bomb at Anuj. His evidence is that thereafter he fled away from the P.O. and he was also injured by the splinters of the bomb. But he says that "he said one Ayub and one Kayoom in that association who had hurled bomb" and that Kayoom had a pistol in one hand and a bomb in the other hand and Ayub had a bomb in his hand. It is inter alia suggested to him in his cross-examination that the persons who were leading the procession were actually hurling bomb which however he denies. P.W.7 Rajesh Chowdhury says that at about 7-30 a.m. he heard one holla (row) from his house and saw that his mother was going out and he went to the street for the purpose of taking his mother back. According to his evidence he went to the meeting place of the gall and P.B.M. Road and there when he was trying to push her mother back he saw that the accused Kayoom had one pistol in one hand and bomb in another hand and Kayoom threw the bomb which struck Anuj and Anuj fell down on being injured and died on the spot. He further says that Anuj was just by his side at a distance of 2/3 steps and there were huge number of persons with Kayoom.

8. PW.8 Kishore Bhagat says that when he was going to his shop from his house at about 8 a.m. he heard that someone had murdered Anuj and set fire to his shop. He says that he also heard that Amarendranath Sadhukhan was the leader of the group that set fire to his shop. He says that afterwards he went there and saw that his shop was entirely destroyed by fire and he does not know anything else. PW. 9 Dr. Dwipnarayan Prosad is a resident of P.B.M. Road. His evidence is that at about 7-30 a.m. when he was taking tea sitting in his verandah which was by the side of that road, there was some trouble and suddenly he heard the sound of one bomb blast and he saw that one boy fell down being injured by such bomb blast and he was also injured with the splinters of the bomb and he also fell down. He however cannot say the name of the boy. He also does not know who had thrown the bomb. In his cross-examination he says that the "holla" started and bombing also started from the side of G.T. Road. P.W.10 Bhagirathi Mall says that at about 7-30 a.m. he was standing on P.B.M. Road and at that time one procession of B.J.P. was passing through that road and suddenly he heard one sound of blasting of bomb there and he fled away from that place.

He says that he had witnessed that the bomb was thrown aiming at the procession but he cannot say who threw that bomb. P.W. 11 Dalu Shaw was declared hostile by the prosecution. He says that about 4 years back in the morning AnuJ died because of bomb injury sustained by him. He also says that on hearing some holla when he came out of his house he saw that a large number of persons were fleeing away and then he came inside his house. P.W. 12 Pannalal Shaw says that he has got a grocery shop in lane No.9, but on 9.12.92 he did not open his shop as there was call of Benglabandh by the B.J.P. and at about 11 a.m. on that day he went near his shop and found that his shop was destroyed by fire. He heard that AnuJ Thakur was murdered but he cannot say how he was murdered. P.W. 13 Jaharlal Bhagat says that his shop on the P.B.M. Road was destroyed by fire but he does not know who set fire to his shop and he did not hear anything. He says that AnuJ Thakur was murdered on being hit by bomb but he cannot say who hurled the bomb.

9. P.W.14 Dilip Kr. Jalswal is a resident of P.B.M. Road and neighbour of Anuj Thakur. His evidence is that at 7-30 a.m. he was standing near the tea stall of Subol Pustl on the P.B.M. Road and at that time there was a row and people began to run away and he also began to run and he saw that AnuJ Thakur was running away and the accused Kayoom was chasing him. He further says that Kayoom had one bomb in his hand and he threw the bomb aiming at AnuJ which struck AnuJ and AnuJ died instantly on the road. He heard Kayoom say "Salake mere folechi" (I have killed him). In his cross-examination he says that in between his house and P.B.M. Road there are other two houses and from his house neither the G.T. Road nor that tea stall is visible. His further evidence is that in that morning bomb blasting was going on. P.W.15 Alope Chakraborty Is the Ward Master of the Chandannagore S.D. Hospital. His evidence Is that on 9.12.92 in the afternoon A.S.I. Parimal Chatterjee of Chandannagore P.S. came to the hospital and held inquest over the dead body in his presence and prepared inquest report which was signed by him as witness. According to his evidence the inquest was held at about 3.30 p.m. He cannot say the name of the deceased. P.W. 16 Chittaranjan Das Is a constable of police. He was present when the inquest was held. He says after the inquest was over postmortem was held by the medical officer of the hospital and he Identified the dead body before the M.O. In his cross-examination he says that as per the inquest report the dead body was unidentified and the deceased was not know to him. He cannot say whether the relatives of the deceased were present at the hospital. P.W. 17 A.S.I. P. Chatterjee held the inquest. According to his evidence he held the inquest from 4-30 p.m. to 5-30 p.m. after coming to Chandannagore S.D. Hospital.

10. P.W.18 Dr. S.K. Ghosh hold post-mortem examination on 10.12.92. His evidence shows that on 9.12.92 the deadbody was brought to the hospital but on that day there was no Identification and the deadbody was Identified on 10.12.92. He found one injury at the middle of the spinal chord on the back which was lacerated injury measuring 10" x 8". Some splinters were recovered from such injury. The doctor is of the opinion that death was due to the injury

noted by him and also because of profuse bleeding which was followed by shock, and that occurred due to bomb injury over the back. Considering the nature of the injury he opines that this was ante-mortem in nature. According to his evidence he held the post-mortem on 10.12.92 at 9-30 a.m. In his cross-examination he says that he found the splinters inside the injury which was sufficient to prove that the injury was caused due to bomb blasting. He further says that there was explosion of bomb and because of the effect of such explosion the injuries were caused and it was not only by the hit of splinters. He further says that from the report (P.M. report) he can say that the bomb hit on the back of the deceased and that considering the nature of the injury he is also of the opinion that there was instant death because of hit by bomb explosion. P.W. 19 S.I.. N.C. Samanta is the I.O. of the case. His evidence is that on the date of occurrence he was attached to Champdanl Top under Bhadreswar P.S. it may be noted here that the occurrence took place within the jurisdiction of Bhadreswar P.S. According to his evidence he returned to the P.S. from Chandannagore Hospital at 1-05 p.m. and immediately thereafter he started for the P.O. and reached the P.O. at 1-30 p.m. and found that the O.C. Bhadreswar P.S. had already sent the deadbody to Chandannagore hospital for P.M. examination. He says that thereafter he went to the house of the de facto complainant but he was not there as trouble was going on in the locality. He further says that S.P., Addl. S.P., D.M., Range D.I.G. were present there and military operation was also started for the purpose of maintaining law and order in that locality, and D.M. had promulgated order u/s 144 Cr.PC for maintaining law and order. He says that on 10.12.92 he had examined Anil Thakur and Ashok Thakur but because of severe tension in the locality and curfew he could not examine other persons on that date. According to his evidence he arrested 3 accused persons on 9.12.92 at about 7-30 p.m. and also arrested two others on 10.12.92. In his cross-examination he says that after 1-30 p.m. on 9.12.92 he went to the house of de facto complainant but the complainant and his family members were not available in the house. In his cross-examination the I.O. says that P.W.6 stated to him that Ayub was in that assembly but he did not say that Ayub had a bomb in his hand. It may be mentioned here P.W.6 Ram Avatar Gupta in his evidence says that Ayub had one bomb in his hand. The I.O. says that on 9.12.92 Bharat Bandh was called on behalf of B.J.P. for 24 hours and that in support of the Bharat Bandh call a procession of B.J.P. was there.

11. We have discussed above the oral evidence in this case. As regards the documentary evidence the prosecution have exhibited the FIR, the seizure list, the inquest report, the P.M. report and the sketch map of the P.O. On the other hand the defence have exhibited the certified copy of FIR in Bhadreswar P.S. Case No. 244 dated 9.12.92 under sections 148/149/ 435/536/427/379 IPC sections 3 & 5 E.S. Act and section 9 MPO Act and the seizure list prepared in connection with the said P.S. Case No. 244 dated 9.12.92. It may be mentioned here that the FIR of Bhadreswar P.S. case No. 242/92 on the basis of which the case leading to the present appeal started was purportedly registered at 1 -05

p.m. at the P.S. whereas the subsequent FIR of the P.S. Case. No. 254 dated 9.12.92 was lodged at the P.S. at 9-45 p.m. on 9.12.92 by S.I. Kanti Ranjan Dutta Roy of Bhadreswar P.S. At the lime of lodging that FIR he also produced as many as 29 accused persons under arrest. Both the FIRs, as it seems, relate to the same incident of 9.12.92. We also get it from the I.O. of the case that over the said incident more than one cases were started. There Is nothing unnatural in it. As we have seen, the incident occurred in a very large scale allegedly leading to murder, looting, arson, rioting, setting fire to houses etc. P.S. Case No. 242 with which we are concerned in the present appeal mainly relates to murder of Anuj Kr. Thakur and events closely associated therewith. The subsequent P.S. case No. 244 in which a large number of accused persons were produced under arrest at the time of lodging the FIR relates to wider aspects of the incident, as it seems. Causing of death of Anuj Kr. Thakur as a sequel to the incident has also been mentioned in the FIR of the P.S. Case No. 244 dated 9.12.92. it has been submitted on behalf of the appellants that although the death of Anuj has been mentioned in the subsequent P.S. case No.244 dated 9.12.92 yet the names of the two appellants have not been mentioned in that FIR. In our opinion this is inconsequential in view of the fact that in the second FIR names of only those persons as accused have been mentioned who were produced under arrest at that time and since the present appellants were not produced under arrest at that time in connection with that case there was no mentioned of their names in the said FIR. In our opinion, we reiterate, there is nothing unusual in it. it has been contended on behalf of the appellants that in view of the deposition of the P.W.1 Chandra Kishor Thakur and P.W.2 Monoj Kr. Thakur. which we have already discussed, there is scope for entertaining a strong suspicion that the FIR was not lodged at the time it purports to have been lodged nor was the same written by the person by whom it purports to have been written and that the same is a connected document. it is true that there is some confusion regarding the writing of the FIR, but one thing Is certain as has been stated by the de facto complainant P.W.1 Chandra Kishore Thakur that it was read over to him after the same was written and then he signed the same. it is also to be noticed that in the written complaint the de facto complainant now P.W. I did not claim to be an eye witness to the event of causing of death of Anuj by throwing of bomb. The FIR purporlingly Is just a piece of information about the death of Anuj caused by bomb explosion and indeed the names of certain miscreants have also been mentioned in the FIR. Since the de facto complainant himself has taken the responsibility of lodging of that FIR at the P.S.. on oath in the witness box, there is, in our opinion, no reason to discard the entire FIR itself and hold that there was no FIR in the case. The question whether and how far the FIR version is to be accepted Is of course a different matter depending upon the quality and credibility of the evidence led in the case, but we are not prepared to hold that there was no FIR in the case or that the FIR on the basis of which the present case was purportedly started should be wholly thrown out of picture. It has been submitted on behalf of the learned Advocate for the appellants that both the versions of the FIR of the present case and of the FIR in P.S. case No. 244 show

that there was procession and widespread disturbance in that locality but the evidence that has been adduced in the present case deviates to a narrow compass to project that the incident was centered round killing of the victim Anuj Kr. Thakur by throwing of bomb by some person as an individualised incident. We are however unable to accept this view inasmuch as over the prosecution witnesses of the present case have spoken about procession and disturbance as we have seen. From the discussion of evidence we find that the eye witnesses to the throwing of bomb leading to the death of Anuj and to the involvement of the appellants are P. W. 2 Monoj Kr. Thakur, P. W.3 Anita Thakur P.W.6 Ram Avatar Gupta, P.W.7 Rajesh Chowdhury, and P.W.14 Dilip Kr. Jalswal. As we have seen P.W.2 Monoj Kr. Thakur the brother of deceased Anuj says that the bomb was hurled by Kayoom. He also speaks about Anuj being hit by bomb. P.W.3 Anita is the sister of the deceased. She saw a large number of persons running away. She was also reported at that time by her Kallashkaka that Anuj had died because of hurling of bomb. She says that she saw the accused Kayoom flee away having one revolver in one hand and one bomb in the other. There is no reason to disbelieve her testimony regarding the presence of the appellant Kayoom there with weapons. She has indeed spoken of bomb in the hand of Kayoom. In our opinion the holding of bomb by Kayoom in his hand does not necessarily negate the other evidence regarding hurling of bomb by him. It may be that after he hurled the bomb, he got another bomb in his hand either from his own pocket or on being supplied from other source. P.W.6 Ram Avatar Gupta who himself was injured with splinters of the bomb speaks about the presence of the appellant Kayoom with pistol and bomb. He also speaks about hurling of bomb by the appellant Kayoom. He further says that appellant Ayub also had one bomb in his hand, but from the evidence of the I.O. we find that to the I.O. he did not speak about bomb in the hand of appellant Ayub as a result of which his evidence regarding the presence of Ayub with bomb stands exposed to doubt. That being so, we will have to be cautious in coming to a finding about the participation of the appellant Ayub in the occurrence even if it is accepted that he was found running away from the place, because it is possible that many persons who incidentally happened to be there without intending to participate in any offensive act might have found themselves trapped in the chain of events and might have taken responsible running away from the place to save themselves. P.W.7 Rajesh Chowdhury also speaks about throwing of bomb by Kayoom resulting into death of Anuj on the spot. P.W. 14 Dilip Jalswal also specifically says that Anuj was running away and the accused Kayoom was chasing him with bomb in his hand and Kayoom threw that bomb aiming at Anuj as a result of which Anuj was struck and he died instantly. He further says that after hurling bomb Kayoom said "shalake mere phelechi". We have no cogent reason to discard the evidence of so many witnesses namely P.Ws. 2,3,6,7, & 14 who have directly involved the appellant Kayoom with the incident and his culpable role in the matter. That being so, we are convinced that the facts, circumstances and evidence on the record, warrant conviction of the appellant Kayoom in respect of the charge u/s 302 IPC for causing death of Anuj by throwing bomb.

12. We would now consider whether there is sufficient evidence against the appellant Ayub to sustain the charge brought against him. It is to be noted here at the very outset that besides P.W.6 and P.W. 11 no other witnesses have spoken about the appellant Ayub. As we have seen P.W.6 Ram Abatar Gupta who claims to be an eye-witness to the occurrence implicates Ayub by saying that he saw Ayub there with a bomb in his hand, We have also seen from the evidence of the I.O. P.W.19 that P.W.6 did not state to him that Ayub had a bomb in his hand. That being so, the deposition of P.W.6 that he saw Ayub with a bomb in his hand becomes doubtful to some extent because if he had seen a bomb in the hand of Ayub he was expected to state the same to the I.O. while examined u/s 161 Cr.PC which he did not do. As regards P.W. 11 Dalu Shaw it is to be noted that he was declared hostile by the prosecution. After he was declared hostile by the prosecution he was confronted by the prosecution with certain statements allegedly made by him before the I.O. In his cross-examination on behalf of the prosecution he says that he did not tell the I.O. that at the relevant time he heard "hella" and then he began to close his shop. The learned Additional Public Prosecutor attracts our attention to the next sentence recorded by the trial court in the cross-examination of the said witness P.W. 11 to the effect that at that time he saw that Anuj Thakur was running away through the P.B.M. Road and he was being chased by Kayoom, Ayub, Hamamutulla, Sabir Ali, etc. being armed with bomb, bhojall etc. towards Garmatala Gali. The learned Addl. Public Prosecutor submits that this is an admission by this hostile witness that he also saw Ayub chasing the victim Anuj. On the other hand it is submitted by the learned Advocate for the appellants that the deposition of this witness was recorded in an imperfect way but when read as a whole it will be evident that the witness actually denied having made any such statement to the I.O. This seems to us also quite probable in view of the fact that in the very next sentence this witness says that he "did not also state to the I.O." that within his notice Kayoom threw one bomb which struck the deceased Anuj Thakur on his back, etc. The very word "also" in this context clearly indicates that he also denies the suggestion that he made to the I.O. the statement recorded in the earlier sentence. In the circumstances we are not prepared to hold that the hostile witness P.W. 11 Sri Dalu Shaw implicates Ayub substantively. That apart. In our opinion, it may not be safe to find the appellant Ayub guilty on the basis of the doubtful evidence of a hostile witness which is also not supported by any reliable corroboration. As we have earlier discussed the evidence of P.W.6 so far as it implicates Ayub with bomb in hand is also exposed to some degree of doubt in view of the fact that in his statement made to the I.O. during investigation he did not say that Ayub had a bomb in his hand. That being so, if we exclude the evidence of P.W.6 regarding bomb in the hand of Ayub there will remain little evidence regarding Ayub's participation in the occurrence in a culpable way. Even if it is assumed that Ayub was there in the moving crowd without having any weapon in his hand, that does not necessarily implicate him in the commission of offence unless some culpable overt conduct on his part is established. As we have seen, there was virtually a pandemonium there and

people were running away and even if in that situation Ayub was seen running only--may be for his own safety--without having any weapon in his hand that would not necessarily implicate him in the commission of the offence, because a large number of people, as we have seen, were running away from the place for safety. Having regard to the facts, circumstances and evidence of record, we are of the opinion that at any rate the appellant Ayub is entitled to benefit of doubt. Accordingly by giving benefit of doubt, we find the appellant Ayub not guilty of the charge framed against him. In the result we held the accused/appellant Kayoom guilty of charge u/s 302 TPC even without the aid of section 149 IPC and convict him accordingly u/s 302 IPC and also maintain his conviction u/s 148 IPC but. find the appellant Ayub not guilty of the charge in respect of which he was convicted by the trial court, by giving benefit of doubt to him.

13. As we have seen the Additional sessions Judge framed charge by incorporating a number of sections in one head of charge. There is no doubt that he should not had framed charge in that manner and he is advised to be careful in future in the matter of framing charge properly. At the same time we are also to say that the Jumbtd up charge contains the allegation of hurling of bomb on Anuj Thakur causing his instant death at the time and place of occurrence and evidence was led to that effect with opportunity to the defence to cross-examination the prosecution witnesses. That being so, it cannot be said that the appellants were prejudiced in any way by the defect in framing of charge or there was any failure of justice in view of such defect. In view of section 464, Cr.PC such defect in the charge, although undesirable, does not in the facts and circumstances vitiate the trial or finding and order of conviction. But of course on merit we have found the appellant Ayub not guilty of the charge framed against him by giving him the benefit of doubt.

14. We now come to the question of sentence so far as the appellant Kayoom is concerned. The learned court below has Imposed death sentence upon the appellant Kayoom. There is no doubt that the incident is a very unfortunate and dastardly one, but having regard to the facts and circumstances, we are of the opinion that this case may not come under the "rearest of rear" category so as to warrant a death sentence. Having regard to the facts, circumstances and evidence on record, we are of the opinion that in this case a sentence of imprisonment for life, instead of death sentence, will serve the cause of justice and accordingly we direct that the appellant/accused Kayoom do suffer imprisonment for life and a fine of Rs. 4,000/- Id. to R.I for 6 months for his conviction u/s 302 IPC. No separate sentence u/s 148 IPC Is Imposed. The Death Reference Is rejected and the Criminal Appeal No. 274/1996 Is also dismissed subject to modification of sentence as noted above. Cr. Appeal No. 275/1996 is however allowed and the order of conviction and sentence passed by the trial court in respect of the appellant Md. Ayub are hereby set aside and he is acquitted of the charges in respect of which he was convicted by the trial court. Appellant Ayub be set at liberty forthwith unless his detention is required under law in connection with any other matter.

Extracts of our observations at pages 2,3,4 and 19 regarding the lapse on the part of the Additional Sessions Judge in the matter of framing charge properly be communicated to him and be placed in his service dessler. The Registrar General of this court is directed to comply with this direction promptly.

M.K. Basu, J.

I agree.

15. Order accordingly