

Apren Joseph Alias Current Kunjukunju and Others

Vs

The State of Kerala

Criminal Appeals Nos. 263 and 300 of 1971

(CJI J. M. Shelat, I. D. Dua, H. R. Khanna JJ)

01.09.1972

JUDGMENT

DUA, J. -

1. These are two appeals (Criminal Appeal No. 263 of 1971 and Criminal Appeal No. 300 of 1971) against a common judgment of the Kerala High Court disposing of four appeals (3 separate appeals by accused Nos. 1 to 5 convicted by the Additional Sessions Judge, Kottayam and one appeal by the State against the acquittal of accused Nos. 6 to 10) affirming the conviction and sentence of accused Nos. 1 to 5 and reversing the order of acquittal of accused Nos. 6 to 10, convicting them under Sections 302/149, I.P.C. as also under Section 148, I.P.C. Accused Nos. 1 to 5 have been sentenced to death by both the Trial Court and the High Court under Section 302, I.P.C. and to rigorous imprisonment for one year under Section 148, I.P.C. whereas accused Nos. 6 to 10 have been sentenced to imprisonment for life by the High Court under Section 302/149, I.P.C. and to rigorous imprisonment for one year under Section 148, I.P.C. All the ten accused persons have appealed to this Court and they are :

1. Apren Joseph alias Current Kunjukunju.
2. Kochukunju Vasu alias Thankappan.
3. Velu Damodaran.
4. Kesavan Kumaran alias Kochu.
5. Cherian Mathew alias Scaria.
6. Mundan Poulouse alias Baby.
7. Yohannan Pothan alias Kochu.
8. Gangadharan Bhaskaran.
9. Kutty Chellappan alias Iruttu.
10. Kunchan Sukumaran.

This is also the order in which these ten persons appeared as accused in the trial.

2. Criminal Appeal No. 263 of 1971 has presented to this Court under Section 2(a) of the Supreme Court (Enlargement of Criminal Appeal Jurisdiction) Act, No. 28 of 1970 by accused Nos. 6 to 10 whose acquittal by the Trial Court was reversed by the High Court on appeal by the State. Criminal Appeal No. 300 of 1971 under Article 136 of the Constitution has been presented by accused Nos. 1 to 5.

3. The alleged occurrence giving rise to the prosecution of the appellants took place at about 1 o'clock on the night between December 13 and 14, 1970, at a place on Manarkad-Tenganal road on the southern side of Kalappurakal dispensary of Baby in Puthupally village in Kottayam. The occurrence is stated to be the result of political animosity between the members of the Marxist party and the members of an organisation of agriculturists called "Karshaka Sangham" at Puthupally of which the deceased Kuruvilla was the Vice-President.

4. On the evening of December 13, there was a meeting of the Karshaka Sangham near the Puthupally junction and it was over at about 10.30 p.m. After attending the meeting (Pappu) Joseph (P.W. 1) and Joseph Dherian (P.W. 4) along with one Baby started for going home. Kuruvilla who met them at the Puthupally junction requested them to accompany him to the house of Yesu Kathanar (Christian priest) (P.W. 5) which was on the western side of Puthupally junction. They readily agreed with the result they all went together to the house of the priest along the Manarkad-Thenganal road. That road runs east to west. While Puthupally junction is on the eastern side Eramallur junction is on the western side of this road. In order to reach the house of the priest one has to go through Eramallur junction. After Kuruvilla had a talk with P.W. 5 and when they were returning through the same route, at the place of occurrence which is about 7 furlongs away from the house of P.W. 5 they met Mathayikutty (Mathayi) (P.W. 3) driving a lorry and coming from the opposite direction. On seeing them P.W. 3 stopped his lorry. One Achankunju was also in the lorry with P.W. 3. After stopping the lorry P.W. 3 told these four persons that accused No. 2 and others were coming that way armed with deadly weapons. P.W. 3 accordingly asked these four persons not to proceed towards Puthupally junction, at the same time offering to take them in his lorry. By the time this conversation was over the accused had already reached the scene of occurrence. As soon as they arrived there accused No. 1 Apren Joseph struck a blow with his chopper on Kuruvilla's head. Kuruvilla tried to ward it off with his right hand but was not successful. Accused Nos. 2 and 3 (Kochukunju Vasu and Velu Damodaran) who had choppers in their hands also gave blows with their respective weapons on the back of Kuruvilla's head. This was followed by the first accused giving two more blows at Kuruvilla's right shoulder. The fourth accused Kesavan Kumaran stabbed Kuruvilla on his back with Mallapuram knife. The fifth accused Cherian Mathew also struck Kuruvilla thrice with an iron rod on his chest. Kuruvilla fell down and died after sometime. P.Ws. 1 and 4 and Baby managed to get into the lorry when Kuruvilla was being beaten though while doing so they implored the accused persons not to kill Kuruvilla. However, P.W. 3 with the three men who got into the lorry at the place of occurrence (P.Ws. 1 and 4 and Baby) and Achankunju who was already in the lorry drove away towards the west. The sixth accused Mundan Poulouse hit him with a wooden spear. As the lorry started moving, the accused pelted stones at it. After dropping Achankunju at Eramalloor junction Mathayi (P.W. 3) took P.Ws 1 and 4 and Baby to the house of P.W. 5 and dropped them there. Thereafter P.W. 3 went to his own house. On account of fear he, however, did not go back towards his home by the same road but took a different route.

5. Early on the morning of December 14, 1970 Markose Mani (P.W. 2) who is a member of the local Panchayat came to know of Kuruvilla's death. He went to the scene of the occurrence and saw the dead body of the deceased. After getting whatever information he could gather there he went to Kottayam East police station, 9 k.m. away, and lodged the first information report (Ex. P-1) at about

8 a.m. According to this report Markose Mani came to know of Kuruvilla's death at about 5 o'clock early in the morning of December 14, 1970. Having gone to the spot he saw the dead body of the deceased. He noticed that the little finger of the right hand of the deceased had been cut off and the ring finger was hanging due to a cut. There were also cut injuries on the back of the head of the deceased. After stating what he had seen the informant proceeded to state :

"..... There was a meeting and procession of farmers at the Puthupally junction yesterday. The meeting was over at 10.30 in the night. Deceased Kunju Kalappurakkal Baby, Padinjarekoothu Pappu, Inchalkkad Kochu and some others had gone from Puthupally to take back the persons who had come from Eramallur for the procession. What I came to know is that while they were returning after getting down the persons who had (sic) for the procession at Kochalum Moodu somebody killed him by inflicting cut injuries at about 2 o'clock in the night at the place where the dead body lay. It is heard that Achankala Vasu, Valia Veetil Pothan, Current Kunju Kunju, Carpenter Damodaran, Inchakad Bhaskaran and some others belonging to the Marxist party who are opponents of the farmers had followed the persons who had gone to Eramallur after the meeting at Puthupally held on yesterday and while Kunju etc., were returning from Kochalum-moodu. Somebody among them killed Kunju by inflicting cut injuries at that place by attacking him. The dead body of Kunju is lying there. I am the member of the IV Ward in Puthupally Panchayat. I have come over here to report the matter. The place of occurrence is 9 k.m. away towards south-east from here...."

6. The Additional Sessions Judge trying the case found accused Nos. 1 to 5 guilty of an offence under Section 302, I.P.C and sentenced them to death. They were also found guilty of an offence under Section 148, I.P.C. and sentenced to rigorous imprisonment for one year each. Accused Nos. 6 to 10 were, however, acquitted of all the charges, reliance for the order of acquittal having been placed on a decision of this Court in *Masalti, etc. v. State of Uttar Pradesh*. ([1964] 8 SCR 133 : AIR 1965 SC 202 : (1965) 1 SCJ 605 : (1965) 1 Cr LJ 226).

7. The convicted persons and the State, both appealed to the High Court of Kerala. The High Court, in a fairly exhaustive judgment, affirmed the convictions and sentences of accused Nos. 1 to 5 and dismissed their appeals. The reference in regard to their death sentence was accepted. The State appeal against the acquittal of accused Nos. 6 to 10 was allowed and their acquittal set aside. They were sentenced to imprisonment for life under Section 302/149, I.P.C. and to rigorous imprisonment for one year under Section 148, I.P.C. The sixth accused was also sentenced to rigorous imprisonment for one year under Section 324, I.P.C. for causing injury (an incised wound) with a wooden spear to Joseph Cherian (P.W. 4).

8. Before us it was strongly urged by Shri Chari on behalf of the appellants that the first information report was lodged after a very long delay and this in the circumstances of the case is fatal to the prosecution. The submission most seriously pressed, and this appears to us to be the basic submission which is sought to be supported by reference to other factors, is that no one had actually witnessed the occurrence and that the whole of the prosecution story has been fabricated with the object of falsely implicating all the accused persons, who are enemies of the prosecution witnesses. The story invented by the prosecution, it was argued, is the work of a highly imaginative and fertile brain. The first information report, contended Shri Chari in his usual forceful manner, was lodged after a long delay because a plausible story had to be built up involving the accused so as to fit in with the murder of the deceased at the place where his dead body was found, and this, emphasised

the counsel, was the real cause for not lodging the report immediately after the alleged occurrence. The interval between the alleged occurrence and the time when the prosecution story was unfolded to the police was, according to the submission, utilised in inventing the story to be placed before the police.

9. Now if this argument is accepted then obviously the prosecution story has to be rejected and all the appellants acquitted. We have, therefore, to seriously examine the challenge to the prosecution story on the basis of the argument that the first information report is highly belated and that the alleged eye-witnesses did not lodge it because they had in fact not witnessed the occurrence.

10. It may be pointed out that the factum of the unnatural death of the deceased by violence at the place where his dead body was found is not disputed; nor has the time of his death been controverted. The sole argument vehemently pressed upon us is, that no one saw the deceased being murdered and the accused have been falsely implicated, on account of enmity, by the prosecution witnesses who have deposed to an imaginary story concocted by them. There is of course no dispute that there was considerable ill-will between the workers of the Marxist party in the local Puthupalli area and the members of the Krishak Sangham. Indeed, even according to the accused, there had been a quarrel between these two groups about 20 days prior to the occurrence in dispute. Some of the accused persons were involved in other criminal cases as well. But enmity as is well-known is a double-edged weapon. Whereas the accused may rely on it in support of their plea of false implication, the prosecution on the other hand may legitimately argue that this provided the necessary motive for the offence. It is true that none of the persons who claim to have been with the deceased since about 10.30 p.m. right up to the time of occurrence informed the police or made any attempt to do so : nor did K. Achan Kunju who was sitting in the lorry next to Mathayi (P.W. 3). Mathayi, however, does state in his evidence that he made an attempt to contact the police on telephone but the telephone line being out of order he did not succeed. This, he did, from the house of Attapurathu Punnachan where he stopped for this purpose on his way back home from the house of Achan (P.W. 5). The contention forcefully pressed before us is that P.W. 3 who was driving the lorry could have driven straight to the police station and lodged the necessary information. Indeed, the submission proceeds like this. After having left the scene of the alleged murder P.W. 3 and his companions in the lorry could and should have gone straight to the police station to lodge the first information report. In any event P.W. 3, who, on his own showing, tried to contact the police on telephone but failed to do so as the telephone line was out of order, could and should, after the unsuccessful attempt, have proceeded in his lorry to the police station to make the report. This should have been considered to be more important than going to his home. The fact that none of these persons considered it important enough or even proper to go and lodge the first information report shows that no one witnessed the murder and the whole story deposed by the prosecution witnesses in court is a concoction which is the outcome of the fertile brain of P.Ws. 1, 3, 4 and 5 and does not represent the truth.

11. Now first information report is a report relating to the commission of an offence given to the police and recorded by it under Section 154, Cr.P.C. As observed by the Privy Council in *K.E. v. Khwaja*, (ILR 1945 Lah. 1 : AIR 1945 PC 18 : 71 IA 203) the receipt and recording of information report by the police is not a condition precedent to the setting in motion of a criminal investigation. Nor does the statute provide that such information report can only be made by an eye witness. First information report under Section 154 is not even considered a substantive piece of evidence. It can only be used to corroborate or contradict the informant's evidence in court. But this information when recorded is the basis of the case set up by the informant. It is very useful if recorded before there is time and opportunity to embellish or before the informant's memory fades. Undue

unreasonable delay in lodging the F.I.R., therefore, inevitably gives rise to suspicion which puts the court on guard to look for the possible motive and the explanation for the delay and consider its effect on the trustworthiness or otherwise of the prosecution version. In our opinion no duration of time in the abstract can be fixed as reasonable for giving information of a crime to the police, the question of reasonable time being a matter for determination by the court in each case. Mere delay in lodging the first information report with the police is, therefore, not necessarily as a matter of law, fatal to the prosecution. The effect of delay in doing so in the light of the plausibility of the explanation forthcoming for such delay accordingly must fall for consideration on all the facts and circumstances of a given case.

12. In the case in hand the eye-witnesses who had seen the occurrence were afraid of going to the police station during night time. The evidence to this effect seems to us to be trustworthy and has not at all been shaken in cross-examination. The submission that no reasonable human being in those circumstances could or should have felt frightened and, therefore the ground of fear is a mere excuse in unacceptable. Indeed, there is hardly any effective cross-examination on the point eliciting any illuminating information indicative of suspicion with respect to their reluctance to go, during the night or early in the morning, to the police station for making the report. The effect on their mind of having witnessed such a gruesome murder at the hands of a group of persons armed with lethal weapons and extremely inimical to the eye-witnesses, cannot be measured by any general yard-stick. It necessarily depends on the mental make up of each individual person. Some may feel so frightened that they would rue their decision which took them to the place of occurrence and would take a long time to be their normal self, whereas some others would not mind informing the police if they can conveniently do so without going out of their way; still others may be highly public-spirited and may, therefore, feel so strongly that they would in their enthusiasm go all out, as though inspired by missionary zeal, to contact the police and inform them about the crime. It is difficult as also inadvisable to lay down any uniform general rule in this respect. As each case has to be considered on its own facts and circumstances let us see how the courts below have dealt with this question. The Trial Court repelled the defence contention in these words :

"It has been pointed out on behalf of the defence that none of the persons who were along with the deceased informed the police. P.W. 3 swears that he made an attempt to contact the police over phone. But because of some line disorder he could not inform the police. P.W. 2 is the Panchayat Member of Ward No. 4 of Puthupally Panchayat. He got information in the early hours of morning and went to the place of occurrence and saw the deceased. Thereafter he proceeded to the police station and gave Ex. P-1 statement. The fact that none of the persons who was present at the time of occurrence did not inform the police is not sufficient to warrant a conclusion that the alleged eye-witness were not present there."

In the High Court also this criticism was repeated but met with no better fate. This is what Narayana Pillai, J. said in this connection :

"One has to visualise the situation in which P.W. 1 and 4 and Baby were at the time. There were many active members and sympathisers of the Marxist Party at Puthupally. That party had strong foothold there. The 10th accused was the Secretary of that party there. The formation of the Karshaka Sangham which was opposed to the Marxist Party was not to the linking of members of the Marxist Party. Ten to twenty days before the occurrence there was a quarrel between members of the Marxist Party and the Karshaka Sangham at Eramalloor about the putting up of

bunds on paddy fields. There was also a quarrel between Kuruvilla and members of the Marxist Party about agricultural labour at one Puthukari field which belongs to several persons. The whole atmosphere must have been surcharged with fear after the meeting of the Karshaka Sangham on the 13th evening was over. There was no residential house anywhere near the scene. The road there was desolated. There was, therefore, nothing unusual if P.Ws. 1, 3, and 4 and Baby left the place at the time of the occurrence for safety instead of remaining there to render assistance to Kuruvilla. Although P.W. 3 had before the occurrence offered to take P.Ws. 1 and 4 and Baby in his lorry, after the occurrence he thought that to take them in his lorry was risky and that was why at the Eramalloor junction he asked them to get out of the lorry. P.Ws. 1 and 4 and Baby were in a room in the house of P.W. 5 for the rest of the night. At 7.15 a.m. P.W. 1 went out of that house."

Moidu J., in a separate concurring note dealt with this matter more specifically and observed :

"The only circumstances pointed out during the argument of the learned counsel was that these witnesses could not have seen the occurrence and that if they had seen they would have reported the incident to the police without delay. The evidence was clear to show that these witnesses would not have dared to get out of the place where they stayed in the night after the gruesome murder was committed. Neither P.W. 1 nor P.W. 4 was prepared to get out of the house of P.W. 5 at midnight. P.W. 3 had to go to his house by a different route and though he made an attempt to inform the police he did not succeed. On the next day P.W. 3 had to go to Erumeli with the lorry and he returned home only by about 5.30 p.m. Within a short time thereafter he was questioned by the police."

From this it is obvious that keeping in view the local tense atmosphere and the effect of this ghastly murder on the eye-witnesses, their strong disinclination to go and lodge the report during the night the after the alleged occurrence, which seems quite natural, cannot by itself arouse any suspicion about the prosecution case. The bad condition of the road, not permitting the lorry to go faster than six or ten miles per hour, as stated by P.W. 3, may also have consciously or unconsciously deterred them, to some extent, from risking a visit to the police station during the night. In this connection it would not be unimportant to bear in mind that P.W. 3 did not possess a driving licence and he would naturally have hesitated in driving the lorry to the police station. The concurrent conclusions of the two courts below on this point deserve serious consideration and cannot be lightly brushed aside. But that apart, it would also need a highly creative and fertile brain to cook up an imaginary story embodying in it, the peculiar features of the prosecution case, and that also within a short span of time, after learning of the murder on the morning of December 14, 1970 and before making the statement to the police at noon the same day as deposed by P.Ws. 1 and 14. In fact P.W. 2, a member of Panchayat, who is no partisan and whose statement is corroborated by P.W. 14 had, already informed the police (per Ex. P-1) much earlier at about 9 a.m. about what he had seen at the place of occurrence and what he had heard involving five accused persons (P.Ws. 1, 2, 3, 7 and 8). This adds to the vulnerability of the defence version. Features which seem peculiar for their insertion in an imaginary story which could hardly be circulated so early as to reach P.W. 2 to enable him to go to the spot and then to go to lodge the F.I.R. at 9 a.m. are (i) bringing on the scene (a) a lorry driven by its owner (P.W. 3) who does not belong to Karshak Sangham and who normally does not drive that lorry and does not even possess a driving licence but has employed a whole-time driver for the said lorry; (b) the other eye-witnesses along with the companion of P.W. 3, Kadiyathuruthil Achan Kunju who has not appeared as a witness, (ii) to make P.W. 3 drive the eye-witnesses to the house of Achan

for dropping them there, after having dropped Kadiyathuruthil Achan Kunju on the road, and finally (iii) on his way back home to make P.W. 3 attempt unsuccessfully to contact the police on telephone from the house of Attapurathu Punnachan. What is more intriguing is that as many as ten accused persons should have been involved but only five assigned overt acts in the murder and one only an injury with a wooden spear to P.W. 4, the rest (including accused No. 10, the Secretary of the Marxist Party) being only involved as members of the unlawful assembly. In the absence of a plausible and rational explanation as to why only accused Nos. 1 to 5 should have been selected by the author of this concocted imaginary version for the direct and active role in the murder, this feature also tends to discount the credibility of the defence version. Now, assuming such a fictional story to have been invented in retrospect, for this is the only alternative to the witnesses having actually seen the commission of the murder, one has to ponder to find a rational and plausible answer to several puzzling questions. To begin with it is not understood where was the necessity of introducing P.W. 3 instead of his driver. And then what was the reason for bringing Kadiyathuruthil Achan Kunju in the picture when he was not to appear as a witness. It is also not easy to understand on the evidence and in the peculiar circumstances of this case, as to how the prosecution witnesses deposing about the occurrence, other than P.W. 3, managed to get together for consultation, after learning of the murder and then how, where and when, did they contact P.W. 3 with the object of prevailing upon him to take up the important role in this drama and subscribe to the imaginary story. P.W. 3 was cross-examined at great length but his credibility was not at all shaken. He said in a forthright manner that he had reached his house on the fateful night at about 2 a.m. and on the following morning at about 6 or 7 o'clock he went to Eramalloor from where he returned at 5.30 p.m. and it was then that he learnt about Kunju's death. He had, however, narrated the incident to his wife and brother on reaching his house at 2 a.m. His statement was recorded by the police at about 7 p.m. on his return from Eramalloor. His testimony appears to be straightforward and impressive, and it has been believed by the courts below. No convincing argument has been advanced for differing with their view. In a concocted story P.W. 3 could not reasonably have been assigned a role of such vital importance. Indeed, his presence seems to be a strong factor which renders the defence theory incredible and establishes the truth of the prosecution version. But apart from the inherent weakness of the theory of the story having been concocted to falsely implicate the accused persons, the prosecution version as a whole has also been accepted by both the Trial Court and the High Court for reasons which cannot be said to be unsound or implausible. In fact, there appears to be a ring of intrinsic truth in this version.

13. The Trial Court believed the version given by P.W. 4 as also the testimony of P.Ws. 1, 3 and 5. P.W. 5 was not an eye-witness to the occurrence but he fully corroborated that the deceased and P.Ws. 1, 4 and Baby had gone to him by 11.30 p.m., and later at 1.30 a.m., the three persons other than the deceased, returned to him and informed him of the occurrence. The Trial Court felt that P.W. 5 had no reason to falsely swear against the accused. The story given by P.Ws. 1, 3 and 4 was considered exhaustive judgment after discussing the criticism levelled against the prosecution version observed :

"We have carefully gone through the entire evidence of all the witnesses. On all material matters the evidence of P.Ws. 1, 3 and 4 is clear, consistent and convincing. All the facts spoken to by them strike as nothing but truth. They are quite natural witnesses. There is absolutely nothing in their evidence to disbelieve them. They corroborate each other. Their evidence is also corroborated by the circumstances brought out in the case. The trial Judge believed them and we consider rightly. It is proved beyond reasonable doubt that it was in the manner spoken to by P.Ws. 1, 3 and 4 that the occurrence took place."

14. We have not been persuaded to hold that these concurrent conclusions of the two courts are in any way tainted by an infirmity justifying interference by us in the present appeal so far as accused Nos. 1 to 5 are concerned whose appeal has been presented under Article 136 of the Constitution. Even otherwise the conclusions are unexceptionable on the material to which our attention is drawn and we unhesitatingly agree with them. It is not disputed and indeed both the courts below have found that on December 12, 1970, there was full moon and as such there was moonlight at the time of the occurrence. The nearest street light is also stated to be about 130 ft. towards the west and the nearest electric post on the eastern side was about 90 ft. away from the place of occurrence. The light of the lorry also helped the eye-witnesses to clearly see who the assailants were. The concurrent conclusion of the two courts below leaves no doubt that the witnesses present at the place of the occurrence were in a position to clearly see and identify the accused persons who were not strangers to them.

15. The mere fact that the eye-witnesses did not gather up enough courage to go to the police station to lodge the first information report or to go to the place of the occurrence during the night or early in the following morning to give some aid to the deceased who undoubtedly was no blood-relation of any one of the witnesses, does not show that they had not witnessed the occurrence and the whole story is imaginary and made up only for falsely implicating the accused due to enmity. P.W. 3 having decided to go home with the lorry, the other witnesses quite naturally did not dare to move about during the night. The conviction of accused Nos. 1 to 5 under Section 302, I.P.C. is upheld and also the sentence under Section 148, I.P.C.

16. In so far as accused No. 6 is concerned the High Court has believed the testimony of P.W. 4 which is corroborated by the medical evidence. We see no reason to differ with the conclusion of the High Court. He must, therefore, be held to have been rightly found guilty of inflicting injury with the wooden spear of P.W. 4. The sentence imposed on him is also not open to any objection. This injury was apparently not inflicted pursuant to the common object to kill the deceased but only when provoked by P.W. 4.

17. This takes us the case of accused Nos. 7 to 10 who have been convicted by the High Court of an offence under Section 148, I.P.C. It is true that these accused persons were accompanying the others but no overt act has been imputed to them. The entire occurrence seems to have taken place within a short span of time and it is difficult to hold that they formed an unlawful assembly with the common object of killing the deceased. No doubt, in their case this Court has to go into the entire evidence because their appeal had been presented under Act No. 28 of 1970. The evidence does not seem to show that they were aware of the common object of accused Nos. 1 to 5 to kill the deceased. They must, therefore, be acquitted of the charge under Sections 302/149. Evidence is also wanting on the record to show that these accused persons were parties to any common object of committing any unlawful act which accused Nos. 1 to 5 had in view. We have, therefore, no hesitation in acquitting them of the charge under Section 148, I.P.C. as well. On the same reasoning accused No. 6 is also acquitted of charges under Sections 302/149 and Section 148, Indian Penal Code.

18. We should like to point out that in this case the learned counsel for the appellants was permitted to refer to any evidence he considered proper for considering the credibility of the witnesses with regard to the whole of the prosecution story because with respect to accused Nos. 6 to 10 the appeal was not before us under Article 186 of the Constitution but under Section 2(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 28 of 1970. It was, therefore, only proper that the evidence be appraised by this Court with respect to all the accused persons, in order to avoid conflict in the conclusions in this respect.

19. Coming to the question of sentence imposed on accused Nos. 1 to 5, after the amendment of Section 367(5), Cr.P.C. in 1955 it is a matter of judicial discretion for the court to decide, on a consideration of all the relevant circumstances of the case, which of the two permissible sentences under Section 302, I.P.C. should be imposed. It is no longer necessary to give reasons for the lesser penalty. The determination of sentences in a given case depends on a variety of considerations, the more important being, the nature of the crime, the manner of its commission, the motive which impelled it and the character and antecedents of the accused. So far as the accused before us are concerned it appears that in their excessive zeal for their party they felt unduly provoked by the success of the meeting organised by the Karshak Sangham and being misguided by political intolerance and cult of violence they committed the offences in question soon after the said meeting. We, therefore, feel that the interest of justice would be fully served in this case if we substitute the sentence of imprisonment for life for the sentence of death. We, however, must not be understood to lay down any general rule with regard to sentence applicable to all cases of political murders. Murder inspired by differences of political opinions and ideologies, it may be pointed out, is wholly inconsistent with our system of Government where the Constitution has guaranteed freedom of thought and expression to all citizens and parties, so long as they act within the Constitution and the law. We have reduced the sentence of death to that of life imprisonment on accused Nos. 1 to 5 in this case because of the peculiar circumstances already mentioned. The sentence under Section 148, I.P.C., would be concurrent with the sentence under Section 302, I.P.C.

20. The appeals are accordingly disposed of as stated in this judgment.

KHANNA, J.

(dissenting). - Ten accused Apren Joseph (36), Kochukunju Vasu (32), Volu Damodaran (32), Kesava Kumaran (24), Cherian Mathew (30) Mundan Poullose (30), Yohannan Pothan (45), Gangadharan Bhaskaran (24), Kutty Chellappan (42) and Kunchan Sukumaran (40) were tried in the court of learned Additional Sessions Judge Kottayam for offences under Section 302, Section 302 read with Section 149 and Section 324, read with Sections 149, 148 and 143, Indian Penal Code in connection with the murder of Kuruvilla alias Kunju (50) and for causing hurt to P.W. 4 Joseph Cherian (31). The Trial Court convicted accused Nos. 1 to 5 for offences under Sections 148 and 302, Indian Penal Code and sentenced them to undergo rigorous imprisonment for a period of one year on the former count and to death on the latter count. Accused Nos. 6 to 10 were acquitted. On appeal and reference, the Kerala High Court confirmed the conviction and sentence of accused Nos. 1 to 5. The High Court further on State appeal convicted accused Nos. 6 to 10 under Section 148 and Section 302, read with Section 149, Indian Penal Code and sentenced them to undergo rigorous imprisonment for a period of one year on the former count and imprisonment for life on the latter count. The sixth accused was also convicted under Section 324, Indian Penal Code and was sentenced to undergo rigorous imprisonment for a period of one year. The sentences awarded to each of accused Nos. 6 to 10 were ordered to run concurrently. Accused Nos. 6 to 10 have filed Criminal Appeal No. 263 of 1971 under Act No. 28 of 1970 while accused No. 1 to 5 have filed Criminal Appeal No. 300 of 1971 by Special Leave. This Judgment would dispose of both the appeals.

22. The ten accused belong to the Communist Party (Marxist) Accused No. 10 was the Secretary of that party in the area. Kunju deceased was the Vice President of an organization of agriculturists called 'Karshaka Sangham' at Puthuppally. Yesu Kathanar (P.W. 5) who is a priest, was the President of the Karshaka Sangham in the adjoining village Eramalloor. There was some dispute between Kunju deceased and the accused relating to a ridge and regarding work in the paddy fields. About

20 days before the occurrence, there was a quarrel between persons belonging to Karshaka Sangham and those belonging to the Marxist party.

23. According to the prosecution case, there was a meeting of the Karshaka Sangham on the evening of December 13, 1970 at Puthuppally junction. Earlier on that day the organizers of the meeting also arranged a procession. The meeting was over at about 10 of 10.30 p.m. Pappu (P.W. 1) who was present in the meeting, then wanted to go to his house along with one Achankunju and Kalappurakkal Baby. Kunju deceased then called Pappu and his companions and requested them to accompany him to the house of Yesu Kathanar (P.W. 5). Pappu and his two companions agreed and accompanied by them, Kunju deceased went to the house of Yesu Kathanar. They arrived at that house at about 11.30 p.m. Kunju had some talk with Yesu and thereafter Kunju and his three companions left the house of Yesu at 12 mid-night. It was a moonlit night. There was also light from the electric poles. When Kunju and his three companions were going on the road in front of a dispensary, they saw the lights of a lorry coming from the eastern side. Kunju got on one side of the road, while his three companions got on the other side of the road. The lorry was driven by Mathayi (P.W. 3), who then told Kunju and his companions that Vasu accused No. 2 and the other accused were coming that way armed with weapons and that Kunju and others should not go in that direction but should get into the lorry. Immediately thereafter accused No. 1 arrived there and aimed a blow with a chopper at Kunju. Kunju warded off the blow with his right hand. The other accused also in the meanwhile arrive there. Accused Nos. 2 and 3 then gave blows on the back of the head of Kunju with choppers. Accused No. 1 inflicted two injuries on the right shoulder of Kunju. Accused No. 4 then stabbed Kunju deceased in his back with a Malapuram knife. At the same time, accused No. 5 gave three blows with an iron rod in the chest of the deceased. Kunju deceased fell down on receipt of these injuries. The companions of Kunju then got into the back of the lorry and shouted to the accused not to kill Kunju. Accused No. 6, who had a wooden spear, then gave a blow with it on the right hand of Achan-Kunju. The lorry then started. While the lorry was moving away, some stones were thrown on the lorry by the accused. The lorry thereafter stopped at Eramalloor second junction where Achan-Kunju got down from the lorry. Mathayi asked Pappu and his companions also to get down from the lorry, but they declined to do so and told Mathayi to drop them at the house of Yesu P.W. Time then was past 1 o' clock. Pappu, Baby and Joseph Cherian got down near Yesu's house and told Yesu P.W. that accused Nos. 1, 2, 10 and others had killed Kunju. Pappu, Baby and Joseph thereafter slept at the house of Yesu. On the following morning they left the house of Yesu.

24. The case of the prosecution further is that on the morning of December 14, 1970, Markose (P.W. 2), whose house is situated near Puthupally market, was told about the present occurrence by his children. Markose is a member of the Panchayat. After taking coffee Markose went at 6.30 a.m. to the spot where the dead body of Kunju was lying. Markose thereafter went to the Kottayam police station at a distance of 9 kilometers from the place of occurrence and lodged there report Ex. P-1 at 8 a.m. According to that report, Kunju deceased had been killed by somebody at 2 a.m. Markose added that he had heard that accused Nos. 1, 2, 3, 7, and 8 had followed the persons who had gone to Eramalloor after the meeting at Puthuppally. Somebody amongst them was stated to have killed Kunju.

25. Circle Inspector John (P.W. 14) then went to the spot of occurrence and arrived there at 11 a.m. The Inspector found the dead body lying there and prepared the inquest report. The dead body was thereafter sent to the mortuary where post mortem examination was performed by Dr. George Paul (P.W. 7) at 3.30 p.m. on that day. Joseph Cherian also earlier on that day got himself examined from Dr. Nair (P.W. 6) at 10 a.m. The doctor found an incised wound 1" x 3/4" x 1/4" on the posterior aspect of right forearm of Joseph. There was also an abrasion on the lip and a contusion on the right

side of the face of Joseph P.W. Accused Nos. 7, 8 and 10 were arrested on December 18, 1970. Accused Nos. 1 to 6 surrendered in the court of magistrate on December 21, 1970, while accused No. 9 surrendered in that court on December 23, 1970. No weapon alleged to have been used by the accused could be recovered by the police.

26. At the trial the prosecution examined Pappu (P.W. 1), Mathayi (P.W. 3) and Joseph (P.W. 4) as eye-witnesses of the occurrence and they supported the prosecution case. Achan Kunju and Baby were given up by the Public Prosecutor.

27. The plea of all the accused in the course of their statements under Sections 342, Code of Criminal Procedure was denial simplicitor. According to them, they had been falsely involved in this case because they belonged to the Communist Party (Marxist). No evidence was produced in defence.

28. Learned Additional Sessions Judge held that accused Nos. 1 to 5 had formed an unlawful assembly after arming themselves with deadly weapons with the common object of committing murder of Kunju deceased. It was further held that those five accused had caused injuries to Kunju deceased with their respective weapons. They were accordingly convicted under Sections 148 and 302, Indian Penal Code. Accused Nos. 6 to 10 were acquitted as, in the opinion of the learned judge, they were not shown to be members of an unlawful assembly. As regards injury on the person of Joseph (P.W. 4), the Trial Judge observed that it could not be said that the above injury was inflicted by accused No. 6 as alleged by the prosecution.

29. On appeal the High Court agreed with the conclusion of the Trial Court so far as the guilt of the accused Nos. 1 to 5 was concerned. As regards accused Nos. 6 to 10, it was observed that it was not necessary to show that they had committed some illegal overt act or had been guilty of some illegal omission. In the opinion of the High Court, the circumstances of the case showed that all the accused were members of an unlawful assembly and that the common object of that assembly was to do away with Kunju deceased, who had earlier on that day organized the meeting. In the result, accused Nos. 6 to 10 were also convicted as mentioned earlier.

30. It cannot be disputed that Kunju deceased died as a result of the various injuries which were inflicted upon him. According to Dr. George Pal, who performed post-mortem examination on the body of the deceased, there were 21 injuries on the body of the deceased, out of which seven were incised wounds, one was a stab wound and two were cut wounds. Besides that, there were four contused abrasions and 7 abrasions. The stab wound was on the left side of the back of the chest, while the cut wounds were on the little finger of the right hand. One of the incised wounds was on the back of the right hand, while another incised wound was on the left hand. The stomach contained 280 mls. of greyish white fluid with a smell similar to that the toddy. The following incised wounds were sufficient, in the opinion of the doctor, to cause death in the ordinary course of nature :

"(1) Incised wound 14.5 c.m. long 1 c.m. gaping obliquely placed on the right side of the back of the head, the lower and inner end being on the midline at the level of the top of the ears. The wound had clear cut margins and the ends were sharp. The underlying skull bone was cut through for 12 c.m. and fissured fractures were found running outwards for 2 and 5 c.m. respectively from the upper and middle portions of the outer edge of the cut on the skull. The coverings of the brain were torn and the brain contused under the fractures.

(2) Incised wound 13.5 c.m. long, 1.5 c.m. gaping horizontally placed at the back of the head at level of the lower end of injury No. (1) right end being at a higher level and both ends being 7.5 c.m. behind the ears. Wound had clean cut margins and ends were sharp and the lower edge showed shelving. The underlying skull was cut through for 10.5 c.m. and the left occipital bone of the brain showed a cut 2 c.m. deep.

(3) Incised wound 5 x 15 c.m. bone deep obliquely placed at the back of the head 2 c.m. below injury No. 2. Margins were clearly cut and the upper edge shown shelving.

(4) Incised wound 7.5 c.m. long, 1.5 c.m. gaping vertically placed on the back of the right shoulder, the upper end being at the level of the top of the shoulder with clean cut margins and sharp ends, the underlying spine of the shoulder blade was cut through exposing the shoulder joint cavity.

(5) Incised wound 10.5 c.m. x 3 c.m. muscle deep vertically placed on the right side of the back and top of the shoulder 8 c.m. inner to injury No. 4. The wound had clean cut margins the upper end was sharp and lower end showed tailing for 2.5 c.m."

31. According to the prosecution case, the injuries found on the body of Kunju deceased were caused by accused Nos. 1 to 5. In support of its case, the prosecution has examined Pappu (P.W. 1) Mathayi (P.W. 3) and Joseph (P.W. 4) as eye-witnesses of the occurrence. The above mentioned three witnesses as stated earlier, supported the prosecution case and their evidence was accepted by the Trial Court and the High Court.

32. Mr. Chari on behalf of the appellant has assailed the ocular evidence adduced by the prosecution and has contended that it suffers from serious infirmities. As against that, Dr. Mahmood on behalf of the State has canvassed for the correctness of the view taken by the High Court.

33. This Court normally does not interfere with the appraisalment of evidence of the Trial Court and the High Court, but that fact would not prevent this Court from interfering if it is found on scrutiny of the evidence that it suffers from glaring infirmities. As many as five persons have been sentenced to death in this case and five others have been sentenced to undergo imprisonment for life. It is essential, in my opinion, that the evidence should be clear and cogent, so as to bring the charge home to the accused beyond all reasonable doubt.

34. According to the prosecution case, Pappu (P.W. 1) and Joseph (P.W. 4) were going with Kunju deceased from the house of Yesu P.W. at about 1 a.m. when Kunju was attacked by the party of the accused. Mathayi (P.W. 3) claims to have witnessed the occurrence because, according to him, he arrived at the spot shortly before the occurrence in his lorry after paying a visit to a contractor. It is also in the evidence of the three witnesses that soon after the accused had caused injuries to Kunju and the latter had fallen down, Pappu and Mathayi P.Ws. along with Baby, who too was with them, got into Mathayi's lorry which was then driven away by Mathayi. The conduct of these witnesses if they had in fact, witnessed the occurrence after that was most unnatural for none of them made any serious attempt to inform the police about the occurrence. It is in the evidence of the above the mentioned witnesses that a first Achan Kunju was dropped from the lorry at the next junction at a distance of about one furlong from the lorry at the next junction at a distance of about one furlong from the scene of occurrence. Thereafter the lorry was taken by Mathayi at the request of Pappu and

others to the house of Yesu P.W. and Pappu P.W., Joseph P.W. and Baby were dropped there in front of that house. Mathayi thereafter took the lorry to his own house. Pappu, Joseph and Baby after informing Yesu about the occurrence are stated to have slept at Yesu's house, while Mathayi remained at his own house. There is no cogent explanation as to why the above mentioned witnesses did not go at the time in the lorry to the police station and lodge a report about the occurrence. If, in fact, a murderous assault had been made on Kunju deceased in their presence, this would have been the normal reaction of the eye-witnesses. No attempt was made in the judgment of Narayana Pillai, J., who wrote the main judgment of the High Court, to find any explanation for the above conduct of the eye-witnesses. Moidu, J., who added a small note, mentioned that the above was indeed the principal contention which had been advanced on behalf of the accused. In the opinion of the learned Judge, the witnesses could not have dared to go out of the place where they were staying for the night after the gruesome murder. I find it difficult to subscribe to the view that the witnesses refrained from reporting the matter to the police soon after the occurrence because of fear. The witnesses had got into the lorry, while the accused were on foot. The police station was at a distance of only 9 kilometers from the place of occurrence. It would not have taken the lorry more than 15 or 20 minutes to reach the police station. There could be no apprehension in the minds of the witnesses that they would be overtaken and assaulted by the accused because the accused were on foot while the witnesses had the advantage of being in a lorry.

35. It also cannot be said that the witnesses were not conscious of the necessity of informing the police about the occurrence. According to Mathayi (P.W. 3), he went to the house of one Attapurathu Punnachan before going to his house and tried to send telephonic intimation to the police. The witness added that he could not contact the police because the telephone line was out of order.

36. Another unnatural feature of the conduct of Pappu, Mathayi and Joseph P.Ws. is that they made no attempt to see as to what was the condition of Kunju deceased after the assault and whether the deceased needed some aid. The witnesses were apparently not aware at the time they left the scene of occurrence that Kunju had died because according to their evidence they shouted at that time to the accused not to kill Kunju. Had Kunju died in the presence of the witnesses, there would have been no occasion for the witnesses to shout to the accused at the time they left not to kill the deceased. Indeed, according to Mathayi (P.W. 3), he came to know of the death of Kunju only on the following day at 5.30 p.m. It may also be observed in this context that the evidence of Dr. Paul, who performed post-mortem examination on the body of the deceased, shows that the deceased might have survived for some time after the assault. It also cannot be said that the witnesses did not go out of fear after the occurrence to the place where the deceased was lying because in the normal course of events the assailants do not remain at the spot of occurrence after the assault.

37. Even if it may be assumed that Pappu, Mathayi and Joseph P.Ws. were afraid to go to the police station in the darkness of the night, there appears to be no justification or cogent reason for their not reporting the matter to the police early in the following morning. It is in evidence that on the following morning the witnesses did not remain confined to their houses but were moving about. According to Pappu (P.W. 1) he went to Puthupally in a bus on the following morning and passed through the spot where the dead body of Kunju was lying. The witness did not step down from the bus despite the fact that he saw the dead body lying there. Mathayi (P.W. 3) admits that he went on the following morning at 6 a.m. to Erumeli and returned from that place at 5.30 p.m. Joseph P.W. states that he went to Vakathalam Hospital by bus at 7.15 a.m. on the following morning. If the three eye-witnesses could move about and go to different places on the following morning, there is no satisfactory explanation as to why they did not go to the police station and make a report about

the occurrence if, in fact, Kunju deceased has been subjected to a murderous assault in their presence. The failure of Pappu, Mathayi and Joseph P.Ws. to report the matter to the police creates considerable doubt about the veracity of the evidence of these witnesses that they had seen the accused causing injuries to the deceased. This Court in the case of Thulia Kali v. State of Tamil Nadu (Criminal Appeal No. 165 of 1971, decided on February 25, 1972) stressed the importance of making prompt report to the police regarding the commission of cognizable offence. It was observed :

"First information report in a criminal case in an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets benefit of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in lodging of the first information report should be satisfactorily explained."

38. Apart from the above infirmity in the evidence of the three eye witnesses, I find that the prosecution evidence is of a partisan character and not such on which implicit reliance can be placed. Pappu (P.W. 1) admits that there was a criminal case between his cousin and the fifth accused five or six months before the present occurrence. Pappu was asked whether he was a member of the Karshaka Sangham. He denied this fact though he admitted that he had paid money to Kunju for the meeting of Karshaka Sangham which had been earlier held on the day of occurrence. The evidence of Joseph P.W., however, shows that Pappu is a member of Karshaka Sangham. Joseph P.W. admits that there were two cases against him for good conduct. Joseph and two other were also sentenced to pay fine in connection with an assault on a tapper. There was also some property dispute in which Joseph and Kunju were arraigned as accused but they were acquitted. Joseph is a member of Karshaka Sangham and was earlier also cited as a witness in a case against the accused.

39. The prosecution has tried to seek corroboration of the evidence of eye-witnesses from the testimony of Yasu (P.W. 5) who has deposed that on the night of occurrence at first Kunju deceased came to his house accompanied by Pappu, Joseph and Baby, and that subsequently Pappu, Joseph and Baby came to the house and informed him of the occurrence. Yesu, as already stated earlier, is the President of Karshaka Sangham in Eramalloor. It is admitted by Yesu that he was accused in a case concerning the church. He was also accused in another criminal case. One other case had been filed against him. Shortly before his evidence in court he was accused in a case filed in the court of District Magistrate. Yesu was also a prosecution witness in a case in the Court of Sub-Divisional Magistrate Kottayam in which certain remarks were made against Yesu. Yesu thereafter filed a petition in the High Court expunging those remarks. Yesu was asked whether a finding had been given in a civil case that he had forged a document. Yesu admitted that there had been such a case, but according to him, it related to the correction of a document. It is further in the evidence of Yesu that the police had sent up for trial Yesu's son and four others for causing injuries to accused No. 10. In view of the above, I find it difficult to place such reliance upon his testimony.

40. Reference has also been made by Dr. Mahmood to the fact that an incised wound was found on the person of Joseph P.W. by Dr. Nair when he examined Joseph on the morning of December 14, 1970. It is urged that the aforesaid injury was caused to Joseph by accused No. 6 with a wooden spear. The presence of the said injury according to the learned counsel, lends assurance to the testimony of Joseph that he was present at the scene of occurrence. In this respect I find that according to Dr. Paul, who is Assistant Professor of Forensic Medicine in Medical College Trivendrum, the incised wound could not be caused with a wooden spear and that such a spear would cause only a lacerated injury. Dr. Paul's testimony thus creates some doubt regarding the reliability of the prosecution evidence that Joseph had received injury with a wooden spear at the hand of accused No. 6. In any case the aforesaid injury would have been caused in a variety of circumstances and would not necessarily show that Joseph was present at the scene of occurrence.

41. The circumstances of the case tend to show that Kunju deceased was killed at a late hour during the night between December 13 and December 14, 1970 when he was coming from a place where he had taken toddy. The fact that no report was lodged with the police during the night and no one went to the village abadi and raised hue and cry tends to show that no one was present along with the deceased at that time. His dead body, it seems, was discovered in the morning and thereafter a report was lodged by Markose who admittedly was not a witness of the occurrence. Markose in the report mentioned the names of only accused Nos. 1, 2, 3, 7 and 8 and, according to him, he had heard that someone out of them had killed Kunju deceased. In my opinion it is not possible to sustain the conviction of the accused-appellants on the evidence adduced in the case.

42. I, therefore, accept the appeal, set aside the conviction and acquit the accused.

Order - In accordance with the opinion of the majority, the appeals are allowed in part. The convictions of accused Nos. 1-5 under Section 302 as also under Section 148 of Indian Penal Code are maintained, but their sentence under Section 302, Indian Penal Code is reduced from that of death to that of imprisonment for life. Their sentence under Section 148 of the Indian Penal Code is upheld. The sentences would be concurrent. The convictions of accused Nos. 6 to 10 under Section 302/149 as also under Section 148 of the Indian Penal Code are set aside and they are acquitted of these charges. The conviction and sentence of accused No. 6 under Section 324 of the Indian Penal Code are maintained and his appeal to that extent is dismissed.

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