(1986) 02 KL CK 0032

High Court Of Kerala

Case No: R.T. 11 and Criminal A. 339 of 1985

Dasan and Others		APPELLANT
	Vs	
State of Kerala		RESPONDENT

Date of Decision: Feb. 21, 1986

Acts Referred:

- Constitution of India, 1950 - Article 20(3)
- Criminal Procedure Code, 1973 (CrPC) - Section 149, 235(2), 275, 276, 278
- Evidence Act, 1872 - Section 24, 25, 26, 27
- Penal Code, 1860 (IPC) - Section 143, 147, 148, 149, 302

Citation: (1986) 23 KLJ 603

Hon'ble Judges: S. Padmanabhan, J; K.G. Balakrishnan, J

Bench: Division Bench

Advocate: M.B. Kurup, A.R. Sreenivasan and Saji Narayanan, for the Appellant;

Judgement

Padmanabhan, J.

The five appellant''s were convicted by the Sessions Judge, Trichur for offences punishable under Ss.143, 147,148 and 302 read with S. 149 of the Indian Penal Code and each of them was sentenced to be hanged by their neck till death for the offence under S 302 read with S. 149 IPC without awarding any separate sentence for the other offences. The proceedings are submitted for confirmation of the death sentence under S. 366 of the Code of Criminal Procedure. The prosecution case is that on account of political enmity they formed themselves into an unlawful assembly at about 9.30 am on 24-3-1984 in the Onaparambu bus stop, the common object being to murder Gopalan, President of the Perinjanam Panchayat. committed rioting armed with M. Os. 1 to 5 daggers and stabbed him to death while he was standing in the bus stop. Deceased was a local leader of the Marxist Communist Party and as its representative he was the local Panchayat President The appellants are prominent workers of the R.S.S in the locality. The occasional clash between the

two organisations and the consequent enmity is alleged to be the motive.

2. Though Gopalan was taken in a car first to the Kuttilakkad Govt. Hospital, the Doctor saw him in the car itself and directed him to be taken to the Cranganore Govt. Hospital sinde his condition was serious. On reaching the Hospital at Cranganore another Doctor examined and declared him dead. Both these doctors were not examined. Shortly thereafter Pw. I gave Ext. PI first information statement which was recorded by Pw. 15 Sub Inspector in the hospital at 10. 45 a.m. The case was registered by him. Pw. 16 Circle Inspector who conducted investigation prepared the inquest report Ext. P3. Ext. P7 is the post-mortem certificate prepared by Pw. 12.

3. Death of Gopalan due to the injuries sustained by him is clear from the depositions of Pws. 1 to 3 and other witnesses, from Ext. P3 ''inquest prepared by Pw. 16 as well as from the evidence of Pw. 12 and Ext. P7 post-mortem certificate prepared by him. If the prosecution evidence is accepted it is a cold blooded murder committed in broad day light in a. public place. So also the evidence, if accepted, unlawful assembly, its murderous common object, rioting armed with deadly weapon and murder committed in furtherance of common object must all be taken as proved. On these aspects there was no dispute also and hence we do not purpose to consider those aspects in detail. The appellants disputed the time and place of occurrence as well as their involvement.

4. Sufficiency of motive was one of the contentions raised. It is said that the allegation is only a general political rivalry without, any individual or collective motive based on any specific enmity and it cannot be taken as sufficient to commit such a grave crime. That factual contention itself does not appear to be genuine. It is true that the appellants, when questioned under S. 313 of the Code of Criminal procedure, denied their connection with R. S, S. That appears only to be a rouse to escape liability. PWs. 1 to 3 and 8 are persons of the locality who know the deceased and the appellants very well. All of them categorically said that the deceased was a prominent marxist leader of the locality and the Panchayat President and the appellants are friends and District workers of the R.S.S. They also said that in the locality clashes between marxists and R.S.S. people were frequent and there was longstanding enmity between the two factions. If anything more was required that was elicited in the cross-examination of Pw. 15 when it was brought out that deceased Gopalan himself was an accused in a case for having assaulted R.S.S. workers and in some other cases he was giving protection to accused belonging to marxist party against R. S. S: workers. It these facts will not constitute motive, we doubt what else will. Further there cannot be any guideline or yardstick to decide what will operate as sufficient motive for commission of a particular crime. It may vary from individual to individual depending upon character, psychology and various other factors.

5. Motive is not an integral part of the crime or an ingredient of it just like means rea or actus reus. Even without any motive at all crimes could be committed Absence of motive will not make an act which is otherwise an offence not an offence. It is only an aid in the assessment of criminality That is relevant in abundance mainly in cases depending upon circumstantial evidence. It is only a ratiocinative aid in the assessment of evidence to fix up criminality. In given cases it may help the court to tilt the balance in assessing evidence. For want of motive a criminal who is otherwise liable to be brought to justice cannot escape. In given cases it may act as a guide to negative the otherwise available presumption of innocence while considering the evidence which the court may have an inclination to accept with a little more of assurance. When there is direct evidence motive looses much of its importance and significance. When the direct legal testimony is so clear, cogent and convincing as to satisfy the judicial conscience of the court in fixing up criminality motive is absolutely irrelevant in the sense that even in the absence of any proof of motive itself conviction could be had. Therefore the argument based on motive has no force at all.

6. Now let us refer to the oral evidence connecting the appellants with the crime. Pws. 1,2 and 3 are the occurrence witnesses. Among them Pws. 1 and 3 are shop owners having their shops at close vicinity to the scene of occurrence. As against them there is not even a suggestion that they are either interested in the prosecution or enmical towards the appellants. No political or personal interest is either suggested or proved and they are the most natural witnesses whose presence is amply established. It is true that Pw. 2 is not having residence or avocation within the close proximity of the scene. But on the fateful morning he was at the residence of one Gopalakrishnan residing close to the scene of occurrence, He went there to enquire about his ailment for which he was in hospital from where he returned home. Deceased also went over there for the same purpose and they so happened to meet. They came to the scene of occurrence together. This fact has been spoken to by the other witnesses also. Therefore his presence at the scene of occurrence is also amply established. The two disqualifications levelled against him are (1) He was a member of the Perinjanam Panchayat in which deceased Gopalan was the president, and (2) He was the President of a Fishermen''s Society in which Gopalan was a member. It is enough to say that these are not grounds to disbelieve a witness whose testimony is otherwise found acceptable. One more ground was urged to discredit him. That is he did not accompany the deceased to the Hospital. He said he did not go for want of space in the car. We can visualise a situation where a prominent political leader is seriously injured in a public place and we accept his explanation as probable. He said on seeing the first stab he was frightened and hence retreated to the nearby shop of Pw. 1. The argument was if so he could not have seen the further stabs because in order to go to the shop of Pw. 1 he has to turn the opposite side. That suggestion was not disputed by him but he said he walked backward looking at the scene itself. There is nothing improbable in such an

act. We do not find any reason to disbelieve these three witnesses.

7. From the evidence of these witnesses it is seen that deceased was standing on a pillar with his hands behind the head and right leg bent when the accused came from behind and attacked him with daggers. First accused stabbed him on the left chest near auxila as a result of which the deceased kneeled and further attacks were thereafter. They said all the accused stabbed him and M. Os. I to 5 were identified by them as the weapons used. There was an argument that in the respective positions of the deceased and the manner in which the injuries were received by him as spoken to by Pws.1 to 3 the injuries are not possible according to medical evidence and hence Pws. 1 to 3 will have to be dis-believed. So also another argument was advanced that Pws. 1 to 3 have only spoken altogether to five injuries (one by each accused) and the remaining injuries found on the dead body were not explained. We do not find any fancy in these arguments. Apart from mentioning the respective postures of the deceased at different stages (which itself may be only approximate) and the fact that the appellants came from behind, these witnesses have not specified exactly the positions of the assailants or the exact manner in which the injuries were inflicted. So also there is no merit in saying that these witnesses have spoken only to five stabs. What Pw 1 said in Ext. P1 as well as in the box was there were incessan stabs. The evidence of Pws. 2 and 3 also are not capable of limiting the stabs to five. A mechanical approach to the oral evidence in an incident in which one man was jointly attacked all on a sudden by five persons is not justified also. As per Ext. P7 there were seven incised injuries and four abrasions. Pw. 12 has stated that injuries 4, 9 and 10 (abrasions) can be caused when the person falls on his knee and hands touching on the ground and the simple incised injuries also could be caused during the same transaction by M. Os. 1 to 5. The answer given by Pw. 12 that injury No. 5 in Ext. P7 is not possible while the injured was on his knees and the assailant was standing cannot in any way discredit the testimonies of witnesses. Such mechanical and computerised appreciation of the oral evidence is not at all justified. The possibility of injury No. 1 in the manner spoken to by the witnesses was affirmed by Pw. 12 in re-examination. We do not find anything to disbelieve the oral evidence on the basis of the medical evidence. Pws 4 and 5 are persons who saw the accused going away from the scene after the incident with weapons and there is no reason to disbelieve their evidence also.

8. In the F.T.R it is stated that Pw. 15 got information at 10-15 a. m, and hence went to the hospital and recorded Ext P1. PW 15 stated in cross that it was only a telephonic information from source not disclosed. So also there is evidence that a death intimation was sent from hospital but Pw. 15 said he went to the hospital and recorded Ext. P1 before getting such an intimation. From the evidence of Pw. 16 an argument was advanced that the death intimation was purposely suppressed. The counsel for the appellants placed reliance on the decision in Raberi Karsan Cova and Others Vs. The State of Gujarat, to contend that the telephonic information received by Pw. 15 ought to have been treated as first information and Ext. P1 could have

been treated only as an information recorded during investigation. For the same purpose the decision in Randhir Singh v. State (1980 Crl L.J. 1397) was also relied on. Those cases have no comparison to the facts of the case before us. What Pw.15 received was an anonymous telephone call. He was not expected to act on it. It is true that first information is intended only as an intimation regarding commission of a cognizable offence for the purpose of setting the law in motion. But an officer in charge of a police station is not bound to treat any gossip or rumour or anonymous call or any information without the requisite details or authenticity to be treated as first information for the purpose of initiating investigation. He is justified in verifying and ascertaining the authenticity and details before registering a case and starting investigation. Depending upon the authenticity and details even a telephonic information could be treated as first information for taking Action. In this case we are not satisfied that there is scope for such a contention in order to treat Ext. P1 only as information received during investigation.

9. An attempt was made to contend on the basis of the decision in Chamara Pradhani v. State (1983 Crl L J 1706) that even if evidence of eye witnesses is clear, cogent and consistent it can be accepted only if it is not demolished by the medical evidence. That depends upon individual cases. If the apparent difference between occular evidence and medical evidence is attributable to any acceptable reason which is capable of compromising the two apparently different versions, otherwise acceptable occular evidence should not normally be rejected. The evidence of the Doctor is also only opinion evidence on which the court could form its owa independent conclusion. Here the argument regarding the alleged apparent difference in time of death is evidently the result of imagination of a legal brain. According to the prosecution case and the occular evidence the incident was by about 9.30 a.m. Within a short time the injured was taken to the Kuttilakkad Govt. Hospital from where without even removing the injured from the car he was carried to the Cranganore Hospital as per medical advise. Before reaching there the patient died and the Doctor examined and declared him dead. All these things transpired within less than one hour. Unfortunately the Doctors in the Kuttilakkad and Cranganore Hospitals are not examined. The intimation received from the Cranganore Hospital was also not produced for the presumable reason that it was not necessary to act upon it since Pw.15 reached the hospital and recorded the first information statement even before the intimation reached the police station. The argument was that there is suppression of evidence in order to postpone the time of incident and death enabling Pws 1 to 3 to see the incident. Postmortem was conducted at 3 p.m. apparently within 5 or 6 hours of death if the prosecution evidence is accepted. Contention was that incident and death might have taken place earlier and a dead-body alone might have been carried in the car. Pw.12 said, based on rigor mortis, that death might have taken place approximately six hours prior to Post-mortem. In cross-examination, Pw.12 said that he cannot deny the suggestion that death might have been 7 or 8 hours prior to post-mortem. This

answer is the basis of the contention. At the same time the Doctor said that presence of rigor mortis is not a sure sign to note the time after death. Failure of Pw. 12 to note the rectal temperature was one of the handles on which the counsel based his arguments. Pw. 8, the wife of the deceased, said that he had his breakfast by about 8 a.m. and left the house by about 8 30 a. m. In Ext. P7 Pw.12 found partially digested food. These facts only probabilises the evidence of Pws 1 to 3 regarding the approximate time of occurrence. The failure in Ext. P9 chemical examination report to note the group of human blood was another contention raised in this connection. These aspects become relevant or crucial only in cases where direct evidence is lacking and identity of the deceased is also in dispute. In a case like this where the incident took place in broad day light in the presence of respectable witnesses who have no doubt at all regarding the identity of the injured and the assailants or the time of death we need not strain ourselves too much on those aspects unless there is reason to doubt the veracity of the evidence. Recovery of the weapon or proof of presence of blood belonging to the group of the deceased in it are not essential conditions precedent to conviction if the evidence is otherwise acceptable. The question of time of death also assumes importance only if the occular evidence if found doubtful. In this case non-examination of the two Doctors and non-production of the death intimation only helped in raising a technical contention challenging the time of incident and death. From the evidence of Pws. 1 and 3 it is clear that Gopalan died only after they left Kuttilakkad (Perinjanam Health Centre) and before they reached Cranganore hospital.

10. We do not find any merit in the contention that there is suppression of evidence. Non-examination of Cw. 3 Chandran is the basis for the argument. Cws. 1 to 7 were cited in the charge to prove the occurrence. Out of them Cws. I,2 and 4 alone were examined as Pws, 1,2 and 3. The decisions reported in Karnesh Kumar Singh and Others Vs. The State of Uttar Pradesh, , 1984 Crl L.J.N.O.C. Page 23 case No. 67 and Soma Bhai Vs. State of Gujarat, were relied on to support the contention. The question of suppression of evidence becomes relevant only because in an endeavour to find out the truth it is the duty of the prosecution to place the entire evidence both favourable and unfavourable to the prosecution or defence so that the court may arrive at the truth correctly. Only if a conscious attempt is made in this line it could be said that there was suppression of evidence thereby creating difficulties for the court to arrive at the truth. The Evidence Act does not say that a particular number of witnesses is necessary to prove a fact. Evidence is being weighed and not counted. It is the worth and not the count that matters. A number of infirm witnesses will not prove a fact but a solitary reliable witness will prove. When a number of persons have seen an occurrence no provision of law enjoins a duty on the prosecution to examine all of them before court. The prosecution is having the discretion to select witnesses for examination. An interested or inimical witness or one who is reasonably suspected to be won over by the defence could very well be given up. Which witness would be material for examination is for the

prosecution to find out. Unless it is shown that a particular witness was withheld with some ulterior motive no adverse inference is possible from the non-examination of a witness. Whether there is calculated withholding of evidence to screen real facts from the notice of the court should be the consideration. Withholding of independent persons who are neither victims of assault nor have any axe to grind against the accused and examination of interested and partisan witnesses alone could be said to be with ulterior motive and it could be held to be suppression. Prosecution is not expected to examine witnesses in the serial order in which they are arrayed in the charge. Picking and choosing a few out of similarly placed witnesses cannot in any way be held to be suppression. Non-examination of a material witness in given situation may some times amount to suppression. Withholding an eye-witness for the sole reason that his evidence is likely to go against the prosecution may on many occasion amount to suppression because of the duty of the prosecution to assist the court in reaching the proper conclusion. The real test will be whether there was any conscious attempt to suppress facts from court by not tendering a particular piece of evidence. So far as this case is concerned three out of sevel equally placed eye-witnesses were examined leaving the others. We do not find anything irregular on it and no ulterior motive was pointed out. By examination of one or more witnesses if the prosecution feels that a particular point is proved there is no duty to examine the others unless their examination is relevant for bringing out any fact not brought out from others and relevant to be placed before court.

11. Another item of evidence to connect the accused with the crime is the information conveyed by them to Pw. 16 in consequence of which the weapons were discovered and which distinctly related to the discoveries. This provision is an exception to Ss. 24, 25 and 26 of the Evidence Act. Exts P4, P5 and P6 are the mahazars and Exts P4 (a). P5 (a) and P6 (a) are the informations extracted in the mahazars. M. Os 1 to 5 and 7 are the weapons. Recoveries were effected by Pw 16 and Pws 9, 10 and II are the attesters. They have proved the informations and the consequent discoveries. The weapons were identified by Pws. I to 5 in the box. The places of concealment were spoken to and pointed out by the concerned accused and actual discoveries were made either by the accused or by other persons from the place pointed out by the accused at the direction of the investigating officer. They were all from places of concealment which could not be noticed by strangers. As held in 1961 KLT (SC) 74 the provisions of S. 27 of the Evidence Act are not within the prohibition of Art. 20 (3) of the Constitution unless compulsion has been used in obtaining the information. The only item of compulsion alleged in this case is hand cuffing of the accused at the time when they were taken to effect the discovery consequent on the information. We are not at the question whether the hand-cuffing was correct o r not, but only whether it will amount to compulsion. The purpose of hand-cuffing is to act as a safeguard against the person escaping from custody. Hand-cuffing itself in the absence of anything else cannot amount to

compulsion for giving the information. Therefore the plea of compulsion cannot be accepted. The argument that the disclosure statement ought to have been extracted and produced as an independent item of evidence to prove the information appears to be highly technical. When a fact is deposed of as discovered in consequence of information received from the accused what is admissible is only so much of the information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered. The fact discovered consequent on the information acts as assurance to the truth of the information. The incriminating portion of the statements are not admissible. For a statement along with the information that the object to which the information relates was used for the commission of the offence is not at all admissible. That is a matter to be proved by independent evidence. Information distinctly relating to the fact discovered alone is admissible. If that information is otherwise known to others or the police officials, then there is no sanctity attached to the information. That is why no weight is being attached to discoveries from public places or places to which others also are having easy access consequent on information. But the public nature of the place or its accessibility to others alone is not the criterion. The main question is whether the particular information was exclusively known to the accused alone or whether it was known to others also. For eg. a public well or a public tank may be a place accessible as of right to the public. But the fact of having placed a weapon underneath the water in such tank or well without being seen or known by others may be an information which is exclusively available to the accused. Such an information and the consequent discovery, if proved, could be accepted The information may be part of the statement made by the accused when questioned after arrest. It may be contained in the case diary which could be made use of by the investigating officer who records the same. It is from that he may be extracting the relevant disclosure statement in the mahazar, Mahazar will be prepared immediately after discovery. Therefore the entry of the disclosure statement in the mahazar could only be after discovery. That does not mean that the information was made or recorded after discovery. Even if it is insisted that there must be a separate extract prepared before proceeding for the discovery consequent on the information it could only turn out to be a technical formality because it could only be the relevant portion copied from the statement contained in the case diary. But what is relevant is only the first information given by the accused and not any repetition or subsequent information of it. The information need not necessarily be by words, but it can also be by gestures. But that also will have to be recorded. When once an information is given the discovery must be on the basis of that information and not any subsequent information. Pointing out on the spot and actual taking could only be procedures in the process of discovery and they are not part of the information if there is already one. So also there cannot be any question of any joint information given by more accused than one. We said so because in this case there was such a contention which be found to be factually incorrect. In this case the discoveries consequent on the information where from beneath a cultvert, from the bottom of a tank and

another place, all exclusively known to the accused alone. The informations and discoveries are amply proved also. In this case the information which led to the discovery itself is not very material because even otherwise there is evidence to connect the accused with the crime. Though it was argued before us that in order to accept the information under S. 27 of the Evidence Act the actual discovery must also be by the accused himself, we do not think that the position is correct. For the applicability of the Section what is required is only that there should be information which relates distinctly to the fact discovered and the discovery must be in consequence of the information. The actual discovery can be by the accused himself, the police officer or any third person at the direction of the police officer. We do not find any reason to discard the evidence relating to the discoveries consequent on the information.

12. We had occasion to hear both sides very elaborately and peruse the evidence in detail. It is true that there are slight discrepancies and variations between the evidence of P. Ws. 1 to 3 in the matter of identification of the weapons and narrations of the individual acts of assaults as well as the relative positions of the injured and the assailants. But on broad aspects their testimonies remain unique and unassailed. Possible errors consequent on difference in conception, perception, memorisaton and reproduction will have to be given some margin. Mr. A.K. Sreenivasan, Advocate for the appellants, was concentrating more on minor contradictions and discrepancies in his attempt to discredit the witnesses. He has forgotten the fact that it is an inevitable result that different honest persons who had occasions to witness an incident like this will differ between themselves in minute details. In fact such difference is only evidence of their truthfulness and not otherwise.

13. The argument that deceased had several enemies and he could have been murdered by some body else at some other place at some earlier point of time is not available in view of the clear evidence available in the case. If a lynching evidence was absent such probabilities could have been argued in an attempt at least to get the benefit of doubt.

14. Serious attack was levelled against the manner which the accused were questioned under S. 313 of the Cr P.C. The object of questioning the accused under S. 313 Cr. P. C. is to enable him personally to explain any circumstance appearing in the evidence against him. The questioning under S. 313(1) (a) is only obligatory. But the questioning under S. 313(1) (b) after the prosecution evidence is over and before the accused is called on for his defence is a must. It must be generally on the case. All circumstances appearing in the evidence against him will have to be put to him in the form of simple questions so that he could understand the questions and give answers offering his explanation. It is not a mere formality eventhough usually the accused themselves do not give the desired seriousness to it. Compound questions should not be put because there is the possibility of the accused being confused or

being unable to explain properly. Evidence and circumstances appearing in the evidence and not put to the accused cannot be used against him. Eventhough questioning under S 313 is mandatory, going by the purpose it is clear that when there is no evidence or circumstance appearing against him he need not be questioned at all, because in such a case there is no question of conviction.

15. There is no case that questions put were not proper or simple or that all the evidence or circumstances were not put to them. The objection is that the questions were recorded by typewritten English and there is nothing to show that the questions were translated into malayalam, which language alone the accused could understand, explained to the accused and answered by them after understanding the questions. So also it was argued that the malayalam translation of the questions are not recorded enabling this court to ascertain what questions were exactly asked and the Sessions Judge has not certified under his signature that the questions were translated into malayalam, explained by him and he personally recorded the questions and answers. It has to be noted that no such contention was taken in the appeal memorandum. Mr. A.R. Sreenivasan, who appeared before us was the counsel who appeared before the Sessions Judge also. He admits that the question were asked in malayalam. The questions recorded in english and the answers record edin malayalam show that the questions were properly understood and answere were given. If so it is clear that this is intended only as a technical contention without any prejudice having been caused.

16. This contention seems to have been raised on the basis of the Short note decision, case No.88 of pages 34 1978 K.U.T. That decision deprecated the practice of recording 313 questions in English and answers in malayalam where the accused do not know English, So also it was laid down there in that when malayalam translations of the English questions are asked these malayalam transactions of the questions also must be recorded in order to ascertain what exactly where the questions that were asked. We have considered that decision in detail and we are of opinion that it has not laid down the correct law on the point. Under S. 272 of the Code English is also the language of the court. Charge is being prepared in English and proceedings of Court including judgment or orders are also written in that language. The code contain provisions for interpretation in the language understood by the accused whenever evidence is given in a language not understood by him. Preparing 313 questions in English cannot be said to violate any of the provisions of the Code. Whenever the accused is unable to understand English the questions could be translated into the language which he understands and the answers recorded. There is no irregularity or illegality in translating English questions into malayalam and recording the answers in malayalam. It is true that it is always safe for the magistrate or the judge to certify under his writing and Signature that the English questions were correctly translated and explained to the accused, that he understood and answered in malayalam and the answers were correctly recorded. In fact section 281 (5) of the Cr. P.C. so provides also. That may

add assurance to what takes place in 313 questioning This could be had in addition to or independent of compliance of rule 37 of the Criminal Rules of Practice. But to insist that malayalam translation of the English questions also should be recorded appears to be an unnecessary formality involving waste of judicial time and energy. Questions are being translated and asked by responsible judicial officers who could very well be believed when they certify that the English questions were correctly translated and asked by them. When the English questions are there how can there be any difficulty in understanding the malayalam versions of the questions asked. Section 281 (3) of the Cr. P. C. Permits recording of the examination of the accused in the language of the court. Eventhough S. 313 does not deal with examination of witnesses but the accused there seems to be no reason to have a discrimination in the matter of language so far as S. 313 alone is concerned. S. 313 does not require recording of the questions in the language spoken by the accused. There is nothing strange in preparing the questions in English, translating and asking them in malayalam and recording the answers in malayalam. What is required to be safeguarded in the interest of justice is that the accused should understand the questions and he should not be prejudiced. In that respect faith in the honesty and integrity of the judicial officers is the solution.

17. In this case there cannot be any dispute that the Sessions Judge translated the questions into malayalam and recorded the answers. But he did not make a certificate that he has done so. It is always desirable that judges and magistrates certify under their signature that questions were translated and explained to the accused who understood the same and gave answers all of which are truely and correctly recorded. In this case the omission could only be an irregularity which did not result in any prejudice at all. The irregularity is only curable. The certificates as enjoined by rule 57 of the Criminal Rules of practice signed by the Magistrate are there in all the Statements.

18. Section 278 of the Cr. P.C. provides that as the evidence of each witness taken under S. 275 or 276 of the Cr, P.C. is completed, it shall be read over to him in the presence of the accused if in attendance, or if his pleader, if he appears by pleader and shall, if necessary, be corrected. The complaint is that deposition of some of the witnesses were not read over by the Judge in open court in the presence of the accused. This contention appears to be correct because some of the witnesses signed the depositions recording that they read the depositions themselves The Judicial Officers will note for guidance that the provisions of S. 278 Cr. P.C. should be complied with. Going by the decisions reported in Mathai Thommen Vs. State, , Pappan Narayanan Vs. Kerala State, and V.M. Abdul Rahman v. King Emperor (1927 P.C. 44) this could only be an irregularity which is curable. The accused were represented by counsel. The depositions were recorded in their presence. It was only in the case of some literate witnesses that the deviation from Section 278 was made. Any how even that has to be avoided so that such contentions may not be raised.

19. It is clear from the evidence that it is a cold blooded murder in furtherance of the common object of the unlawful assembly to which all the five appellants were members. They committed rioting armed with deadly weapons. P W. 12 has stated that death was due to shock and haemorrhage to the right lung and injuries 1, 2 and 5 are sufficient in the ordinary course of nature to cause death. Conviction under all the courts are only to be confirmed.

20. In exercising the sentencing discretion the Sessions Judge had a light hearted approach. After stating that the prosecutor argued for capital punishment and the accused craved for mercy, the Sessions Judge had his discussion on Sentencing discretion in one sentence when he said "considering the circumstances of the case, I feel that the capital sentence can be imposed''

21. In Bachan Singh Vs. State of Punjab, the Supreme Court laid down that the normal punishment for murder is imprisonment for life and the extreme penalty will be justified only in ''rarest of rare'' cases. After that decision the Supreme Court considered and followed the decision in Several cases, though in some cases with some sort of resentment over its rigour. Erabhadrappa v. State of Karnataka (AIR 1983 S. C. 446) was a case in which death sentence was confirmed by the High Court. The appellant in that case murdered his master''s wife during the dead of night by strangulation for gain by betraying the trust of his master. It was a preplanned cold blooded murder for greed in achieving his object of committing robbery. Their Lordships found that the appellant was guilty of a heinous crime which deserved the extreme penalty. but said "Failure to impose death sentence in such grave cases where it is a crime against society - particularly in cases of murders committed with extreme brutality - will bring to naught the sentence of death provided by S. 302 of the Indian Penal Code. The test laid down in Bachan Singh Vs. State of Punjab, is undoubtedly not fulfilled in the instant case. Left with no other alternative, we are constrained to commute the sentence of death passed on the appellant into one for imprisonment for life. "These passages show that that the judges who decided the case felt that the appellant deserved death penalty but they were helpless in awarding it because of the rigour of the guidelines in Bachan Singh''s case.
22. For the same reason death sentence was commuted in Bishan Singh and Others Vs. State of Punjab, also. But in a later decision in Machhi Singh and Others Vs. State of Punjab, the earlier decision in Banchan Singh''s case was explained in order to water down its rigour by giving certain principles, guidelines and examples in deciding the cases which could be treated as the ''rarest of rare'' for consideration of capital sentence. Along with the circumstances of the crime the circumstances of the offender also has to be taken into account. All the aggravating and mitigating circumstances have to be drawn up giving full weightage to the mitigating circumstances in striking the balance before exercising the option. The option has to be exercised bearing in mind that life imprisonment is the rule and death sentence is only the exception to be resorted to only when life sentence is found altogether

inadequate after due consideration of all the relevant facts and circumstances and that too only in gravest crimes of extreme culpability. The crime must be of an uncommon nature in which even after giving maximum weightage to the mitigating circumstances the court must be of opinion that sentence of imprisonment for life is inadequate and there is no alternative but to impose death sentence. The crime must be of the rarest of rare type where the collective conscience of the community is so shocked that it will expect the infliction of death penalty. In Individual cases it is for the Judges to apply these guide lines and decide the sentence. To those who have no scruples in killing others, if it suits their ends, there must be rule of law and fear of being brought to book to operate as a deterrent. Death sentence may be justified in cases of murders committed for motives which evince total depravity and meanness, as for instance murders by hired assassins for money, or reward, cold blooded murders for gains of persons on whom the murderer was in a dominating position or position of trust, murders committed in the course of betrayal of the mother land etc. Murders of. members of Scheduled Caste or minority community etc committed not for personal reasons but in circumstances which arouse social wrath, cases of ''bride burning'', dowry deaths, murders committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation etc. also may come within the category of rarest of rare'' cases. Crimes committed in enormous proportion, for instance murders of all the members of family or a large number of particular caste, community or locality could also be grouped under this bead. Murders of innocent children, helpless women, old or infirm persons or public figures generally loved and liked by the society could also shock the collective conscience of the community and could be considered for the maximum penalty, But in all these cases before awarding the sentence the aggravating and mitigating circumstance will have to be considered and the balance struck after taking all the facts and circumstances into account.

23. We have summarised and extracted these principles laid by the Supreme Court only because the Sessions Judge has not considered these aspects due to reasons which may include ignorance also. Otherwise in this case the Sessions Judge would not have attempted to sentence five persons to hanging with the aid of Section 149 without any discussion at all by the only sweeping words "Considering the circumstances in this case, I feel that the capital sentence can be imposed". Is his simple feeling sufficient to take away the God given lives of five individuals eventhough they are proved to be murderers? Was he not bound to consider "the circumstances in this case?" Judicial experience and wisdom ought to have told him that the exercise of his sentencing discretion is justiciable arid subject to confirmation by this court. Is not this court entitled to know by what all considerations weighed with the Sessions Judge in deciding the sentence in order to exercise the judicial review on it. Life of individuals are not to be taken away by mere ''feelings'' from the vacuum. Judicial powers are intended to be exercised judicially with atmost care and caution especially when we are dealing with life and liberty of

citizens. We are constrained to say that the Sessions Judge has been shewn callous indifference and indiscretion in this respect. The Sessidns Judge has also acted in disregard of S. 235 (2) of the Cr. P.C. Heating the accused on the question of sentence is not intended as a formality. It is intended to give an opportunity to place before court facts and materials relating to various factors bearing in the question of sentence. If those facts are contested then opportunity for evidence also will have to be allowed. What the Sessions Judge asked these five accused after pronouncing the judgment of conviction was whether they have any reason not to sentence them. That is not hearing on the question of sentence. Such a question will normally be asked only when an accused pleads guilty to the charge. When the entire trial is over and when the accused is found guilty of murder and when no exception is involved there is no question of not imposing any sentence. Two alternatives alone are there and hearing on the question of sentence in such cases is only hearing as to which of the two sentences is to be awarded. In the matter of recording deposition of witnesses and statements of the accused also the Sessions Judge seems to have committed irregularities of which we had occasion to discuss earlier. In this case the murder was premeditated and calculated. There was no provocation. It was on account of enmity and the crime was committed openly in a public place. Still we do not feel that is one of the gravest of crimes involving extreme culpability and for that reason alone without considering the other aspects discussed in Machhi Singh and Others Vs. State of Punjab, we find that it is not one of the rarest of rare case attracting the extreme penalty provided by law.

While confirming the conviction of all the appellants, we allow the appeal in part, set aside the sentence of death and substitute the sentence of imprisonment for life against all the appellants. The Criminal R. T. is also disposed of accordingly.