Priyan S/O Prakasan and Sunil @ Container Suni Vs. State of Kerala

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Court : Kerala

Decided On : Dec-10-2009

Reported in : 2010CriLJ1138

Judge : K. Balakrishnan Nair and; P. Bhavadasan, JJ.

Acts : Evidence Act - Section 27; ;Kerala Anti Social Activities (prevention) Act; ;Indian Penal Code (IPC) - Sections 34, 201, 302 and 417; ;Code of Criminal Procedure (CrPC) , 1973 - Sections 37, 43, 129, 164, 232, 313 and 366

Appeal No. : Crl. A. No. 1299 of 2007

Appellant : Priyan S/O Prakasan and Sunil @ Container Suni

Respondent : State of Kerala

Advocate for Def. : Public Prosecutor

Advocate for Pet/Ap. : B. Raman Pillai, Adv.

Disposition : Appeal allowed

Judgement :

P. Bhavadasan, J.

1. Five persons were arrayed as accused in Crime No. 110/2005 of Ettumanoor Police Station, for the offences punishable under Sections 302, 201 and 417 read with Section 34 IPC. Initially, A1 and A2 alone were available for trial and the other three accused, including the appellants herein, were absconding. Later on, the appellants surrendered before Court and they stood trial. The appellants were found guilty of the offences alleged against them and were sentenced to the punishment mentioned earlier. Death Sentence Reference is filed as per Section Section Cr.P.C.

2. The case of the Prosecution, in brief, is as follows:

Praveen, a young man, aged about 20 years, at the time of the incident and the elder son of PW1, was employed with the first accused in the case, namely, Shaji, who was then functioning as the Deputy Superintendent of Police in the Kerala Police Department. He was serving at Malappuram, at the relevant time. Praveen was engaged as a Conductor of the bus, owned by the wife of the first accused Shaji and he was also the driver of the personal car belonging to Shaji. The deceased Praveen was allowed to stay in a room of the lodge, belonging to Shaji, who was residing nearby, with his family. Praveen was related to the first accused and so, he had absolute freedom in the house of the first accused Shaji, who, as already stated, was working as a Dy. S.P. in the Kerala Police Department. It seems that Praveen misused the freedom given to him, as he developed an unholy relationship with the wife of the first accused. On coming to know about the

said relationship, the first accused became furious and Praveen was thrown out of his job. Praveen was fortunate enough, to get employment as a Driver in a shop, distributing mattresses. However, the first accused was in no mood to spare him. The allegation of the Prosecution is that the first accused conspired with the other four accused persons, had Praveen brought to him by the second accused and thereafter, murdered him. The further allegation is that the first accused dismembered the body of Praveen and threw the various parts of his body at various places. The appellants herein and the other accused are alleged to have aided the first accused in his commissions.

3. Praveen, who had gone for his job, as usual on 15.02.2005 also, did not return home. Initially, the members of his family thought that he would have gone to attend the festival in the temple at Ettumanoor. The next day also, he did not return. That aroused the suspicion of the members of his family and they informed PW1, the father of Praveen, who was working at Thiruvananthapuram, about the same. Though PW1 tried to locate his son, he was unsuccessful. He, therefore, laid a complaint before the Police on 18.02.2005. In the meanwhile, it so happened that the various parts of the body of Praveen, which were disposed of by the accused, surfaced in the backwaters, at various places. The body parts were identified as that of Praveen, by PW1 when he was taken to various places and parts of the body were shown to him. Ultimately, the various crimes registered in various Police Stations, on sighting the legs, hands and torso at different places, were consolidated and Crime No. 110/2005 of Ettumanoor Police Station was treated as the leading case.

4. The Prosecution case is that with the active participation of the first accused and as per his instructions, the second accused managed to bring the deceased Praveen with him from Ettumanoor to Kottayam on 15.02.2005 in the evening. Late in the night, while the second accused was returning in his motor bike along with Praveen, as part of the conspiracy between the accused persons, A1 caught hold of Praveen at a particular place at Kottayam and then murdered him. The case was investigated by PW67 Circle Inspector of Police. There is a further allegation that before causing the death of Praveen, he was forced to write Ext.P1 letter to his father, by the first accused in the case, to the effect that he was leaving for Bombay in search of some job. PW68 Dy.S.P., who took over the investigation of the case, after recovering various parts of the body, identified them as belonging to Praveen, according to the statements of the witnesses and had the first accused arrested. Then, he came to know about the role of other accused persons also, in the crime. He sent the parts of the body recovered for chemical analysis, and also seized the vehicle used by the first accused. He also had the assistance of the Scientific Assistant, attached to the Mobile Laboratory of the Kerala Police Department. It appears that the two appellants herein surrendered before PW68. PW68, on the basis of the confession statements said to have been given by the appellants, located various places, where the accused had gone on the relevant date. Finally, after completing the investigation, he laid charge before Court.

5. The Judicial First Class Magistrate, Ettumanoor, before whom the final report was laid, took cognizance of the offence. The case was committed to the Sessions Court, Kottayam and the Sessions Court made over the case to the Additional Sessions Court Fast Track (Ad hoc) No. II, Kottayam, for trial and disposal. The latter Court, on receipt of the records, required presence of the appellants and after hearing them, charge was framed for the offences punishable under Section 302, 201 and 417 read with Section 34 IPC. The charge was read over to the accused, who pleaded not guilty and claimed to be tried. The Prosecution had PWs 1 to 68 examined and Exts.P1 to P189(b) marked. MOs.1 to 65 were got identified and marked. After the close of the evidence, the accused were questioned under Section 313 Cr.P.C. They denied all the allegations and the incriminating circumstances brought out in evidence against them and maintained that they were innocent. Presumably finding that they could not be acquitted under Section 232 Cr.P.C., they were asked to enter on their defence. The accused chose to adduce no evidence, except producing Ext.D1. On appreciation of the materials before it, the Court below found that the Prosecution has succeeded in establishing the case against the appellants. Accordingly, they were convicted and sentenced, as already mentioned. The conviction and sentence are assailed in these appeals and reference is made to this Court under Section 366 Cr.P.C. for confirmation of the sentence awarded to the appellants.

6. The questions that arise for consideration in these cases are:

1. Whether the Court below was justified in coming to the conclusion that the Prosecution has succeeded in proving the acts alleged against the appellants.

2. Whether the Court below was justified in awarding capital punishment to the accused persons.

7. As already stated, Praveen, who was the elder son of PW1, was initially an employee of the first accused in Crime No. 110/2005 of Ettumanoor Police Station. For reasons as already stated, he left the employment under the first accused and at the relevant time, he was employed with a shop, dealing in mattresses, at Ettumanoor. The Prosecution case, in brief, is that the first accused in the above said Crime, who nursed grudge against the deceased Praveen, had the deceased brought to him by the second accused and the first accused, with the help of the appellants herein, murdered the deceased. Thereafter, his body was dismembered and various parts of his body were thrown at various places.

8. PW1 is none other than the father of the unfortunate Praveen. He has two sons of whom, Praveen is the elder one. He would depose that Praveen was, earlier employed as a Conductor in the bus, owned by the wife of the first accused Shaji and also the driver of the personal car belonging to Shaji. PW1 deposed that Praveen had worked with Shaji from 2001 till the end of 2004. PW1 would say that by the end of November 2004, his brother informed him that something had gone wrong in the work place of Praveen. He also told PW1 that Praveen should be brought home before Shaji reaches his house at Palluruthi. Since PW1 found it impossible to return home immediately, he requested his brother to take steps as are necessary, to ensure the safety of Praveen. Accordingly, the younger son of his brother went to Palluruthi and brought back Praveen to their house. PW1 would state that his brother received a phone call from Shaji, demanding that Praveen should be taken to him immediately. He threatened that otherwise, he would come to their house and do away with Praveen. PW1 asked his brother to take his son to Shaji. PW1 says that when Praveen was taken to the house of Shaji, he was brutally manhandled by Shaji. Thereafter, he had taken Praveen to Thiruvananthapuram for treatment and after the treatment period, Praveen returned home and began to attend to his work. On 16.02.2005, PW1 says, when he reached home from Thiruvananthapuram, he did not find Praveen there. His wife told him that Praveen had gone for his work on the previous day morning i.e., on 15.02.2005 and had not returned till then. She also told him that since festival was going on in Ettumanoor temple, she thought that Praveen would have gone to attend the same. PW1 says about the frantic searches made by him for his son. But, he was unable to locate him. He enquired with Shaji also. Shaji seems to have told him that Praveen had not gone there and also told him, what his son had done. He says about the letter received by him when he returned home thereafter. He would depose that on 18.02.2005, he laid a complaint before the Police and he identified his complaint as Ext.P2. He then speaks about the news in the newspapers of 16th and 18th February, to the effect that parts of the body of a person were found surfaced in the backwaters at various places. The Sub Inspector of Police took PW1 to Medical College Hospital and the lower limbs procured by the Police were shown to him. He recognised them as that of Praveen. Later on, he came to know that the upper limbs and head were also recovered and he identified them also, as that of his son. Thereupon, he was convinced that his son Praveen was no more. He speaks about the various steps taken by the Police Officers and also the fact that he and his wife were subjected to DNA test.

9. PW2 is a worker attached to a thattukada (a four wheeler cart, vending food) run by PW10, situated on the opposite side of Arcadia Bar near K.S.R.T.C. Bus Stand, Kottayam. The said witness deposed that on 15.02.2005, at about 8.30 pm, two persons had come to the thattukada on a motor bike. They asked for two 'bull's eye' (half-fried eggs) and they were served with the same. PW2 would also say that one of the persons, named Vinu, who was the second accused, was familiar to him and he asked Vinu, who was accompanying him and he replied that it was Praveen. PW2 deposed that A2 told him that they have a plan to go for a movie and when his suggestion was sought for, he replied that 'Udayananu Tharam' was a good movie. They left the place. PW2 then says that at about 11.30 p.m. on the same day, he found a Maruti van halting near Arcadia Hotel. He deposed that he had occasion to see the first accused, namely, Shaji, getting down from the car and going towards K.S.R.T.C. Bus Stand side. The three other persons in the car got down and they took black coffee from the shop of PW2. He, however, failed to identify the accused in Court.

10. PW3 is a close relative of PW1. He too says that, for quite some time, the deceased Praveen was working for Shaji, who was a resident of Palluruthi. He would depose that for compelling reasons, Praveen had to leave that job. This witness says that one day, towards the end of November, a phone call was received from Smt. Vijayamma, who is closely related to them, to the effect that they should go and bring back Praveen immediately, for his safety. She also pointed out that this should be done before the first accused Shaji reaches Palluruthi. Immediately, Praveen was brought back to his home by his cousins and uncle. Thereafter, they received a phone call from the first accused, demanding that Praveen should be taken to him immediately. He would also say that the first accused namely, Shaji had come to attend the marriage engagement function of the second accused and there, he asked PW3 whether Praveen had come to attend the function. When he replied that he has not, Shaji openly declared that if Praveen had come there, he would have chopped him into pieces. Within a few days after the said incident, Praveen was found missing. He then speaks about the identification of the body parts of Praveen, by PW1.

11. PW4, who is a Blacksmith, says that at the behest of the first accused Shaji, he had crafted MO4 chopper. PW5 is closely related to PW1. He speaks in tune with the evidence furnished by PW1, the father of Praveen. He claims that he had gone to Pallurthi to bring back Praveen. He would also say that when Praveen was taken back to Shaji as demanded by him, Praveen was brutally man- handled by Shaji. He would also say that Praveen apologised to Shaji for his misconduct and Shaji had told him that he should never be seen at Ernakulam. Rest of his evidence is similar to the one given by PW1. The evidence of PW6, 7, 8 and 9 are not very relevant in the present context, except that PW8 would say that Shaji, the first accused in the crime had taken the Maruti Van belonging to him, for a day.

12. PW10 is the owner of the thattukada, on the opposite side of Arcadia Bar near K.S.R.T.C. Bus Stand, Kottayam. He says that on 15.02.2005, two persons had come to his shop at about 8.30 pm. and had 'bull's eye'. He also says that one among them was familiar to him and he introduced the other person to him and PW2. After taking food from their shop, they went towards Anand Theatre to watch a film. At about 11.30 pm. on the same day, a Maruti van was stopped and parked near Arcadia Hotel. Rest of the evidence of PW10 is in tune with that of PW2.

13. PW11 is an autorickshaw driver, by profession. He says, on 15.02.2005, while he was going through Chemmanampadi Junction near Medical College, at about 12 midnight, he happened to see a motor bike and a Maruti van, parked by the side of the road. He would depose that he saw two persons, coming out of the van and dragging the person sitting behind the bike, into the van. However, he was unable to identify the accused in Court.

14. PW12 is another autorickshaw driver, who claims to have seen a Maruti van, parked by the side of the road to Arpookara temple. As far as the appellants are concerned, there is nothing in the evidence to show that they had any role to play in the incident. This witness was also not able to identify the appellants in court. The evidence of PW15 is not very relevant. PW16 was examined to ascertain whether any of the appellants was familiar to him. He, however, was unable to identify any of the appellants in court and he also stated in his evidence that the person by the name he knows, is a different person. PW17 was examined to show the involvement of the first appellant in the incident, but he was also unable to identify the appellants in court and pointed out that he had no familiarity or acquaintance with the appellants. He further stated that the persons he knows by the names Praveen and Sunil are different persons, than those present before court and the persons whom he knew, were not involved in any case at all. The evidence of PW18, who is the Deputy Police Surgeon, attached to the Medical College, Kottayam had conducted the potency examination of Shaji. There is not much relevance in the evidence given by this witness in the present context. PW19 Professor of Forensic Medicine and Police Surgeon, Medical College, Kottayam had conducted autopsy on the limbs of an unknown person and had filed Ext.P25 report. He had also examined the torso and filed Ext.P27 report.

15. The evidence of PWs 20 to 34 are that of formal witnesses and they have no much significance in the present case. PW35 is the Scientific Assistant, attached to the District Mobile Laboratory, District Police Office,

Kottayam. He speaks about having collected samples from various places and also from the Maruti van. PW36 was examined to show that the first appellant in this case, namely, Priyan was related to him and he was involved in the incident. However, this witness turned hostile to the Prosecution and the Prosecution could not derive any support from his evidence. He did not identify the accused before Court also. In fact, his case was that the person by name Priyan, present before court, was not the person, who was familiar to him. He denied the various statements alleged to have been given by him earlier, to the Police. However, he stated that Priyan had told him that 'Shaji Sir has betrayed us' and that he would also say that Priyan had told him that he had to keep away from there for some time.

16. PWs37 and 38 are First Class Judicial Magistrates, who recorded the statements of witnesses under Section 164 Cr.P.C. PW39 was examined to show that the accused persons had bought from his shop, a towel, which was allegedly used to strangulate the deceased person. While he admitted that the Police had brought the appellants to his shop, he denied of having sold any towel to them. He also denied of having given any statement to the police to the effect that the accused had purchased the towel shown to him from his shop. He turned hostile and the Prosecution derived no support from his evidence also.

17. PWs 40 and 41 are formal witnesses. So also, PWs 42 to 44. PW45 is a Police Constable, whose evidence is not very relevant in the present context. PW46 is a Police Constable, attached to the Vaikom Police Station, who claims to have seen the torso of a person near Thanneermukkom bund. He informed the matter to the C.I. of Police, who came to the spot and did whatever was necessary, thereafter. PW47 is the staff attached to the Judicial First Class Magistrate's Court, Ettumanoor, who had forwarded the various articles produced before court for chemical examination. PW48 was examined to prove the recovery of a weapon. However, he denied of having familiarity or acquaintance with the accused persons and denied that he had seen any recovery, claimed to have been made by the Police. PW49 owns property at Eramalloor. He says, on 22.01.2006, Police had come to his property by about 4-4.30 pm. The two accused persons before court were also brought by the Police along with them. He came to know that the severed head of deceased Praveen had been buried in his property. But, nothing was recovered from there. However, he deposed that he had no familiarity with the accused persons. PW50, a salesman in a petrol bunk, was examined to prove that petrol was bought from his bunk for the Maruti van driven by Shaji and that he had happened to see the present appellants in the said vehicle. However, he stated that in the van driven by Shaji, there were three other persons, but he did not know them at all. In court, he deposed that he does not know the accused also. PW51 is the Salesman of the very same petrol bunk and his evidence is, in no way different from that of PW50. The evidence of PWs 52 and 53 has no much significance. The evidence of PW54 has got some relevance. He runs a shop at Bombay. His family is also settled in Bombay. He deposed that he knew the accused persons i.e., the appellants herein. They had come to his shop in Bombay and enquired about a person named Madhu. They specified that they were on the look out of Madhu, who deals in passports. They wanted to have their passports made. PW54 would say that at that time, another person, named Sunil was also in his shop and he talked to the accused persons. The accused gave their names as Santhosh and Deepak. He states that Sunil took them to Highway Lodge and told them to take a room there. Later on, they came to him again and asked him to take them to another lodge as they had no money to pay a daily rent of Rs. 300-350/-. So, he found out another place for them. He says that later on a few occasions, he had gone to the hotel and had occasion to see the persons there. He identified the persons before court also. PW55 is a person, who runs a mess at New Varaval in Bombay. He deposed that PW54 had brought them to his mess and requested that they may be provided with lodging. This witness would say that he provides lodging and food for Rs. 2000/- per month. He would depose that the accused persons resided there for about 3-4 months. Later on, he came to know from the newspapers that they were accused in a murder case. A few days thereafter, Police had come to his mess. The Police had brought the photos of the accused with them. He identified them and told them that they had stayed in his mess for some time. He identified the accused before court also.

18. PW56 deposed that the second appellant is familiar to him. He says that he had sold a portion of his property to one Sekharan. The son of Sekharan, namely Saji had put up a building in the said property and in

that building, the second accused came with Saji and stayed there for 2-3 days. Later, when he met Saji, he told him that he was involved in a case.

19. The next witness is PW57, who, at the relevant time, was a Cashier at Mithila Bar at Eramalloor. He deposed that the accused were familiar to him, but denied that they used to come to the bar. He also deposed that he could not say whether they had come to the bar in the night at about 10 pm., on 15.02.2005. However, he stated that the Police had brought them to the Bar for taking evidence and it was then only that he was seeing them for the first time.

20. PW58 was employed as a Cashier in the fast food shop near Mithila Bar. He came to know about the accused for the first time, when they were brought by the police to his food shop. He could not remember whether they had taken food from his shop on 15.02.2005 in the night. Apart from saying that, he added that he had no familiarity with the accused at all. PW59 is a casual labourer. His deposition says that an year ago, on a particular day at about 4 pm, he had occasion to see the first appellant being brought by the Police to 'Envees Bar'. He denied that he had any familiarity with the appellants. PW60 is the brother of the first appellant. He, however, stated that the second appellant was not familiar to him. He would say that he had not been involved in any case, but the Police had forcibly taken him to the Police Station. He was told that his brother was involved in a murder case and wanted him to disclose the whereabouts of his brother. He denied of having any knowledge about the same. His evidence shows that his brother Priyan does business in building materials. He denied that his brother was engaged in the business of selling onions. PW61 is the father of the second appellant. He deposed that the Police had come in search of his son, to his house. They told him that he was involved in the Praveen murder case. A short while thereafter, his son left the place and he returned only after one year.

21. PWs62 to 67 are Police Officers. Their evidence is to the effect that the appellants, after the incident, had gone into hiding and they went to various places in search of them. They would say that in spite of their best efforts, they could not find them. PW68 is the Investigating Officer. He speaks about the various recoveries made by him on the basis of the confession statements stated to have been made by the first accused in the Praveen Murder case, namely, Shaji. He also speaks about the various steps taken by him during the investigation of the case. On 19.01.2006, the appellants herein surrendered before the CI of Police, Thripunithura. This witness says that he had them arrested. He also speaks about the confession statements said to have been given by the appellants in this case and the places he had gone on the relevant dates. These are the evidence in this case.

22. The court below came to the conclusion that the evidence of PWs 2 and 10 show the involvement of the appellants in this case and the fact that the accused were found absconding, are clinching circumstances against them. Based on these items of evidence, the court below came to the conclusion that the Prosecution has succeeded in establishing the case against the appellants. Accordingly, they were convicted for the offences punishable under Sections 302, 201 and 417, read with Section 34 IPC and they were awarded the capital punishment.

23. It is extremely difficult to uphold the finding of the court below. The evidence of PWs 2 and 10 have already been referred to. It may be recalled that PW10 is the owner of the thattukada, which is run, opposite to Arcadia Hotel, of which PW2 was the employee. Their evidence is to the effect that late Praveen and the second accused in the crime, namely, Vinu had come to their shop and had food from there on 15.2.2005 at about 8.30 pm. They also stated that later, on the very same day at about 11.30 pm., they happened to see the first accused in the crime, namely Shaji, coming in a Maruti van and halting near Arcadia Hotel. They saw the first accused getting out of the van and moving towards K.S.R.T.C. Bus Stand, Kottayam. They also deposed that at that time, three persons got out of the van and took black coffee from their shop. Their evidence in court did not show that they have identified the appellants herein as two of the persons among the three, who had come to take black coffee from their shop on 15.02.2005. In fact, they stated that the appellants are total strangers to them. The court below found that since five persons were involved in the

incident and two of them have already been identified and found guilty, the two appellants must be the two among the three persons left. The basis for reaching such a conclusion is not discernible either from the evidence or the judgment of the Court below. PWs 2 and 10 have not identified the appellants as persons, who had come in the Maruti van driven by the first appellant in the case on 15.02.2005 and that the two appellants among the three are those who had black coffee from their shop. The other clinching item of evidence, according to the Court below, was the fact that the appellants were found absconding, soon after the incident. It must at once be noticed that though the Prosecution has a case that several Police Constables and officers were deputed to locate the whereabouts of the appellants, the Prosecution had not produced any records to show that any of those officers had reported the appellants to be absconding. However, there is evidence to show that those two persons were in Bombay for a brief period. But the question is whether that by itself, is sufficient to fasten the liability on them. The only circumstance, therefore, is that they had been absconding for some time. The question which arises, therefore, for consideration, is whether the mere absconding by itself, is sufficient to implicate them.

24. In the decision reported in Matru v. State of U.P. AIR 1971 SC 1050 it was held as follows:

The appellant's conduct in absconding was also relied upon. Now, mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest, when wrongly suspected of a grave crime : such is the instinct of sell-preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally, the Courts are disinclined to attach much importance to the act of absconding, treat it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused. In the present case, the appellant was with Ram Chandra till the F.I.R. was lodged. If thereafter, he felt that he was being wrongly suspected and he tried to keep out of the way, we do not think this circumstance can be considered to be necessarily evidence of a guilty mind attempting to evade justice. It is not inconsistent with his innocence.

25. In the decision reported in Subramanian v. State of Kerala 2004(2) Kar LJ 997 it was held as follows:

It is true that the flight of the accused from justice after the occurrence is a relevant circumstance involving the conduct of the accused. But, conclusion of guilty mind cannot be drawn from the circumstances alone. Mere absconding itself does not necessarily lead to a firm conclusion of guilty mind. It is not a determining link in circumstantial evidence. But, that act is a relevant piece of evidence to be considered along with other evidence and its evidential value will depend upon the circumstance of the case.

It has been observed that the flight of the accused from justice after the occurrence is a relevant circumstance, involving the conduct of the accused, but, the conclusion of guilty mind cannot be drawn from that circumstance alone. Merely because the so called accused had absconded, it does not lead to an irresistible conclusion that he was responsible for the crime. It may be a determining link in the chain of events, but, that solitary item of evidence, even if proved, by itself, cannot be treated as a substantive evidence to fasten the liability on the person concerned.

26. In the light of the evidence available on record, we asked the learned Public Prosecutor appearing for the State to enlighten us as to how he justifies the findings of the court below. But, in spite of his best efforts, the learned Public Prosecutor was unable to substantiate the findings of the court below. Except the possible weak evidence, i.e., the absconding of the appellants, there is nothing in the evidence against the appellants. The evidence of PW68 Investigating Officer, who speaks about the various recoveries made, is of no consequence. Most of the recoveries were made on the basis of the confession statement said to be given by the first accused in the case, namely Shaji. Therefore, the subsequent act of finding the place cannot be said to be said to be a recovery on the basis of the statements alleged to have been given by the appellants and coming within the ambit of Section 27 of the Evidence Act. We are, therefore, unable to uphold the finding of

the court below. We find that there is absolutely no evidence against the appellants to show that they had any role to play in the incident, which resulted in the death of Praveen.

27. In the light of the above finding, automatically, acquittal has to follow and the question of confirmation of the sentence of death does not arise, but we feel it necessary to consider if the acts were proved and it was found that the appellant had significant role to play in the incident, which resulted in the death of Praveen, then, is it appropriate to impose the capital punishment ?

28. The law as regards awarding of capital punishment, has undergone considerable changes. Several theories of punishment and sentences have been propounded. Before the amendment of the Criminal Procedure Code in 1973, the accepted norm was that if an offence was punishable with death or life imprisonment, death was the immediate choice and life imprisonment was an exception. In such cases, reasons had to be given as to why the sentence of life imprisonment was awarded. After the amendment in 1973, the situation changed and it became just the converse, i.e., life imprisonment is the rule and capital punishment is an exception. Still, a lot of confusions arose, regarding the cases in which capital punishment could be awarded. After much deliberations and debates, 'the rarest of rare cases' theory was evolved.

29. In the meanwhile, the crime scenario has changed considerably more so, in the recent times. Organised crimes are of recent origin. Mercenaries find such crimes to be lucratives and they are also on the increase. They have made butchering, slaughtering, dismembering, murdering etc., their profession and a convenient means of earning income. Crimes committed by them have gone up considerably. The ordinary law was found to be inadequate to put a check on their activities. Many persons took recourse to anti social activities, endangering the life and property, which cause a threat to the Society and severely affect the maintenance of public order, creating an atmosphere of fear and horror. The kinds of crimes have also been increased. Ordinary law available namely, the Indian Penal Code and the Criminal Procedure Code, which was once found to be sufficient to protect the property and person and to maintain law and order, was soon found to be inadequate and insufficient. The application of those laws has not been able to prevent the commissions of crimes and anti social activities. So, it became necessary to take steps to enact laws to meet the challenges. The Kerala Anti Social Activities (prevention) Act, was thus enacted,as the Indian Penal Code and Criminal Procedure Code dealt with only acts, after the commission of a particular act though there is a stray preventive measure. Increase in the number of crimes became alarming that the Legislature felt it absolutely necessary to enact a preventive law and that resulted in the enactment of the Act mentioned above.

30. The sentences to be awarded, have been the subject matter of considerable debate for a long time. It could be seen that a lot of discussions have been made within and outside the court in the matter of sentences and several theories were propounded. There is usually, wide disparity in the matter of awarding sentences. In fact, a reading of the provisions of IPC relating to murder and culpable homicide, not amounting to murder would show the circumstances, under which the law looks at an act by an offender, to ascertain whether it is a murder or culpable homicide, not amounting to murder. The question relating to the award of capital punishment was considered in detail, in the following decisions :

Jagmohan Singh v. State of U.P. : (1973) 1 SCC 20; Bachan Singh v. State of Punjab : AIR 1980 SC 898; Machhi Singh v. State of Punjab : 1983 (3) SCC 470; Subhash Ramkumar Bind v. State of Maharashtra : 2003(1) SCC 506; Allauddin Mian v. State of Bihar : AIR 1989 SC 1456; Swamy Sraddananda (2) v. State of Karnataka 2008 (13) SCC 767 & Santosh Kumar Satish Bhushan Bariyar v. State of Maharashtra : 2009 (6) SCC 498 The decision reported in Jagmohan Singh v. State of U.P. (supra) was rendered, prior to the amendment of the Cr.P.C. and the other decisions, subsequent to the amendment. The principle of 'rarest of rare cases and the aggravating and mitigating circumstances', was first enunciated in Bachan Singh v. State of Punjab (supra) wherein the criteria for determining such cases, where capital punishment is justified, was also declared and the said principle holds the field even now, though a slight deviation appears to have been taken in the decision reported in the decision in Santosh Kumar Satish Bhushan Bariyar : (2009(6) SCC 498). The aggravating and mitigating circumstances were categorised in the decision in Bachan Singh's case, as follows:

Aggravating circumstances : A court may, however, in the following cases, impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality ; or

(b) if the murder involves exceptional depravity ; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed -

(i) while such member or public servant was on duty ; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder, he was such member or public servant, as the case may be, or had ceased to be such member or public servant ; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.

Mitigating circumstances :- In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

(5) That in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

These are not intended to be exhaustive. Apart from considering the above aspects, the question as to the constitutional validity of capital punishment was also considered in Bachan Singh's case (supra).

31. In Machhi Singh v. State of Punjab (supra), the examples of aggravating circumstances have been adumbrated in the following manner:

32. The reasons why the community as a whole does not endorse the humanistic approach reflected in 'death sentence-in-no-case' doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of 'reverence for life' principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent of those who have no scruples in killing others, if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude

by 'killing' a member of the community, which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation, the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so 'in rarest of rare cases' when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I. Manner of commission of murder

33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

(i) When the house of the victim is set aflame with the end in view to roast him alive in the house.

(ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(iii) When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for commission of murder

34. When the murder is committed for a motive which evinces total depravity and meanness. For instance, when (a) a hired assassin commits murder for the sake of money or reward (b) a cold- blooded murder is committed with a deliberate design in order to inherit property or to gain control over a property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position or trust, or (c) a murder is committed in the course for betrayal of the motherland. III. Anti-social or socially abhorrent nature of the crimes

35. (a) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance, when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(b) In cases of 'bride burning' and what are known as 'dowry deaths or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. Magnitude of crime

36. When the crime is enormous in proportion. For instance, when multiple murders, say, of all or almost all the members of a family or a large number of persons of a particular caste, community or locality, are committed. v. Personality of the victim of murder

37. When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons. We notice from the decision quoted above that the murder committed by a hired assassin for money or reward is treated as an aggravating circumstance. After referring to the above said decision, the Apex Court in Swamy Sraddananda(2) v. State of Karnataka (supra), held as follows:43. In Machhi Singh v. State of Punjab : (1983) 3 SCC 470 the Court crafted the categories of murder in which 'the community' should demand death sentence for the offender with great care and thoughtfulness. But, the judgment in Machhi Singh (supra) was

rendered on 20.07.1983, nearly twenty-five years ago, that is to say, a full generation earlier. A careful reading of the Machhi Singh categories will make it clear that the classification was made, looking at murder mainly as an act of maladjusted individual criminal(s). In 1983, the country was relatively free from organised and professional crime. Abduction for ransom and gang rape and murders committed in the course of those offences were yet to become a menace for the society, compelling the legislature to create special slots for those offences in the Penal Code. At the time of Machhi Singh, Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were no mafia, cornering huge Government contracts purely by muscle power. There were no reports of killings of social activists and 'whistle-blowers'. There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made today. Relying upon the observations in Bachan Singh v. State of Punjab : (1980) 2 SCC 684 therefore, we respectfully wish to say that even though the categories framed in Machhi Singh's case (supra) provide very useful guidelines, nonetheless those cannot be taken as inflexible, absolute or immutable. Further, even in those categories, there would be scope for flexibility as observed in Bachan Singh's case (supra) itself.

32. Coming to the facts of the case on hand, it can be found that a gruesome murder was committed and the body of the victim was mutilated. The king-pin, behind the incident was A1 in the case, who is a Police Officer and three of the persons, including the appellants herein, were hired assassins. It was a well planned pre-determined act. It can be seen from the records that they have made murder and amputation, a means to earn income. If, as a matter of fact, the Prosecution was able to establish that the accused were involved in the incident, the sentence that should be awarded would be nothing less than capital punishment, going by the law laid down by the Apex Court in Bachan Singh's case (supra). In fact, in such cases, the Court should seriously consider whether imposing a sentence, which is less than capital punishment, will be justified or not. The same should be the approach in the case of other offences also. The maximum sentence provided under law should be imposed on hired goondas. The Legislature has provided the maximum penalty for all offences, with the intention that it should be imposed in some cases. Maiming and killing are the avocations of hired muscle- men. Wages of sin in their case should be paid in the form of maximum penalty provided under law. The sentences in such cases must send a clear message to the public that such acts would not be tolerated. Such persons deserve no sympathy or leniency at the hands of the Court as they are always a threat and potential danger to the Society. The Society needs to feel safe and for that, the Courts should adopt such steps as are necessary. However, in the case on hand, we are constrained to set aside the conviction and sentence passed by the court below and acquit the appellants against the charges levelled against them. The appellants herein, who are accused Nos. 1 and 2 in SC No. 120/06 before the Additional Sessions Judge Fast Track Court (Ad hoc)-II, Kottayam, shall be released forthwith, if their presence is not required in connection with any other case.

The Criminal Appeal is allowed as above. The D.S.R. is accordingly closed.