Acharaparambath Pradeepan & Anr. Ã ... vs State Of Kerala Ã Respondents on 15 December, 2006

Author: S.B. Sinha

Bench: S.B. Sinha, Markandey Katju

CASE NO.:
Appeal (crl.) 1278-1279 of 2005

PETITIONER:
Acharaparambath Pradeepan & Anr. Appellants

RESPONDENT:
State of Kerala Respondents

DATE OF JUDGMENT: 15/12/2006

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:

J U D G M E N T WITH CRIMINAL APPEAL NOS. 1280-1281 OF 2005 S.B. SINHA, J :

A ghastly murder in Mokeri East U.P. School, Paramel, Kannur Distt., Kerala took place on 1.12.1999 at about 10.40 a.m. K.P. Jayakrishnan Master (deceased) was a teacher in the said school. He was the class teacher of class VI B. The school did not have a proper building. It was a semi- permanent shed. Whereas two sides of it had pucca walls with a height of about seven feet, the western and eastern walls were having kutcha ones. It had three classrooms, viz., for students of classes VA, VI B and VII B. In the northern room, class VIIB was to be held whereas class VIB was situate in the middle room and to its south was the class room of VA. On its eastern side, there was only 70 cm. wall having about 2 feet height. Another building was separated by 2.5 metres wide pathway. Classes VIB and VA were separated only by a screen.

The deceased was the State Vice President of Bhartiya Yuva Morcha. Appellants were members of the Communist Party of India (Marxist Group). Political enmity between the two parties is not in dispute. There had been a threatening to the life of the deceased. He had been provided with personal security. At the time of incidence, the body guard of the deceased was sitting at the gate of the school. He was overpowered by pouring some poisonous liquids in his eyes and mouth and his service pistol was taken away to prevent any possible obstruction that he may cause. He was, thus, made immobile.

There was a house by the side of the said school building belonging to a teacher named Prabhavathy.

While the deceased was teaching in class VIB, the accused persons entered the class. Accused No. 2 Sundaran (A2), Accused No. 3 Shaji (A3) and Accused No. 6 K.K. Anil Kumar (A6) entered from the eastern side of the building whereas Accused No. 1 Pradeepan (A1), Accused No. 4 Dineesh Babu (A4) and Accused No. 7 Sajeevan (A7) entered from the western side of the building. On receiving signal from A2 from the eastern side, A1 and A4 assaulted the deceased with iron rod on the back of his head. He cried 'Oh Mother' and then ran for safety. A1 chased him inside the classroom. He was inflicted with further blows with iron rods several times on different parts of his head. A4 also attacked him with deadly weapons like iron rod, large chopping knife, axe, etc. A7 also chased him and inflicted injuries. The deceased made a futile attempt to escape, ran towards the south-eastern corner of the classroom near the blackboard. At that time, A2, A3 and A6 came from the eastern side of the classroom, trespassed thereinto and attacked the deceased. He suffered as many as 44 injuries on his person. The assailants thereafter wrote a warning on the blackboard of Class VA threatening the witnesses with dire consequences in case anybody dares to depose against them. The prosecution case furthermore is that Accused No. 5 Rajan (A5) had taken his possession in an adjoining compound near the classroom in question with a view to scare away any possible intruders.

The Circle Inspector (PW29) of the police station received an anonymous telephone call about the incident. He came to the school. The class teacher of Class VA Vijayan Master (PW1) was thereafter taken to the police station. He lodged a First Information Report at about 11.15 a.m. The First Information Report was recorded by PW28. Initial investigation was conducted by PW29. The investigation was slow because of political pressure. A special investigation group thereafter was constituted. It was taken over by a Deputy Superintendent of Police (PW30).

The prosecution case, therefore, is that a criminal conspiracy was hatched by the accused to do away with the deceased wherefor they formed themselves into members of an unlawful assembly with the common object of committing his murder.

In the First Information Report, nobody was named. PW1, however, turned hostile. The main eye-witnesses who were examined on behalf of prosecution are child witnesses. Dinoop (PW3) aged about seven years was a student of Class VIB. Punya (PW4), a girl of the same age was studying in the same class. Shinoop (PW5) aged about ten years was then in Class VA whereas Ramisha (PW6) aged about eleven years was again a student of Class VIB. K.M. Ashithosh (PW7) and A. Rajeevan (PW8) allegedly saw the accused persons running away from the place of occurrence.

PW7 was a resident of Valangode near Cheruvancheri. He and PW8 allegedly had gone to Koorara in the vicinity of the school to invite players from the Koorara Sporting Fighters Club. As they could not meet anyone, they had been returning home in an autorickshaw. They noticed the accused persons armed with weapons which were blood stained.

PW7 was a sympathizer of the Bharatiya Janata Party. PW8 was a supporter of the Congress Party. They reached home on 1.12.1999 and came to learn that the deceased had been murdered in the classroom. The statements of PWs 7 and 8 were recorded on 5.03.2000. Statements of the witnesses were recorded some time between 4.01.2000 to 6.01.2000. Appellant No. 1 (A1) was arrested, on the basis of the statements made by the eye-witnesses on 25.01.2000 and after the statements of PWs 7 and 8 were recorded, other accused persons were arrested on 6.03.2000.

Test Identification Parade in respect of A1 was held on 8.02.2000. The said Test Identification Parade was conducted by a Judicial Magistrate (PW24). There were three rounds of Test Identification Parade. PWs 3, 4 and 5 participated therein. PWs 6 to 8 did not take part in the said Test Identification Parade. A1 was identified by PW5. PWs 3 and 4, however, although could not identify A1 in the Test Identification Parade, he was identified at the trial. According to them, he was having beard but as he was put in the Test Identification Parade as a clean shaved person, he could not be identified.

Another test identification parade was held on 4.04.2000 in respect of other six accused persons which was also conducted by PW24. 36 non- suspects were placed in the said Test Identification Parade. In was conducted in his court room. PW3 identified A2 and A6 in the first round and identified only A2 in the second and third round. PW4 only identified A6 in the second round. PW5 identified A6 in the first round, A2, A4 and A6 in the second round and A4 and A6 in the third round whereas PW6 identified A4 in the first and second rounds and did not identify any of the assailants in the third round. PW7 identified A2, A3 and A5 in all the three rounds whereas PW8 identified A2, A3, A4, A5 and A7 in all the three rounds.

In Court, however, PW3 and PW5 identified A1 to A4, A6 and A7. PW4 identified A1 and A5 whereas PW6 identified A1, A4 and A5. PW7 identified A1 to A5 whereas PW8 identified A2 and A4 to A6.

A chargesheet was filed under Sections 143, 147, 148, 120B, 343, 449, 302, 332, 328, 394, 397, 398 and 506(i) read with Section 149 of the Indian Penal Code. Thirty witnesses were examined by the prosecution to prove its case. Some defence witnesses were also examined. DW2 has also been relied by the High Court. During trial, A7 died. As against A1 Pradeepan, the prosecution case was said to be that on receiving signal from A2, he had hit the deceased with an iron rod thereby causing injury on the back of his head. He chased him inside the classroom and assaulted him repeatedly with his iron road on different parts of his body. All the child witnesses had seen him attacking with iron rod. He was identified by all the child witnesses in court. Whereas, the eye-witnesses saw him assaulting the deceased repeatedly, PWs 7 and 8 saw him leaving the scene after the occurrence along with A2

and A3. As noticed hereinbefore, he was identified, even in the first Test Identification Parade by PW5.

So far as A2 Sundaran is concerned, the prosecution case against him was that along with A3 and A6, he had hidden himself behind the parapet wall on the eastern side of the classroom and he had given signal whereupon only A1 entered the classroom and started attacking the deceased. A2 subsequently chased him inside the classroom and attacked with deadly weapons. He was also seen by PWs 7 and 8 leaving the scene after commission of the crime. PWs 3 and 5 are eye-witnesses to the role of A2.

So far as A3 Shaji is concerned, he along with A2 was said to have chased the deceased inside the classroom and inflicted lethal injuries with deadly weapons. PWs 3 and 5 are eye-witnesses as having been inflicting fatal injuries on the person of the deceased. He was also seen after the commission of the crime by PWs 7 and 8. He had been identified in the Test Identification Parade by PWs 7 and 8, as noticed hereinbefore. PW8, however, did not identify him in court.

A4 Dinesh was said to have entered into the classroom along with A6 and A1 and attacked the deceased with deadly weapon along with other accused. He was seen carrying sword and attacking the deceased by PWs 3, 5 and 6. He was also said to have been seen by PW8.

A5 Rajan was acquitted.

A6 Anil Kumar was seen along with A2 and others. He also chased the deceased inside the classroom. He was seen attacking the deceased by PWs 3 and 5. He was identified in the Test Identification Parade by PWs 3, 4 and 5. He was also identified by PW8 in court.

A7 Sajeevan died and as such it is not necessary for us to notice the alleged role played by him.

We may briefly notice the findings of the learned Trial Judge, which are :

> 1. The child witnesses could not have been in a position to identify the accused as had been a very traumatic experience for them. In this regard the trial court relied on the testimony of PW19, an author of a book on Psychiatry who stated that the reaction to a traumatic incident may vary from child to child. Trial Court held that the mind of a child would be very clear and they would have no animosity to implicate an innocent man and hence their evidence can be relied upon.
>
> 2. PW3 identified A1, A3, A6, A4 and A7 in court and hence the trial court held that "evidence of PW3 brings out the fact that he knows miscreants by sight. PW4 was able to identify only A1 and A5. Trial Court relying on the earlier testimony of the expert pointing out the varied reaction to a traumatic event held that PW4 may have reacted differently and not seen all the assailants.

3. PW5 also identified A1, A2,A3,A4,A6 and A7. PW6 identified A1, A4 and A5. Hence on the testimonies of the above child witnesses, the trial court held that their reaction to the event was not entirely identical but only natural and hence it cannot be said that they were tutored as, if that were to be so, they would have all identified the accused.

4. As regards the alleged infirmities in holding of the identification parade, the trial court noted that two sets of identification parades were conducted. One only with one suspect namely A1 and the second with A2 to A7. The Trial Court noted that three chances were given during the parade and inspite of that only PW5 was able to identify A1 and PW3 and PW6 were unable to do so. Trial Court however opined that no precaution was taken by the investigating officer, to ensure that the accused were not seen prior to the parade. Trial Court furthermore observed that the investigating officer (PW30) had known "the illegal consequence of his act and had deliberately given aid to suit the defence" and that he had done it so as to help the accused and to spoil the legal validity of the identification parade.

5. The Trial Court also faulted the conduct of the investigating officer, stating that investigation commenced only on 8-12-99 i.e. 7 days after the murder and the court noted that the reason for this delay remained unexplained.

6. The Trial Court also accepted that there was an inordinate delay in questioning and examining the witnesses, and that there were material contradictions vis-a-vis exhibits D1-D18 but it was observed that "the grounds of defence have to be appreciated in a court of law only when the investigation was done with utmost fairness" and the Court yet again noted that subsequent conduct of investigating officer was only to aid the defence and this explained the reason for delay in arresting the accused, delaying in conducting the identification parade." but nevertheless the Court found the testimony of "witnesses to be natural, trustworthy and inspired confidence."

7. As regards the testimony of chance witnesses, PW7 and PW8, who had seen the accused persons after the incident having weapons, the trial court held that, there is no hard and fast rule that chance witnesses should be disbelieved and since the testimonies of PWs 3,4,5,6 "were sufficient to disclose the complicity of the accused persons, the evidence of PWs 7&8 is not so material."

8. As regards the conduct of the investigating officer vis-a-vis the infirmities in the investigation, the trial court stated that the same would not mean that the prosecution should be thrown out stating "The SC has given guidance in such a situation and the court has to accept the trustworthy and reliable evidence given by the eye-

witnesses before the court in respect of the occurrence, if it inspires confidence of the Court."

9. As regards the testimony of the DW1, it was found to be unreliable and "not sufficient to create a doubt about the complicity". As regards testimony of eye-witness DW2, it was noticed that she herself had deposed to the effect that she had not "seen the incident and was studying at that time" and hence came to the conclusion that "such a witness cannot be believed." The Trial Court also said that she attended counseling sessions conducted by the supporters of the Marxist party and hence said that her testimony was untrustworthy."

10. The trial court also took note of the fact that the investigating officer had not recovered any of the weapons used by the assailants, and it was the other police officers had suo-motu recovered some weapons without the knowledge of the investigating officer despite the fact that PWs 3, 4, 6 had stated that they had seen the iron rod used to murder the deceased.

11. The Trial Court came to the conclusion that A1-A4, A6 and A7 had shared a common object and were members of an unlawful assembly. However, it found A5 not to be connected with the offence.

By reason of his judgment and conviction and sentence dated 26.08.2003, the learned Sessions Judge found Accused Nos. 1,2,3,4 and 6 guilty of offences under Sections 143, 147, 148, 342, 449, 302 read with Section 149 of the Indian Penal Code and all of them were sentenced to death and all sentences were directed to run consecutively.

The High Court, however, while agreeing with the findings of the Trial Judge opined, that its criticism on holding of the Test Identification Parades being not based on any material was not justified. It was furthermore observed that even criticism in regard to holding of the Test Identification Parade by the learned Sessions Judge was also not proper. It furthermore opined that there was no basis for the learned Sessions Judge's finding that the investigating officer had intermeddled with holding of the Test Identification Parade. The High Court opined that all requisite precautions had been taken by PW24 and that in the second Test Identification Parade, he himself selected persons. The learned Judges of the High Court, in this behalf, noticed the letters issued by PW24 to the Superintendent of Central Prison and observed that the same shows that the direction was given to the said authority and not to the investigating officer (PW30).

The High Court furthermore noticed that A1 in his statement under Section 313 of the Code of Criminal Procedure admitted that when he had entered the court room of PW24, his entire body was covered. It was also found that PW24 took all precautions to see that no exposure took place of the accused persons and in fact 16 non-suspects having similar age and features were mixed and all police officers were sent out.

As regards, the second identification parade, the High Court opined that nothing had been brought on records to show that PW24 at any point of time violated any norms for holding the Test Identification Parade and PW30 had no role to play therein whatsoever.

Appeals preferred before the High Court by the appellants have been dismissed, but all sentences were directed to run concurrently.

Mr. Mahesh Jethmalani, learned senior counsel appearing on behalf of the appellants has principally raised the following contentions:

(i) The statements of the eye-witnesses being child witnesses, their statements should have been considered with due caution. There being no corroboration and no closer scrutiny, no reliance thereupon could be placed on their testimonies.

(ii) The appellants having not been identified by all the witnesses in the test identification parade and keeping in view the fact that one was held on 8.02.2000 and the other on 04.04.2000, i.e., after undue delay, the same should not be relied upon.

(iii) PWs 7 and 8 were chance witnesses and keeping in view the unnatural nature of their evidences, the same should not have been relied upon particularly when they made their statements for the first time on 5.03.2000 and no explanation was offered as to why they had not made their statements at an early date.

(iv) PW1 who was also a class teacher, had only seen three assailants and, thus, the prosecution story that seven persons took part in the assault should not be believed.

(v) PWs 3, 4 and 6 having not identified even A1 in the Test Identification Parade and having identified him only in court, they must be held to have been tutored.

(vi) No reliance could have been placed on the identification of the accused by the child witnesses as : PW3 although identified A2, A3 and A6, but failed to identify them two times out of three rounds of identification. Similarly, PW4 also did not identify A1.

She identified only A5 who has been acquitted. Even she did not identify A1 even in the first Test Identification Parade. She also did not name the accused in her statement before the police. Similarly, PW6 could not identify A3, A4 and A6 in the Test Identification Parade.

(vii) The testimonies of PWs 7 and 8 should not be believed as they were chance witnesses. They being residents of a distant village, their presence was suspicious; they have given different versions in regard to the purpose of their visits. The purported identification made by them from a moving autorickshaw raises grave suspicion about its authenticity. It was unnatural that PW7 would see blood stained weapons but would not describe the nature of weapons they were carrying. Although PW7 was convinced that the appellants have committed the murder of the deceased, he did not go to the police, or inform any of the person which was unnatural. Even when he had gone to the house of Jaykrishnan Master where police officers were present, he did not give any information, which appears to be wholly unnatural. His political rivalry with the accused being known, the chances of the appellants having been falsely implicated by him cannot be ruled out.

Mr. J.C. Gupta, learned senior counsel appearing on behalf of State of Kerala, on the other hand, would support the impugned judgments contending:

> (i) Incident had occurred inside the classroom and the child witnesses being students, they could see the occurrence as also the role played by the accused persons.
>
> (ii) Having regard to the fact that as many as 44 injuries were inflicted on the deceased, the occurrence must have taken some time and as such they had enough time to identify the accused.
>
> (iii) Even if no Test Identification Parade had been held, identification of the accused in court being substantive evidence, there is no reason to discard the same particularly when the children had no animus against the appellants nor did they have any affinity to the deceased.
>
> (iv) The appellants having threatened the witnesses with dire consequences that in case anybody dares to depose against them, the stand taken by the children being really courageous, has justly been believed by the courts below.
>
> (v) When six persons were assaulting the deceased, it cannot be said to be a case where a child witnesses had only a fleeting glimpse of the accused. All of them had not run away. Some did, some did not. As reaction to the same incident would vary from person to person; it cannot be expected that each would react in a similar fashion.
>
> (vi) If the evidences of the child witnesses are natural and probable, they cannot be disbelieved. Corroboration of the statements made by a child witness may be by way of oral evidence or may be by way of circumstantial evidence.

Mr. Yashank Adhyaru, learned senior counsel appearing on behalf of the interveners would submit that all the eye-witnesses spoke about the particular manner in which the occurrence took place and even if they were tutored, they could not have depicted the occurrence in the manner in which they did. It was pointed out that even they could not be shaken in the cross- examinations.

Before adverting to the rival contentions of the parties, as noticed hereinbefore, we may take note of some special features of the case.

There were about 40 students in the school. Out of them, four students deposed in the court. PW1, who was the class teacher of class VA, was the first informant. Even he turned hostile. PW9 who was the bodyguard could not identify the assailants, as some poisonous substance was thrown on his face and eyes. All the eye-witnesses were traumatized. They could not go back to the classroom and for that matter to the school. Some of them lost their valuable time in getting admission in another school or to settle themselves. Investigation for whatever reason had not been conducted properly.

The slipshod manner in which the investigation was carried out is amply borne out from the records. Despite the fact that a teacher in the classroom before the students of tender age had brutally been murdered and PW29, who reached the place of occurrence soon thereafter, does not appear to have shown a very keen interest in the matter. He although conducted the inquest and prepared a mahazar but did not even note down whether a warning was written on the classroom of class VA despite the fact that the number of witnesses deposed to that effect. Same is the conduct of PW28 who also did not say as to whether there had been any writing on the blackboard in any of the classroom. PWs 3, 4 and 6 categorically stated that the deceased was teaching them mathematics and they had been asked to solve some problems. Some writings, thus, were there on the blackboard but photographs did not show the same. Even no attempt was made by PW29 to trace out the accused immediately.

He merely sent PW1 to his jeep to the police station for the prpose of registration of the FIR and waited outside the school. There had been a public protest. Curfew had also to be imposed resulting in constitution of a special investigating team. PW30 took over the investigation of the case only on 8.12.1999. By that time, much evidence must have been lost. Witnesses were examined in between 4.01.2000 and 6.01.2000. A large number of witnesses might have been questioned but then why the witnesses had to be examined till 22.08.2000 betrays our comprehension. At least the teachers, students and the persons having land and residential houses near the school could have been examined promptly. Their statements could have resulted in apprehension of accused. At least more evidences could have been found out.

We although appreciate that in a case of this nature the witnesses must gather courage over a period of time to come out with their part of story but we are not very sure that the same standard should be applied to PWs 7 and

8. They were members of a political party. PW7 was a sympathizer of the Bharatiya Janata Party. He came to learn about the incident on the same day at about noon. He even went to the house of the deceased. Police officers were present there. He must have talked to others that the accused persons committed the murder but still he had not opened his mouth.

He went to the village Koorara to invite players for playing kabbadi. He did not meet anyone. On his way back, he took an autorickshaw because he did not get a bus. He saw the accused with blood stained weapons in their hands. In his cross-examination, he stated that he was not aware as to what had happened in the school, but in his examination-in-chief, he had categorically stated that on reaching home, he received the information that the deceased was murdered in the classroom by cutting and stabbing. We, therefore, do not intend to place any reliance on his testimony. The learned trial judge, as noticed hereinbefore, also did not place any reliance on his testimony. Almost for the similar reasons, PW8 cannot be believed.

Some caution is also required to be exercised in case of chance witnesses. It requires a close scrutiny of the evidence of a chance witness.

In Harjinder Singh Alias Bhola v. State of Punjab [(2004) 11 SCC 253], it was stated:

> "The foregoing discussion leads us to conclude that the Trial Court and the High Court did not consider certain material aspects apparent from the evidence and there was almost a mechanical acceptance of the evidence of the two chance witnesses whose evidence should have been evaluated with greater care and caution. As pointed out by this Court in Satbir v. Surat Singh, a cautious and close scrutiny" of the evidence of chance witnesses should inform the approach of the Court. In these circumstances, this Court need not feel bound to accept the findings. The overall picture we get on a critical examination of the prosecution evidence is that PWs 3 & 4 were introduced as eye-witnesses only after the dead body was found."

Descriptions of a few persons were given in the statements of the child witnesses. Except A1, however, they were not arrested. The reason for their being not arrested had not been disclosed. They were arrested, as noticed hereinbefore, on 6.03.2000 only after their names were disclosed by PWs 7 and 8. Test Identification Parade of the accused persons, other than A1, was held on 4.04.2000. Why the Investigating Officer took such a long time for arranging a test identification parade has not been disclosed. Furthermore, A3 was not identified. A6 was present when the first Test Identification Parade was taken but he had not been identified by any of the witnesses.

We are not impressed with the purported explanation in regard to the holding of test identification parade. Identification of the said accused by the child witnesses, having regard to the facts and circumstances of the case lead us to a definite conclusion that they were the only persons who participated in the commission of the offence.

They are entitled to benefit of doubt. There had been great delay in conducting the Test Identification Parade. Undue delay has also occurred in recording the statements of PWs 7 and 8.

We, therefore, are of the opinion that it is a fit case where benefit of doubt should be given to the said appellants.

The case of A1, however, stands on a different footing. He was first to enter the classroom. He was carrying an iron rod in his hand. He was the first person who had given the first blow on the back of the deceased. The deceased cried out 'Oh mother'. All the witnesses testified to the said fact. Even if we are to discard the prosecution case that six persons had committed the crime, the role played by A1 was witnessed by all the four child witnesses. He was put to Test Identification Parade. He was having beard when the occurrence took place. When he was put to Test Identification Parade, he did not have any. Still he could be identified by PW5. Different rounds of identification had taken place.

Comment made by Mr. Jethmalani that how PW5 could identify A1 when he had been facing the southern wall of the shed in which three classes were situated, is, in our opinion, does not carry much weight. The two classrooms were separated only by a screen. There was a gap. The students would go to class VIB through the gap.

Attention of one student might have been drawn to the occurrence. He might have been looking towards the door; whereas others' attention might not be drawn to it. It is not in dispute that the

screen fell down after the accused persons entered with force in class VIB. A person who had seen the accused persons entering into the room and forcing their way to another classroom can notice them. There was no reason to disbelieve the witnesses that the assailants had entered Class VIB via Class VA. Why did they do so cannot be explained but why A1 entered on receiving signal from somebody's else cannot also be explained. Why an assailant had been seen to cause the first injury chasing the deceased, it would have certainly been possible for him to remember the face. PW5 had another occasion to look to the accused when he had tried to run away but fell down. He, thus, saw the accused again.

PW5 saw A1's photograph in a newspaper in connection with another function. He identified the accused and went to the police. He had seen him earlier also conversing with his class teacher outside the classroom. That may be one of the reasons why PW1 did not name the assailants although they were known to him and ultimately turned hostile.

PW5 certainly stated the same for the first time in court. But, it would be too much to expect of any person to say everything in his statement before the police. To see a person by face is one thing but to know him by his name is different. Some improvements in the testimony of a witness would not lead to rejection thereof in its entirety.

We will refer to the evidence of the other child witnesses a little later but we may notice the legal position operating in the field.

Section 118 of the Indian Evidence Act seeks to exclude evidence of those who may suffer from intellectual weaknesses. It reads as under:

> "Who may testify.- All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

In terms of the said provision, therefore, all persons shall be competent to testify unless by reason of tender years, the court considers that they are incapable of understanding the questions put to them and of giving rational answers. It is for the Judge to satisfy himself as regards fulfillment of the requirements of the said provision. The opinion of the learned Judge had been recorded and, thus, it satisfies the test laid down by this Court in Rameshwar S/o Kalyan Singh v. The State of Rajasthan [AIR 1952 SC 54].

It is not the case of the appellants that the court had failed to comply with the statutory obligations in this behalf. It is also not the case of the appellants that their testimonies otherwise should not have been accepted.

A child indisputably is competent to testify if he understands the question(s) put to him and gives rational answer thereto. None of the witnesses have been found to be suffering from any intellectual incapacity to understand the questions and give rational answers thereto.

In Ratansinh Dalsukhbai Nayak v. State of Gujarat [(2004) 1 SCC 64], this Court stated the law, thus:

> "6. Pivotal submission of the appellant is regarding acceptability of PW-11's evidence. Age of the witness during examination was taken to be about 10 years. Indian Evidence Act, 1872 (in short the 'Evidence Act') does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease- whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer J in Wheeler v. United States. The evidence of a child witness is not required to be rejected per se; but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon "

Indisputably, certain factors are required to be considered as regards reliability of the testimony of the child witnesses but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of child witnesses.

Some experts are of the opinion that if a ghastly crime is committed in presence of the child, the same is registered in his mind very effectively. It may be or may not be. But there may not be any dispute that what may be effectively registered in one's mind, may not be so registered in the mind of the others.

The question came up for consideration recently before this Court in Yuvaraj Ambar Mohite v. State of Maharashtra [2006 (10) SCALE 369] wherein it was stated:

> "PW-3 was a child witness. The learned Sessions Judge satisfied himself that he was capable of deposing before a court of law. He categorically stated that his father used to treat the deceased as his sister. He used to visit her house very often. He used to help her in purchase of mutton, milk, vegetables, etc. The deceased called him on that day for purchasing mutton. When he went to deliver the same, he saw Appellant. On his query, the name of Appellant was disclosed. He identified him as a person teaching Judo Karate in School No. 9. It may be true that he had not been able to identify Appellant in court because he was not having beard but he was identified when his photograph was shown to him. In his evidence, he categorically stated that not only his father, the deceased and Appellant had been taking liquor but he also disclosed that they were consuming whisky mixed with beer while taking meal. As he saw Appellant recoiling on the body of the deceased, he went to the balcony as he had become ashamed on seeing the same. He was given a sum of Rs. 100/- for getting a

> bottle of liquor. He brought it. He was asked again to get another bottle. He did so again. They consumed the same whereafter he was again asked to bring a third bottle which request was also complied with. He found the deceased adjusting the channel of TV and Appellant had been standing nearby with his hand around the neck of the deceased. He remembered also the title song of the serial which was being exhibited in the TV. He categorically stated that when he came back in the afternoon, he was not allowed to go inside by Appellant. PW-4 also came and she was also not allowed to go inside on the plea that the deceased was sleeping."

On the said premise the child witness was believed.

Strong reliance has been placed by Mr. Jethmalani on Panchhi and Others v. State of U.P. [(1998) 7 SCC 177] wherein this Court has laid down that the evidence of a child witness must find adequate corroboration before it is relied upon but then it was also stated therein that it was more a rule of practical wisdom than of law.

If some corroboration was necessary, PW5 was amply corroborated by PWs 3, 4 and 6. They might have not been able to identify A1 in the Test Identification Parade but the reasons stated by them cannot be wished away. A person may be identified with or without beard in different circumstances. The identification of A1 cannot be discarded as each one of them had sufficient time to see him particularly when as many as 44 injuries had been inflicted and a warning had been written on the blackboard. The deceased was evidently attacked by a large number of persons. It was therefore not a case of a fitting glimpse of the accused by the witnesses. Some of the witnesses ran but some of them did not. Sometime even identification in court is accepted even if no Test Identification Parade is held.

In Malkhansingh and Others v. State of M.P. [(2003) 5 SCC 746], a 3- Judge Bench of this Court held so stating:

> "It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine. In the instant case the courts below have concurrently found the evidence of the prosecutrix to be reliable and, therefore, there was no need for the corroboration of her evidence in court as she was found to be implicitly reliable. We find no error in the reasoning of the courts below. From the facts of the case it is quite apparent that the prosecutrix did not even know the appellants and did not make any effort to falsely implicate them by naming them at any stage. The crime was perpetrated in broad daylight. The prosecutrix had sufficient opportunity to observe the features of the appellants who raped her one after the other. Before the rape was committed, she was threatened and intimidated by the appellants. After the rape was committed, she was again threatened and intimidated by them. All this must have taken time. This is not a case where the

> identifying witness had only a fleeting glimpse of the appellants on a dark night. She also had a reason to remember their faces as they had committed a heinous offence and put her to shame. She had, therefore, abundant opportunity to notice their features. In fact on account of her traumatic and tragic experience, the faces of the appellants must have got imprinted in her memory, and there was no chance of her making a mistake about their identify "

PW5, therefore, had been corroborated by PWs 3, 4 and 6. PW3 was sitting in the second row when he saw three persons entering into the classroom. He saw the deceased running from one corner of the classroom to another. He was chased and overpowered by three of them and others joined thereafter. PW3 had been in classroom throughout. So were PWs 4 and 6. Presence of the child witnesses is not in doubt. However, they have reacted differently but their evidence is not unnatural.

This is a case where the children have shown a rare and strong courage, which their teachers have failed to show. It was expected that the teachers would speak out the truth but they did not.

The prosecution witnesses are also supported by the medical evidence. It will bear repetition to state that 44 injuries were inflicted on the deceased. Injury Nos. 1 and 2 are as under:

> "1) Incised wound 8 x 2 cm. bone deep spindle shaped placed obliquely across the midline on middle scalp.
>
> 2) Incised wound 15 cm. x 1.5 cm. extending from just to the right of midline to left, fracturing the parietal bone and exposing the dura."

One of the injuries corroborates the evidence of the witnesses. Injury No. 2 had caused a fracture which could have been caused by way of an iron rod. PW15 Scientific Assistant in his report Ex. P17 noted the presence of blood stains in the cemented portion of pathway and also on the side wall of the pathway.

DW2 was examined on behalf of the defence. She had seen the incident. She, however, could not identify the assailants stating that she had been studying but she corroborated the prosecution witnesses to the extent that the deceased had cried 'Oh Mother' whereafter she ran away. Only because a few of them had run away, the same would not mean that all others would do so. PWs 3 to 6 had withstood the test of cross-examination. Their testimonies are consistent and uniform. They might not have been able to state the details and features of all the assailants in their statements before the Investigating Officer but at least in material particulars they did.

There may be some delay in examinations of PWs 3 to 6 by the investigating officer. Delay in recording the statements of the eye-witnesses to the occurrence, normally is looked down upon but each case has to be considered on its own facts. The learned Trial Judge in his elaborate judgment has noticed that the investigating officer has not done his best. We have also noticed the slipshod manner in which case was investigating.

In State of U.P. v. Satish [JT 2005 (2) SC 153] as regards delayed examination of the witnesses, this Court stated:

> "19. As regards delayed examination of certain witnesses, this Court in several decisions has held that unless the Investigating Officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion "

We, therefore, do not see any reason to disbelieve the testimonies of PWs 3 to 6 so far as A1 is concerned.

Defective investigation by itself may not lead to a conclusion that the accused is innocent.

In Visveswaran v. State Rep. by S.D.M. [(2003) 6 SCC 73], this Court held:

> "Before we notice the circumstances proving the case against the appellant and establishing his identity beyond reasonable doubt, it has to be borne in mind that the approach required to be adopted by courts in such cases has to be different. The cases are required to be dealt with utmost sensitivity, courts have to show greater responsibility when trying an accused on charge of rape. In such cases, the broader probabilities are required to be examined and the courts are not to get swayed by minor contradictions or insignificant discrepancies which are not of substantial character. The evidence is required to be appreciated having regard to the background of the entire case and not in isolation. The ground realities are to be kept in view. It is also required to be kept in view that every defective investigation need not necessarily result in the acquittal. In defective investigation, the only requirement is of extra caution by courts while evaluating evidence. It would not be just to acquit the accused solely as a result of defective investigation. Any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of prosecution when it is otherwise proved."

In State of M.P. v. Mansingh & Ors. [(2003) 10 SCC 414], this Court held:

> "Even if it is accepted that there was deficiencies in investigation as pointed out by the High Court, that cannot be a ground to discard the prosecution version which is authentic, credible and cogent. Non-examination of Hira Lal is also not a factor to cast doubt on the prosecution version. He was not an eyewitness, and according to the version of PW 8 he arrived after PW 8. When PW 8 has been examined, the non-examination of Hira Lal is of no consequence."

The question which now arises for consideration is as to whether we should uphold the death sentence imposed upon A1. In the peculiar facts and circumstances of this case, we are of the opinion that it cannot be said to be a rarest of rare case warranting imposition of the extreme punishment.

The question as regards imposition of death sentence has been considered recently by this Court in Aloke Nath Dutta & Ors. v. State of West Bengal [Criminal Appeal Nos. 867-868 of 2005 disposed of on 12th December, 2006]. We are not reiterating the same.

While upholding the sentence imposed by the learned Trial Judge as also the High Court, we only convert the death penalty to rigorous imprisonment of life under Section 302/149 of the Indian Penal Code. Convictions and sentences on other charges are upheld. Criminal Appeal Nos. 1278-1279 of 2005, so far as A1 is concerned, is dismissed subject to the modification of sentence to the extent mentioned hereinbefore and that of A4 is allowed.

Other accused persons are given benefit of doubt and they are acquitted. Criminal Appeal Nos. 1280-1281 of 2005 are allowed accordingly. They are directed to be set at liberty unless wanted in any other case.