

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.T. SANKARAN
&
THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

FRIDAY, THE 13TH DAY OF NOVEMBER 2015/22ND KARTHIKA, 1937

CRL.A.No. 1667 of 2010

JUDGMENT IN SC 158/2008 of III ADDL. SESSIONS JUDGE, KOLLAM, DATED 14-06-2010

APPELLANT/3RD ACCUSED:

GIREESH, S/O. SIVAN, KUZHIYATTU VEEDU,
C.P. IX, NO. 672, EDAVATTOM CHERRY
CHIRAKKARA VILLAGE, KOLLAM DISTRICT.

BY ADV. SRI. C. RAJENDRAN

RESPONDENT/COMPLAINANT:

STATE OF KERALA - REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SMT. BINDU GOPINATH

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 6.11.2015, ALONG
WITH CRA. 1918/2010, CRA. 185/2011, THE COURT ON 13-11-2015, DELIVERED THE
FOLLOWING:

K.T. SANKARAN & RAJA VIJAYARAGHAVAN.V, JJ

Crl.Appeals.1667 of 2010, 1918 of 2010 and 185 of 2011

Dated 13th November, 2015

JUDGMENT

Raja Vijayaraghavan.V.

1. The appellants in these appeals are the accused Nos. 1 to 3 in S.C.158 of 2008 of the III Additional Sessions Judge, Kollam. In the aforesaid Sessions case, appellants along with six others, were tried for having committed offence punishable u/s 143, 147, 148, 302 r/w S.149 of the IPC. While the appellants were convicted and sentenced u/s 302 r/w S. 34 to undergo imprisonment for life, the accused Nos.4 to 9 were found not guilty and were acquitted. It is against the aforesaid judgment, conviction and sentence that these appeals have been preferred. As these appeals arise out of a common judgment, they are considered and disposed of together.

2.The prosecution case in its bare essentials runs in the following lines :-

The marriage of PW6 – Raju, was held at N.K.P. Auditorium , Navaikulam. The first informant Madhavan and deceased Suseelan are relatives of Raju and they were actively involved in the conduct of marriage. Accused Nos. 1 and 2 are known to Raju and they were also invitees to the wedding. In the course of the wedding feast, there occurred some altercation when accused No. 1 – Ammachan Suresh and A2 Sunil created a ruckus. Suseelan locked horns with accused Nos. 1 and 2 and is said to have assaulted the 1st accused which made him furious. A1 Suresh declared that he would retaliate while leaving the auditorium. As is customary in those parts of the state, the brides party paid a return visit to the house of Raju in the evening and they left at 6.45. After they had left, PW1 - Madhavan, PW4 - Ratheesh, son of Madhavan , PW 5 - Vineesh and some other friends and relatives were at the home and nearabouts of the house of PW6 - Raju.

In view of the visit of the brides party, a shed was built outside the house and the place was illuminated with tube lights. At that time, accused Nos. 1 and 2 came to the house of Raju and called Suseelan and the deceased went with them towards the temple on the north through the road lying immediately on the east of the house of Raju. The accused Nos. 3 to 9 were waiting there.

3.The charge is that on account of previous enmity, the appellants along with seven others, formed themselves into an unlawful assembly at about 19.30 hours on 4.4.2004, the common object being to murder Suseelan, committed rioting armed with deadly weapons, and inflicted stab injuries on Suseelan resulting in his death at Kunnumukku - Gurunappankavu road at Thavanampoika.

4.PWs 4 and 5 claim to be eye witnesses to the occurrence and they alerted the neighbours. PW 1 , Raju and others rushed to the scene of crime to rescue Suseelan and were

armed with logs and sticks. The accused are alleged to have fled from the scene. Suseelan was found lying on the road after having sustained the fatal injuries. He was carried to the house of PW 6 and thereafter was taken to the J.J.Hospital, from where he was referred to the Medical College Hospital, Thiruvananthapuram. After examination, he was declared dead by the doctor.

5. PW1 – Madhavan, a near relative of the deceased, gave Ext.P1 statement which was recorded by PW11, the Sub Inspector of Police, Parippally. On the basis of Ext.P1 statement, Ext.P1(a) FIR was registered on 4.4.2004 at 11.30 p.m. Thereafter, investigation was conducted by PW14, the Circle Inspector of Police, Paravur. He conducted inquest over the dead body of Suseelan and thereafter, prepared Ext.P3 scene mahazar. The body of the deceased was sent for postmortem which was conducted by PW13 - Dr.Sreekumari, who issued Ext.P7 postmortem certificate. PW14 arrested accused Nos.1 and

2 on 9.4.2004. On the same day itself, on the basis of the disclosure statement given by the 2nd accused, MO2 sword wielded by him during the commission of offence was seized as per Ext.P12 mahazar. The accused No.3 was arrested at 5.00 a.m on 15.4.2004. On the same day, at 8.15 a.m, on the strength of the disclosure statement given by the 3rd accused, MO3 knife was recovered as per Ext.P4 mahazar. The blood sample of the deceased, which was collected at the time of conduct of postmortem and the weapon of offence and other materials recovered from the scene of crime were sent for chemical analysis and Ext.P21 report was obtained. After completion of investigation, PW12, the Circle Inspector of Police verified the investigation and laid the final report before the jurisdictional Magistrate who initiated committal proceedings in accordance with law and committed the case to the Court of Sessions.

6.The accused appeared before the Sessions Court on

summons and the learned Sessions Judge after hearing the prosecution and the defence, framed a charge u/s 143, 147, 148, and 302 of the IPC r/w S.149 IPC.

7. On the accused pleading not guilty to the charge framed against them by the Court below for the aforementioned offence, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 14 witnesses as PWs.1 to 14 and got marked 21 documents as Exts.P1 to P21 and 25 material objects as MOs.1 to 25. Exts.D1 to D8 and D8(a) to D8(i) case diary contradictions were marked by the defence.

8. After the close of the prosecution evidence, the appellants were examined u/s 313 (1)(b) of the Cr.P.C with regard to the incriminating circumstances appearing against them in the evidence for the prosecution. They denied the incriminating circumstances put to them and maintained their innocence.

9. The learned Sessions Judge on an appraisal of the evidence let in, came to the conclusion that the direct eye witness testimony of PW4 and PW5 along with the other facts and circumstances proved by the prosecution, convincingly established that accused Nos.1 to 3 have committed the offence in furtherance of their common intention and convicted them accordingly. The appeals are filed by the convicted accused, challenging the above findings.

10. We have heard learned counsel Sri.B.Mohanlal, Sri.M.K.Chandramohan Das, and Sri.C.Rajendran appearing for the respective appellants and also Smt.Bindu Gopinath, the learned Public Prosecutor.

11. Sri B. Mohanlal, who appeared for the 1st accused submitted that no specific overt act has either been alleged or proved against the said appellant. It was further

submitted that the evidence let in by the prosecution through PW1, PW4 and PW5 was unbelievable and could not have been the basis for conviction.

12.Sri M.K. Chandramohan Das , the learned counsel appearing for the 2nd accused submitted that there are gross inconsistencies in the testimonies of the eye witnesses which make it unsafe to rely on their evidence. It was further argued that accused No. 2 had no role to play in the whole incident and the benefit of doubt ought to have been extended to the 2nd accused as was done in respect of accused Nos. 4 to 9 by the learned Sessions Judge.

13.Sri C.Rajendran, the learned counsel appearing for the 3rd accused submitted that the prosecution came forward with a definitive motive which was found to be false at the stage of evidence. By referring to Ext.P1 FI statement, it was pointed out that there was no reference to the

participation of the 3rd accused at the earliest stage. It was further submitted that his name finds a place in the records only from 9.4.2004 and even at that time, the prosecution had no case that a weapon in the nature of MO3 knife was used. It was also argued that the police had conducted the search of the houses of accused Nos. 1 and 2 immediately after the occurrence but no such endeavor was made in respect of the 3rd accused, making it probable that the inclusion of the 3rd accused in the array of accused, was an after thought. The learned counsel strongly attacked the eye witness testimony of PW4 and PW5 and argued that they had no occasion to witness the occurrence. Referring to Ext. P1, it was argued that it was inconceivable for PW 1 to leave out the name of his son, Ratheesh, who claims to be an eye witness, when Ext.P1 statement was furnished to the police. It was also submitted that a conscious effort has been made by the prosecution to shift the place of occurrence which makes it unsafe to sustain the conviction. By taking us

through the evidence of PW4 and PW5 and by referring to the omissions and contradictions brought out during cross examination, it was contended that their evidence was untrustworthy and should be eschewed from consideration.

14. We have meticulously gone through the evidence and also anxiously considered the arguments of the counsel appearing for the accused.

15. The death of Suseelan due to the injury sustained by him is clear from the evidence let in by the prosecution by examining PW1, PW3, PW4, PW5, PW6, PW10 and other witnesses, from Ext.P2 inquest report prepared by PW14 as well as from Ext.P7 postmortem certificate prepared by PW13. Ext.P13 postmortem report and also the evidence of PW13 - Professor of Forensic Medicine, reveals that injury No.1 to 3, which are deep incised penetrating wounds sustained to the front and back of chest

puncturing the pericardium, incising the lungs and injuring various parts of the heart are sufficient in the ordinary course of nature to cause death. The doctor has also opined that injuries No.1 to 8 are possible by using MO3 knife. The defence does not dispute the death of Suseelan as a result of injuries sustained as aforesaid but they dispute the involvement of the accused and also the place of occurrence. We are of the view that the prosecution has successfully established the fact that Suseelan was murdered and that the injury sustained are sufficient in the ordinary course of nature to cause death.

16. We shall now refer to the oral evidence connecting the appellants with the crime. The prosecution relies on the direct eye witness testimony of PW4 and PW5 to bring home the finding of guilt. Their evidence is to a certain extent supported by PW1, the first informant. PW1 has deposed that deceased Suseelan is the son of his wife's sister. It is based on Exhibit P1 statement furnished by

him at 11.30 p.m on 4.4.2004 that Ext.P1(a) FIR was registered. It is seen that P1 (a) FIR has been initialed by the learned Magistrate on the next day itself at 1.00 p.m. In his evidence, PW1 testified that Suseelan was murdered on the day on which the marriage of PW6 - Raju was solemnized. The house of Raju, who is his relative, is situated on the western side of his house. He along with the other relatives, had gone to Navaikulam to attend the marriage ceremony. According to the said witness, there occurred an altercation between the 1st accused and one of his friends with deceased Suseelan. Suresh had threatened Suseelan with dire consequences for having assaulted him at the auditorium. They returned at about 1.00 p.m and went to the house of Raju at 5.30 p.m to welcome the family of the bride who were visiting the bridegroom's house. At about 6.45 p.m, the visitors left. He along with his son Ratheesh were sitting in the Pandal. While so, the 1st accused approached his son and asked him to call deceased Suseelan who was sitting inside the

house and was doing some accounting work. Suresh and one of his friends took the deceased towards the north through the road lying immediately on the eastern side of the house of Raju. After about ten minutes, he heard loud noises, and he along with the other people who were sitting there, ran to the said place. Suresh was seen brandishing a sword and another person who could be identified by sight was holding a knife. There were about 8-9 persons and the time was about 7.30 p.m. There was enough light to identify the accused. Suseelan was seen lying in blood in a prone position on the side of the road. He was taken to the hospital. He heard about the death of Suseelan later in the night. According to the witness, when he reached the place of occurrence the assailants were seen running towards the northern side. He identified accused Nos. 1 and 2 as the persons who had come to the house inquiring about Suseelan and with whom Suseelan had left.

17. The argument of the defence mainly centered around the truthfulness or otherwise of the prosecution version and it veered around Ext. P1 statement given by Madhavan after the occurrence. We note that Suseelan was initially taken to J.J. Hospital and from there to the Medical College Hospital and PW1 has stated that it was on receipt of information of the death of Suseelan that he had lodged the FI Statement. In Ext. P1 statement broad details of the incident has been stated by PW1 who is not an eye witness to the occurrence. He has specifically named accused Nos. 1 and 2 and also the sequence of events commencing from the altercation that took place at the Auditorium. It is of course true that in respect of the reason for the hostility, there is no consistency. In Ext. P1, PW1 has stated about an incident involving a photographer but in evidence that version was given a go by and it was stated that there was an incident involving a girl. What ever that may be, the fact of the matter is that there occurred a fight, between the deceased on one side

and the accused Nos. 1 and 2 on the other side, and it was the accused Nos. 1 and 2 who had called the deceased from the house of Raju and took him towards north. We are also of the view that the omission to mention the names of PW4 and PW5 in the First Information statement cannot be said to be fatal in the facts of the instant case. PW1 has stated in Ext.P1 that the incident was witnessed by several people and in that view of the matter, the omission cannot be taken to be a reason to view the genesis of the prosecution case with suspicion. It cannot be expected that Ext.P1 statement should be an encyclopedia of the entire case. It is not even a substantive piece of evidence. It has value, no doubt, but only for the purpose of corroborating or contradicting the maker. The omission or mis-description of some details in the earliest statement which was recorded most promptly, within 4 hours of the occurrence, according to us, would not tell upon the prosecution case or the statements of the eye witnesses with regard to the

participation of the appellants in the crime. After proper deliberation of the earliest version with the statement of the eye witnesses and the facts and circumstances noted in the instant case, we are of the view, that the contentions raised by the defence have no sustainability .

18.PW4 is one of the occurrence witnesses and he has deposed of having seen the incident. He testified that on the fateful day at 6.00 p.m, the relatives of the bride had come visiting to Raju's house. He also attended the function. The bride's party had left at about 7.00 p.m. He deposed that as he wanted to answer nature's call, he along with his friend Vineesh went to his house after the bride's party had left. Since his house is lying at a lower level from the road, one has to go down some steps to reach his house. While he was going down, he saw 8 - 9 persons sitting on the steps leading to the house. He identified the persons as A1, A2, A3, A4 and A9 and certain others who could be identified by sight. Suresh

asked him whether he had seen Suseelan and he answered that he was in the house of Raju. While he was returning back, they were not found there. He along with Vineesh, sat near the water pipe in the front of the house of Raju. At that time, accused Nos.1 and 2 came there and inquired about Suseelan. PW4 was asked to call Suseelan and he called him. Thereafter, Suseelan was seen taking with accused Nos.1 and 2 and he saw all of them going towards the temple. He along with PW5 followed them and saw them standing in front of the temple. Thereafter, he saw accused No.2 kicking Suseelan as a result of which Suseelan had fallen down. PW4 and PW5 rushed forward to help him and at that time, A2 - Sunil brandished a sword and prevented them from getting near. He saw accused No.3 Gireesh stabbing Suseelan repeatedly. The other accused were hitting and stamping Suseelan. When they made a hue and cry, the persons who had assembled at the house of Raju came running. On seeing them, the accused are alleged to have fled from the scene. PW4

went after the accused but he could not apprehend them. Suseelan was taken to Raju's house and was made to lie on a table. He did not go with Suseelan to the hospital. Later he came to understand that Suseelan had succumbed to the injuries. He identified MO3 knife used by accused No.3 to stab Suseelan and also MO2 sword brandished by accused No 2. During cross examination, the defence brought out Exts.D2 to D7 contradictions and contended that the above contradictions in his evidence would severely discredit his testimony and make it unsafe to place any reliance on the same. It was argued that PW4 was employed abroad and he had attended the Court at the instance of PW3 to give a false version without even receiving the summons.

19.The prosecution also examined PW5 - Vineesh, a friend of PW4, who is also an eyewitness to corroborate the version of PW 4. Vineesh also testified that he had seen the incident in which Suseelan was murdered. His version is

identical to that of PW4 particularly because they were moving together after 6.45 p.m at which time the bride's relatives had left the house of Raju. He was with PW4 when he had gone to his house for answering nature's call. He had seen the accused sitting on the steps leading to the house of PW4. The only discrepancy in his evidence is that instead of accused No.1 Suresh, it was accused No.2 who had inquired whether Suseelan was there in the house of Raju. He along with PW4 had witnessed the accused taking the deceased towards the northern side. He also stated that he along with PW4 had followed the accused and deceased and they were witness to the brutal assault that took place in front of the temple. He also saw Sunil kicking the deceased and thereafter, the 3rd accused inflicting stab injuries. According to him, the 2nd accused Sunil had brandished a sword and had threatened the persons who had come to rescue Suseelan.

20.The defence brought out Exts.D8, D8(a) to D8(h)

contradictions in his evidence and contended that the above inconsistencies, omissions and contradictions in his evidence would render his evidence untrustworthy. It was vehemently argued about the unique phenomenon in which both PW4 and PW5 have denied their earlier statements with regard to identical aspects. According to the learned counsel, their parrot like version brings out that the said witnesses were tutored.

21. We have gone through the contradictions brought out in the evidence of PW4 and PW5. A closer scrutiny reveals that all these contradictions are trivial and relates to inconsequential aspects and that too with respect to matters which have no connection with the inner core of the prosecution case. As to where the witnesses had sat when the visitors had left and which of the accused inquired about the presence of Suseelan at the house will not affect the veracity of their testimony with respect to their presence at the house and their witnessing the

murderous assault on Suseelan. It is also inconsequential whether the deceased Suseelan had talked to the bride or not and what the doctor had said when the injured was taken to the J.J. Hospital. These are the nature of contradictions brought out while cross examining PW4 and PW5.

22. We are of the view that the discrepancies or the omissions brought out are not material ones so as to be of some serious consequence. It is well settled in law that minor discrepancies on trivial matters not touching the core of the case or not going to the root of the matter could not result in rejection of the evidence as a whole. It is also well accepted principle that no true witness can possibly escape from making some discrepant details, but the Court should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that it would be justified in jettisoning his evidence. It is

expected of the Courts to ignore the discrepancies which do not shed the basic version of the prosecution, for the Court has to call into aid its vast experience of men and matters in different cases to evaluate the entire material on record. [See **Vinod Kumar V State of Haryana (2015 (3) SCC 138)**]

23.It is also a settled position of law that even if there are some omissions, contradictions or discrepancies, the entire evidence cannot be discarded. After exercising care and caution and sifting the evidence to separate the truth from untruth, exaggeration, embellishments and improvements, the Court can come to the conclusion as to whether the residual evidence is sufficient to convict the accused. Witnesses cannot be expected to depose with arithmetic exactitude about the incident when they are called upon to give evidence years after the incident.

24.After having gone through the evidence of PW4 and PW5

and other attending circumstances, tested in the light of the above stated principles, we have no hesitation in coming to the conclusion that the discrepancies pointed out by the appellants are neither material nor do they affect the case of the prosecution adversely.

25. We are not inclined to accept the contention of the learned counsel that PW4 and PW5 are planted witnesses. We have already held that absence of the names of PW4 and PW5 in Ext.P1 cannot be a reason to doubt their presence at the scene. It is true that Ext.P14 report detailing the names of the accused involved in the offence was submitted before Court only on 9.4.2004. Delay or lapses on the part of the Investigating officer in submitting Ext.P14 report cannot be attributed with any major significance in the facts of the instant case. It is seen from the records that the statements of the main witnesses were recorded by PW14 immediately after the incident and the name of PW4 finds a place in Ext.P2

inquest report prepared on 5.4.2004. which has reached the Court on 6.4.2004. We are of the considered view that the contentions of the defence touching the credibility of the versions of PW4 and PW5 are without any basis.

26.The prosecution had also examined PW6 - Raju on whose wedding day this unfortunate incident had occurred. He testified that his marriage was conducted on 4.4.2004 at NKP Auditorium, Navaikulam. Accused Nos.1 and 2 had attended his marriage. PW6 further deposed that while the feast was going on, there occurred some quarrel between accused Nos.1 and 2 on one side and the deceased Suseelan on the other side. He also spoke about the presence of Suseelan in his house. At about 7.30 p.m, he heard loud scream on the northern side of his house. According to him, Suseelan, was carried to his house with bleeding injuries and Nirmala, the sister of Suseelan, had tended to him. It was thereafter that Suseelan was shifted to the hospital. In cross examination, the witness stated

that some tube lights placed outside the shed were found destroyed. This fact was highlighted by the defence to contend that some other incident involving the brides party had taken place outside his house. After having gone through the materials on record, we are of the view that no such inference is warranted.

27.PW10, who is none other than the brother-in-law of the 1st accused, was also a witness to the occurrence, but he turned hostile for obvious reasons. His evidence would, to a certain extent, corroborate the evidence of PWs 1 , 4 and 5. In his evidence, PW10 has stated that accused No.1 is his brother-in-law and deceased Suseelan is his neighbour. PW10 also had attended the marriage of Raju. He admitted that he had seen Suseelan lying on the road on the north of the house of Raju after having sustained stab injuries and he was bleeding. It was the said witness who along with Nandan had taken the injured Suseelan to the house of Raju and from there to the hospital. His shirt

had become stained with blood and the same was handed over to the police. He also stated that there was some incident which occurred in the course of the wedding at Navaikulam. He also stated that there was ample light in front of Raju's house. Though hostile to the prosecution in so far as the incident is concerned, the evidence of PW10 will corroborate the versions of PWs 1 , 4 and 5 in so far as fixing the scene of occurrence and the presence of light is concerned.

28. Much arguments were raised by the defence touching the motive. The motive attributed to the accused initially was that there was a quarrel between accused Nos.1 and 2 on one side and the deceased on the other side which took place at N.K.P Auditorium, Navaikulam where the wedding ceremony of PW6 - Raju was conducted. CW17 was the photographer who was cited by the prosecution to prove this aspect. But at the stage of evidence this was given a go by and the prosecution alleges that there occurred a

fight with the deceased when accused Nos.1 and 2 had taken out a flower from the head of a girl who had come for the marriage ceremony. He also stated that a fight had occurred in the pantry area between the accused and the deceased and it was owing to the said enmity that the accused had come to the house of Raju later in the evening and had inflicted serious injuries on him. The learned counsel appearing for the appellants contended that when the prosecution had come forward and alleged a specific motive they were bound to prove the same and by setting up a different one at the stage of evidence, the prosecution has demolished its own case.

29.It is to be remembered that motive is not an integral part of the crime or an ingredient of it just like mens rea or actus reus. Gruesome crimes could be committed even without any motive at all and absence of motive cannot make an act which is otherwise an offence not one. It is only an aid in the assessment of criminality. Motive

assumes immense significance in cases which depend on circumstantial evidence. It is only a ratiocinative aid in the assessment of evidence to fix a criminality. In given cases, it may help the Court to tilt the balance in assessing evidence. For want of motive, a criminal who is otherwise liable to be brought to justice cannot escape. When there is direct evidence, motive loses much of its importance and significance. When the direct legal testimony is clear, cogent and convincing so as to satisfy the judicial conscience of the Court in fixing up criminality, motive is absolutely irrelevant and the accused can be convicted even in the absence of any proof of motive.(see **Dasan and Others v. State of Kerala (1987 Crl.L.J 180)**). Therefore, the argument based on motive has no force at all.

30.We do not find any merit in the contention of the counsel for the appellant that the non examination of CW17 - the photographer, with whom accused No.1 is alleged to have

entered into a dispute at the auditorium will prove fatal to the prosecution case. It is vehemently argued by the learned counsel that there is also suppression of evidence causing prejudice to the accused. After evaluating the prosecution evidence, it does not appear to us that there is any suppression of evidence in the instant case. This Court in a catena of decisions has held that the question of suppression of evidence becomes relevant only because in an endeavor to find out the truth it is the duty of the prosecution to place the entire evidence, both favorable and unfavorable, to the prosecution or to the defence so that the Court may arrive at the truth correctly. Only if a conscious attempt is made in this line, it could be said that there was suppression of evidence thereby creating difficulties for the Court to arrive at the truth. When a number of persons have seen an occurrence, no provision of law enjoins a duty on the prosecution to examine all of them before Court. The prosecution is having the discretion to select witnesses for examination. Which

witness would be material for examination is for the prosecution to decide. Unless it is shown that a particular witness was withheld with some ulterior motive, no adverse inference is possible from his non examination. The real consideration should be whether there is a calculated withholding of evidence to screen real facts from coming to the notice of the Court. Withholding an eye witness for the sole reason that his evidence is likely to go against the prosecution may, on many occasions, amount to suppression because of the duty of the prosecution to assist the Court in reaching the proper conclusion. The real test will be whether there was any conscious attempt to suppress fact from Court by not tendering a particular piece of evidence. In the instant case, the prosecution wanted to examine CW17 to prove the motive part. When there was credible eye witness testimony, proof of motive pales into insignificance. We therefore, reject the said contention as well.

31.The learned counsel appearing for accused No. 3 also vehemently challenged the evidence of recovery and contended that there was no authorship of concealment and also that the evidence of recovery was unbelievable. In the case on hand, the prosecution strongly relies on Exts.P12(a) and P4(a) information conveyed by accused Nos.2 and 3 to PW14, in consequence of which MO2 and MO3 weapons were discovered. It has come out in evidence, that the information so conveyed by the accused distinctly led to the recoveries. Exts.P4 and 12 are the mahazars and P4 (a) and P12(a) are the informations extracted in the mahazars. MO2 and MO3 are the weapons recovered on the strength of the aforesaid disclosure. The aforesaid recovery was proved in evidence by the prosecution. The weapons were also identified by the witnesses. PW14 while in the box, stated the details of the information furnished which led to the discovery. For the applicability of Section 27 of the Evidence Act, which is based on the doctrine of confirmation by

subsequent events, there should be information which relates distinctly to the facts discovered and the discovery must be in consequence of the information. We do not find any reason to discard the evidence relating to the recoveries consequent to the information.

32. We are also not impressed with the contention raised by the learned counsel appearing for the 3rd accused, that Ext.P21 report of chemical analysis is inconclusive in as much as the report only revealed that MO3 contained blood which was insufficient for determining the origin. According to the learned counsel, this would reveal that MO3 was not used for commission of the offence. We cannot agree. In **Shaji v. State of Kerala (AIR 2013 SC 651)**, the Apex Court has held that the failure by the serologist to detect the origin of blood due to disintegration of the serum does not mean that the blood stuck on the weapon could not have been human blood at all. It was further observed that sometimes it is possible,

either because the stain is insufficient in itself or due to haematological changes and plasmatic coagulation, that a serologist may fail to detect the origin of the blood in question. However, in such a case, unless the doubt is of a reasonable dimension, which a judicially conscientious mind may entertain with some objectivity, no benefit can be claimed by the accused in this regard. It was further held that once the recovery is made in pursuance of a disclosure statement made by the accused, the matching or non matching of the blood group loses significance.

33.The next question is whether the learned Sessions Judge was justified in convicting the appellants with the aid of S. 34 of the IPC when they were originally charged with the aid of S. 149 of the IPC . In the case on hand, originally, 9 named accused were charged with the aid of S. 149, and on conclusion of trial, the accused Nos. 4 to 9 were acquitted extending the benefit of doubt to them.

34.In **Mohan Singh v. state of Punjab (AIR 1963 SC 174)**, the Constitution Bench of the Hon'ble Supreme Court considered the question as to whether accused could be convicted u/s 302 read with S.34 of the IPC when S.149 of the IPC could not be invoked as against them for reason of acquittal of the named co-accused. The Apex Court held as follows in Para.13 of the judgment.

“That inevitably takes us to the question as to whether the appellants can be convicted under S.302/34. Like S.149, S.34 also deals with cases of constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The essential constituent of the vicarious criminal liability prescribed by S.34 is the existence of common intention. If the common intention in question animates the accused persons and if the said common intention leads to the commission of the

criminal offence charged, each of the persons sharing the common intention is constructively liable for the criminal act done by one of them. Just as the combination of persons sharing the same common object is one of the features of an unlawful assembly, so the existence of combination of persons sharing the same common intention is one of the features of S.34. In some ways the two sections are similar and in some cases they may overlap. But, nevertheless, the common intention which is the basis of S.34 is different from the common object which is the basis of the composition of an unlawful assembly. Common intention denotes action in concert and necessarily postulates the existence of a prearranged plan and that must mean a prior meeting of minds. It would be noticed that cases to which S.34 can be applied disclose an element of participation in action on the part of all the accused persons. The acts may be different; may vary in their character, but they are all actuated by the same common intention. It is now well settled that the common intention required by S.34 is different

from the same intention or similar intention. As has been observed by the Privy Council in *Mahbub Shah v. Emperor*, 72 Ind App 148 : (AIR 1945 PC 118), common intention within the meaning of S.34 implies a pre arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre arranged plan and that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case."

35. In **Pal Singh v State of Punjab (2014 (3)SCALE 36)**,

the Apex Court had occasion to re-consider the issue whether the accused could be convicted u/s 302 r/w 149 Indian Penal Code, in the event of acquittal of named accused and it was held as follows:-

[11]. In *Dhari and Ors. v. State of Uttar Pradesh*: AIR 2013 SC 308, this Court re-considered the issue whether the appellants therein could be convicted under Sections 302

r/w 149 Indian Penal Code, in the event that the High Court had convicted three persons among the accused and the number of convicts has thus remained less than 5 which is in fact necessary to form an unlawful assembly as described under Section 141 Indian Penal Code. This Court considered the earlier judgments in Amar Singh v. State of Punjab AIR 1987 SC 826; Nagamalleswara Rao (K) v. State of A.P.: AIR 1991 SC 1075, Nethala Pothuraju v. State of A.P : AIR 1991 SC 2214; and Mohd. Ankoos v. Pubic Prosecutor : AIR 2010 SC 566, and came to the conclusion that in a case where the prosecution fails to prove that the number of members of an unlawful assembly are 5 or more, the court can simply convict the guilty person with the aid of Section 34 Indian Penal Code, provided that there is adequate evidence on record to show that such accused shared a common intention to commit the crime in question. (See also: Jivan Lal v. State of M.P. : (1997) 9 SCC 119; Hamlet v. State of Kerala : AIR 2003 SC 3682; Fakhruddin v. State of M.P.: AIR 1967 SC 1326; Gurpreet

Singh v. State of Punjab : AIR 2006 SC 191;
and S. Ganesan v. Rama Raghuraman and Ors.
AIR 2013 SC 840)

(emphasis supplied by us)

36.The same principle was reiterated in **Babu and Another v State rep. by Inspector of Police, Chennai and Another (2013 (4) SCC 448)**, wherein relying on **Dhanna and Others Vs. State of M.P. [1996 (10) SCC 79]**, the Apex Court held that, where the Court finds that the strength of the assembly was insufficient to constitute into “unlawful assembly”, but the remaining persons who participated in the crime had shared common intention in the main perpetrators of the crime, the Court can take the aid of S.34 of the IPC even if the said section was not specifically mentioned in the charge. In view of the above position, the learned sessions judge was justified in invoking S. 34 of the IPC to convict the accused.

37. The contention raised by the learned counsel appearing for accused Nos. 1 and 2 that the prosecution does not allege any overt act as against them and that it was the 3rd accused who had inflicted the fatal injuries on Suseelan and in view of the above, it cannot be held that the said appellants had prior concert, is also meritless. In the case on hand, there is credible and trustworthy evidence revealing the participation of accused Nos.1 to 3. It has also come out from the eye witness accounts of PWs 4 and 5 that appellants who are accused Nos.1 to 3 had shared common intent. We have meticulously analyzed the evidence and we are of the view that the prosecution has successfully proved the element of participation in action. It was accused Nos.1 and 2 who had called Suseelan out from the house of PW6 - Raju and he was taken towards the north through the road lying on the eastern side of the property of PW6. It was the accused No. 3 who had inflicted fatal injuries with MO3 knife and accused Nos. 1 and 2 were acting in concert . The accused No. 2 was

brandishing a sword and had threatened the witnesses. All these aspects are clearly borne out from the active conduct of the appellants and also from the facts and circumstances. It is by now settled that S. 34 requires a pre-arranged plan and it pre-supposes prior concert. The prior concert or meeting of minds can be determined from the conduct of the offenders unfolding itself during the course of action and the mode in which they have perpetrated the crime. All these attributes are present in the instant case and we do not find any error of law in the finding of the learned Sessions Judge .

38. On a consideration of the entire aspects, we are of the view that the learned Sessions Judge has rightfully held that the evidence tendered by the occurrence witnesses and the fatal injuries sustained by the deceased as revealed from Ext.P7 postmortem certificate together with the attending circumstances would convincingly establish that the appellants have committed the offence in

furtherance of their common intention and that they are liable to be convicted u/s 302 r/w S.34 of the IPC. In view of the above, the conviction under all the counts are only to be confirmed. In so far as the sentence is concerned, we have no reason to differ from what has been ordered by the learned Sessions Judge .

39. Accordingly, the appeals are dismissed confirming the conviction and sentence. The appellants shall be entitled to set off for the period they have been in custody in this case as provided u/s 428 of Code of Criminal Procedure, subject to the orders passed by appropriate authority u/s 432/433 of Code of Criminal Procedure.

Sd/-
K.T. SANKARAN
Judge

Sd/-
RAJA VIJAYARAGHAVAN.V.
Judge

MrCs/7/11/2015

//True copy//
P.S. To Judge