

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 28.11.2014

Date of decision: 30.03.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.S.RAMANATHAN

Criminal Appeal No.123 of 2004

and

Criminal Revision Case No.1063 of 2003

Crl.A.No.123 of 2004

1.Kumaravel
2.Rajkumar
3.Suresh Kumar @ Suresh
4.Thomas Mathew
5.Jaya Murugan
6.Franklin
7.Rangasamy
8.Chandran @ Raja @ Chandra

... Appellants/Accused
2 to 7, 9 and 10.

vs.

State rep.by
the Inspector of Police,
Koolakambai Police Station.
(Crime No.50/2000)

... Respondent/Complainant

Crl.Revision Case No.1063 of 2003

H.S.Mehtha

... Petitioner/p.w.3

Versus

1.Amalraj
2.Kumaravel
3.Rajkumar
4.D.Suresh Kumar @ Suresh
5.Thomas Mathew @ Ponnachan
6.Jaya Murugan
7.Franklin
8.Rangaswamy.M

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9.G.Chandran @ Raja @ Chandra

... Respondents 1 to 9/
Accused 1 to 7,9 and 10.

10.State rep.by Inspector of Police,
Koolakombai Police Station.

... 10th Respondent/Complainant

PRAYER : Criminal Appeal was originally filed before the Principal Sessions Judge, Udagamandalam, under section 374 (2) of Cr.P.C. praying to set aside judgment dated 30.04.2003 made in S.C.No.2 of 2002 on the file of the Assistant Sessions Judge, Udagamandalam, and subsequently, transferred to this Court.

Criminal Revision Case filed under sections 397 and 401 Cr.P.C., against the judgment of the Assistant Sessions Judge, Udagamandalam, made in S.C.No.2 of 2002 dated 30.4.2003.

Mr.I.C.Vasudevan : for Appellants - 1, 2, 4 to 8 in Criminal Appeal No.123 of 2004

and

for respondents - 1 to 3, 5 to 8 in
Crl.R.C.No.1063 of 2003

Mr.V.Raja Mohan : for 3rd Appellant in Criminal Appeal No.123 of 2004,

and

for 4th respondent in Crl.R.C.No.1063 of 2003

Mr.R.John Sathyan : for Petitioner in Crl.R.C.No.1063 of 2003

Mr.A.N.Thambithurai : Additional Public Prosecutor for
the respondent in Crl.A.No.123 of 2004
and for respondent No.10 in
Crl.R.C.No.1063 of 2003.

COMMON JUDGMENT

This Appeal was filed by Accused Nos.2 to 7, 9 and 10 in S.C.No.2 of 2002 on the file of the learned Assistant Sessions Judge, Udagamandalam, against the judgment dated 30.4.2003 made in S.C.No.2 of 2002 convicting them for offences under sections 120B, 147, 324, 506(ii), 364, 395, 279, and 341 IPC. Initially, the Appeal was filed by the Appellants before the learned Principal Sessions Judge, Udagamandalam, and having regard to the Criminal Revision Case No.1063 of 2003 filed by PW.3, the Appeal filed before the Principal Sessions Judge was withdrawn and transferred to this Court by an order of this Court and re-numbered as Crl.A.No.123 of 2004.

2. The case of the prosecution is that on 17.2.2000 at 1.00 p.m., all the accused and one Tamilselvan (since deceased) formed an unlawful assembly and conspired to murder Non-Such Estate Manager, Mehtha, and pursuant to the said conspiracy, on the same date, at about 4.30 p.m., A.1 to A.4 and the deceased Tamilselvan formed an unlawful assembly and they were driving Zeep T.A.R.3464 in a rash and negligent manner and while overtaking the Zeep TN 43 7443, wherein PW.3, the driver Subramani (PW.2), and Soundarrajan (PW.1) were travelling, the driver of the zeep T.A.R.3464 dashed against the Zeep TN 43 7443 and PW.1 and PW.2 were dragged from Zeep TN 43 7443 by A.2 and A.3 and the Manager PW.3 Mehtha was bodily lifted into the Zeep T.A.R.3464 by A.1 to A.4 and his eyes were closed and his hands were tied and he was threatened and beaten up with rod and his signature was obtained in blank papers by intimidation and the said Mehtha was taken to Otterline and from him gold chain, Cell Phone, cash amounting to Rs.1,600/- were forcibly taken by A.1 to A4 and therefore, A.1 to A.4 have committed the offences punishable under section 120B, 147, 341, 279, 352(2) counts, 364, 307, 386, 395 and 506(ii) of the IPC.

3. To prove the prosecution case, 20 witnesses were examined and 21 Exhibits were marked and 6 MOs were also marked before the trial Court. The learned trial Judge convicted A.1 for offences punishable under section 120B, 147, 324, 506(ii) of the IPC and sentenced to undergo rigorous imprisonment for one year for each offence and also convicted A.1 under sections 364 and 395 IPC and sentenced to undergo rigorous imprisonment for three years for each offence and to pay a fine of Rs.1,000/- for each offence, with default stipulation. The trial Court convicted A.2 to A.3 for offence under section 120B, 147, 324 IPC r/w 34, 506(ii) IPC and sentenced to undergo rigorous imprisonment for one year for each offence and convicted A.2 and A.3 for offence under section 352 IPC and sentenced to undergo simple imprisonment for three months and further convicted A.2 and A.3 for offence under sections 364 and 395 IPC and sentenced to undergo rigorous imprisonment for three years for each offence and to pay a fine of Rs.1,000/- for each offence, with default stipulation. A.4 was convicted for offence under Section 120B, 147, 324 r/w 34, 506 (ii) r/w 34 of the IPC and sentenced to undergo one year rigorous imprisonment for each offence and was convicted for offence under sections 341 and 279 and sentenced to undergo simple imprisonment for one month for each, and was convicted for offence under sections 364 and 395 of the IPC and sentenced to undergo three years rigorous imprisonment for each offence and to pay a fine of Rs.1,000/- for each offence, with default stipulation. A.5 to A.7, A.9 and A.10 were convicted for

offence under sections 120B, 147, 324 r/w 34, 506(ii) of the IPC r/w 34 IPC and were sentenced to undergo one year rigorous imprisonment and were convicted for the offence under sections 364 r/w 34 and 395 r/w 34 IPC and sentenced to undergo rigorous imprisonment for three years for each offence and to pay a fine of Rs.1,000/- for each offence, with default stipulation. The sentences were directed to run concurrently. Aggrieved by the impugned judgment of conviction and sentence, the Appellants filed the above Appeal.

4. PW.3 who was the victim filed the revision against the impugned judgment of conviction and sentence stating that the sentence imposed on the Appellants was inadequate and the trial Court ought to have imposed a maximum sentence for the offence committed by the accused.

5. Mr.I.C.Vasudevan, learned counsel appearing for the Appellants 1 to 3 and 5 to 8 submitted that so far as the Appellants 4 to 8 are concerned, there is no evidence of conspiracy. Admittedly, they have not taken any part in kidnapping PW.3 and as regards conspiracy, except the evidence of PW.5 Chandran who had deposed that at about 1.00 p.m., on 17.2.2000, A.5 to A.7, R.9 and A.10 were talking to each other to the effect that unless the Manager was done to death, labour problem could not be solved and at 2.30 p.m., people belonging to Puthiathamilagam also spoke in the same manner. There is no other evidence to implicate, Appellants 5 to 8 for having committed the offences by invoking section 34 and 120B IPC. He submitted that so far as the evidence of PW.5 is concerned, his evidence cannot be believed and he admitted in cross-examination that after hearing the conversation of accused 5 to 10 at 1.00 p.m., and at 2.30 p.m., he did not inform the Manager/victim about the same nor warned him of the possible attack by the accused. He also did not inform anybody in the factory about the same. He therefore submitted that the conduct of PW.5 in not informing anybody about the conspiracy alleged to have been hatched by A.5 to A.10 would only go to show that there was no conspiracy as alleged by the prosecution. The learned counsel further submitted that admittedly, the police patrol was there and large number of workers were assembled and PW.5 has not informed anybody about the conspiracy to kidnap PW.3 by the other accused 5 to 10 and the conduct and behaviour of PW.5 would only lead to the conclusion that the evidence of PW.5 cannot be believed. He therefore submitted that once PW.5's evidence is eschewed, there is no evidence of conspiracy and common intention and therefore, Appellants 4 to 8 who are accused A.5 to A.7, A.9 and A.10, cannot be convicted for the various offences as admittedly they were neither present in the scene of occurrence while kidnapping PW.3 nor they had committed any overtact in kidnapping PW.3.

6. On the other hand, the learned Additional Public Prosecutor Mr.A.N.Thambithurai, for the respondent/State submitted that conspiracy cannot be proved by direct evidence and ultimately, the Court has to take into consideration the surrounding circumstances to arrive at the conclusion in respect of conspiracy and common intention and in this case, having regard to the admitted facts that there was labour unrest, A.5 to A.8 belonging to a particular political party came to the factory only for the purpose of creating problem and after the meeting of the labour union leaders with the management, the conciliation ended in failure, and the Manager was kidnapped by A.1 to A.4 and the deceased Tamilselvan. All these facts would lead to the conclusion that there was conspiracy among the political leaders who supported the agitation inside the factory and in pursuance of the conspiracy hatched by the leaders of the political party, namely, Appellants 5 to 8, A.1 to A.4 and the deceased Tamilselvan, kidnapped PW.3 and that was rightly considered by the trial Court and convicted Appellants 4 to 8 for offence under sections 120B, 147, 324 r/w 34, 506(ii) r/w 34, 364 r/w 34, 395 r/w 34 IPC and therefore, the impugned judgment of conviction and sentence does not call for any interference.

7. According to me, the conviction against Appellants 5 to 8 cannot be sustained for the following reasons:-

As rightly submitted by the learned counsel for the Appellants, except the evidence of PW.5, there is no evidence to connect these Appellants - 5 to 8 with the offence committed by A.1 to A.4 and the deceased Tamilselvan. No doubt, there was unrest in the factory and talks were going on between the workers and the management and the leaders of a particular political party who are A.1, A.5 to A.10 came to the factory for conciliation and the talks ended in failure. PW.5 gave evidence that at 1.00 p.m., on 17.2.2000, A.5 to A.10 were saying that unless the Manager was done to death, the matter could not be solved. Admittedly, he did not inform the same to anybody and even to the Manager/PW.3 and he also admitted that police patrol was there and large number of workers were gathered. Therefore, the conduct of PW.5 in not informing any workers about the conspiracy hatched by A.5 to A.10 and he did not even inform the Manager PW.3 about the imminent danger, would only prove that no such incident had taken place. The evidence adduced for conspiracy must be believable one. In this case, having regard to the reasons stated above, the evidence of PW.5 cannot be believed to arrive at the conclusion that there was conspiracy among A.5 to A.7, A.9 and A.10 at about 1.00 p.m., and 2.30 p.m., on 17.2.2000, and pursuant to that conspiracy, A.1 to A.4 committed the offence at 4.30 p.m., on the same day. It is also pertinent to mention that the Appellants 4 to 8 were

convicted of the offences with the aid of sections 120B and 34 IPC and in the absence of common intention or conspiracy, they cannot be convicted for various offences. Hence, I hold that the prosecution miserably failed to prove the conspiracy and common intention on the part of Appellants 4 to 8 with the other accused and therefore, the conviction and sentence against Appellants 4 to 8 for various offences cannot be sustained and the judgment convicting them for various offence is liable to be set aside.

8. Mr.I.C.Vasudevan, learned counsel for the Appellants 1 to 3 and Mr.Rajamohan, learned counsel for the fourth appellant submitted that the trial Court erred in believing the evidence of PW.1 to PW.3 for convicting A.1 to A.4 for various offences and admittedly, A.2 to A.4 were not known to PW.1 and PW.2 and they were identified by the witnesses PW.1 and PW.2 only during the test identification parade and therefore, their evidence cannot be believed. He also submitted that PW.1 also admitted that he was shown the accused before test identification parade and he came to know about the identity of these persons through news paper. He therefore submitted that when PW.1 and PW.2 were aware of the identity of A.1 to A.2, earlier to Test Identification Parade, no purpose would be served by conducting test identification parade and therefore, the accused cannot be convicted on the basis of identification parade wherein PW.1 and PW.2 identified A.1 to A.4. He also submitted that PW.1 did not identify A.2 & A.3 in the Court and therefore, as per the judgment of the Hon'ble Supreme Court reported in (1999) 3 Supreme Court Cases 54 in the matter of Vijayan Versus State of Kerala, when the witness failed to identify the accused in Court but identified the accused in test identification parade, the identification in the test identification parade loses its importance. He therefore submitted that there is no evidence for conspiracy and therefore, Appellants 1 to 3 may be acquitted.

9. I am unable to accept the contention of the learned counsel for the Appellants. As regards the test identification parade, though PW.1 did not identify A.2 and A.3 in the Court, he identified them during test identification parade and PW.2 identified those persons in the Court as well as in the test identification parade and PW.3/Manager, identified all the accused - A.1 to A.4 and the deceased Tamil Selvan, and therefore, it cannot be stated that the accused were not identified by the witnesses. Further, having regard to the presence of A.1 to A.4 and the deceased Tamilselvan in the scene of occurrence and having regard to the offence committed by them, the Court is justified in inferring conspiracy among A.1 to A.4 and the deceased Tamilselvan and the trial Court has rightly convicted A.1 to A.4 for offences as stated supra.

10. Appellants 1 to 4 are A.2 to A.5. As stated supra, according to the evidence of PW.1, PW.2 and PW.3, A.1 to A.4 and the deceased Tamilselvan, came in the Zeep T.A.R. 3464 and dashed against the Zeep TN 43 7443 in which PWs.1 to 3 were driving. The entire case of the prosecution is depending on the evidence of PW.1 to PW.3 who deposed that A.1 to A.4 and the deceased Tamilselvan were in the Zeep T.A.R. 3464 and after dashing against Zeep TN 43 7443, A.2 and A.3 pulled PW.1 and PW.2 from the Zeep and in that process, they got injured and other accused lifted PW.3 from the Zeep TN 43 7443 and kept him in that Zeep TAR 3464 and according to the evidence of PW.3, all the accused attacked him with hands and one accused who was sitting behind him attacked with an object, which according to PW.3 must be an iron rod and he sustained injuries on the right shoulder.

11. Therefore, having regard to the evidence of PW.1 to PW.3, we will have to see whether the prosecution has made out a case against Appellants 1 to 4 for having committed the offence punishable under sections 120B, 147, 324, 506(ii), 364, 395, 352 and 279 of the IPC.

12. As stated supra, PW.1 and PW.2 have given evidence regarding the incident upto kidnapping of PW.3 by accused 1 to 4 and the deceased Tamilselvan. According to me, the evidence of PW.1 and PW.2 are cogent and they have also identified A.2, A.3 and A.4 during the test identification parade and A.1 to A.4 were also identified by the Manager and having regard to the sequence of events narrated by PW.1 and PW.2, there is no reason to reject their evidence. PW.3 has given evidence regarding the rash and negligent driving of the vehicle by A.1 to A.4 and their act in dashing against the Zeep in which he was travelling and causing injuries to PW.1 and PW.2 and kidnapping him and also assaulting him with hands and iron rod. The evidence of PW.3 was also corroborated by the recovery of iron rod and recovery of bloodstained cloth from PW.3 and these aspects were spoken to by PW.14, PW.15 and PW.16. PW.14 is the witness to Ex.P.8-Cellpone Recovery Mahazar. PW.16 is the witness to confession and recovery of iron rod. PW.9 spoke about the presence of A.1 to A.4 in the Zeep prior to the occurrence. The Doctor who examined PW.3 also gave evidence about the injuries sustained by PW.3 and also deposed that the injuries would have been caused in the manner as alleged by PW.3. The learned Judicial Magistrate who conducted test identification parade was examined as PW.19 and he also gave evidence regarding the manner in which the test identification parade was conducted and how the accused were identified by PW.1 to 3. Therefore, having regard to the evidence of PW.1 to PW.3, the recovery of Cell Phone, iron rod and also having regard to the evidence of PW.9 who saw A.1 to A.4 just prior to the

occurrence travelling in the Zeep, the prosecution has proved the offence of A.1 to A.4. A.2 to A.4 are the Appellants 1 to 3 herein. Therefore, I hold that the trial Court has rightly convicted Appellants 1 and 2 for offences under section 120B, 147, 324 r/w 34, 352, 364 and 395 of the IPC and Appellant No.3 for offence under sections 120B, 147, 324 r/w 34, 506(ii), 341, 279, 364 and 395 of the IPC. The trial Court has also rightly acquitted Appellants 1 and 2 for offence under sections 341, 279, 352 (1 count), 307 and 386 IPC and Appellant No.3 was acquitted for offence under sections 352 (2 counts) r/w 34, 307, 386 IPC as there is no evidence to that effect.

13. Mr.R.John Sathyan, learned counsel for the revision petitioner submitted that the trial Court ought to have convicted Appellants 1 to 3 for offence under section 307 IPC as PW.3 deposed in evidence that A.1 while pushing him from the Zeep shouted that unless PW.3 was done to death there would not be peace. He therefore, submitted that having regard to the fact that all the five persons came in the Zeep and A.1 expressed his intention to murder PW.3 and dragged him from the Zeep and all the accused helped A.1 to kidnap PW.3 would lead to the conclusion that they shared common intention and therefore, the lower Court ought to have convicted A.1 to A.4 for offence under section 307 IPC. He also submitted that convicting Appellants 1 to 3 for offence under section 364 and 395 IPC which are punishable for imprisonment for life or rigorous imprisonment for a term which may extend to 10 years, the trial Court ought to have imposed seven years imprisonment for offences punishable under sections 364 and 395 IPC but instead, three years rigorous imprisonment was given. Therefore, the punishment imposed on A.1 to A.4 has to be enhanced.

14. I am unable to accept the contention of the learned counsel for the revision petitioner. Though offences under sections 364 and 395 IPC are punishable with imprisonment for life or rigorous imprisonment which may extend to a term of ten years, having regard to the facts of the case and the evidence adduced, it cannot be stated that the accused really intended to commit dacoity. No doubt, PW.3 was kidnapped but at the same time, after assaulting PW.3 for some hours, he was allowed to go free by accused 1 to 4. Therefore, there was no intention on the part of the accused 1 to 4 to kidnap PW.3 with an intention of committing murder or get ransom and the act of the accused 1 to 4 will come under section 365, namely, kidnapping with an intention to confine secretly and wrongfully.

15. According to me, Appellants 1 to 3 can be convicted only under section 365 IPC punishable for seven years rigorous

imprisonment and having regard to the labour unrest and the dispute between the management and the workers, the trial Court has rightly exercised the discretion and awarded 3 years rigorous imprisonment. Similarly, in respect of offence punishable under section 395 IPC, the trial Court has rightly exercised the discretion and imposed three years rigorous imprisonment. Hence, I do not find any perversity in awarding sentence of three years for offence under sections 395 and 365 IPC. Insofar as the sentence in respect of other offences, the trial Court has rightly exercised its discretion and imposed sentence on A.1 to A.3 for one year. Similarly for offence under sections 341 and 279 IPC, one month simple imprisonment was imposed for each offence and for offence under section 352 IPC three months simple imprisonment was imposed. Hence, I do not find any infirmity in the conviction and sentence imposed on Appellants 1 to 3 for various offences and the same are sustained.

16. In the result, Appeal No.123 of 2004 is dismissed against Appellants 1 to 3 and the impugned judgment is sustained in respect of Appellants 1 to 3. Appeal No.123 of 2004 is allowed in respect of Appellants 4 to 8 and the impugned judgment is set aside insofar as the Appellants 4 to 8 are concerned and fine amount, if any paid, shall be refunded to them and they are acquitted of the charges levelled against them. Bail Bonds, if any executed, shall stand terminated. The Criminal Revision Case No.1063 of 2003 is dismissed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

asvm

To

1. The Principal Sessions Judge,
Udagamandalam, Nilgiris District.
2. The Assistant Sessions Judge,
Udagamandalam, Nilgiris District.
3. -do- Through The Principal Sessions Judge,
Udagamandalam, Nilgiris District.

4. The District Judge -cum-
Chief Judicial Magistrate,
Udagamandalam, Nilgiris District.

5. The Inspector of Police,
Koolakombai Police Station.

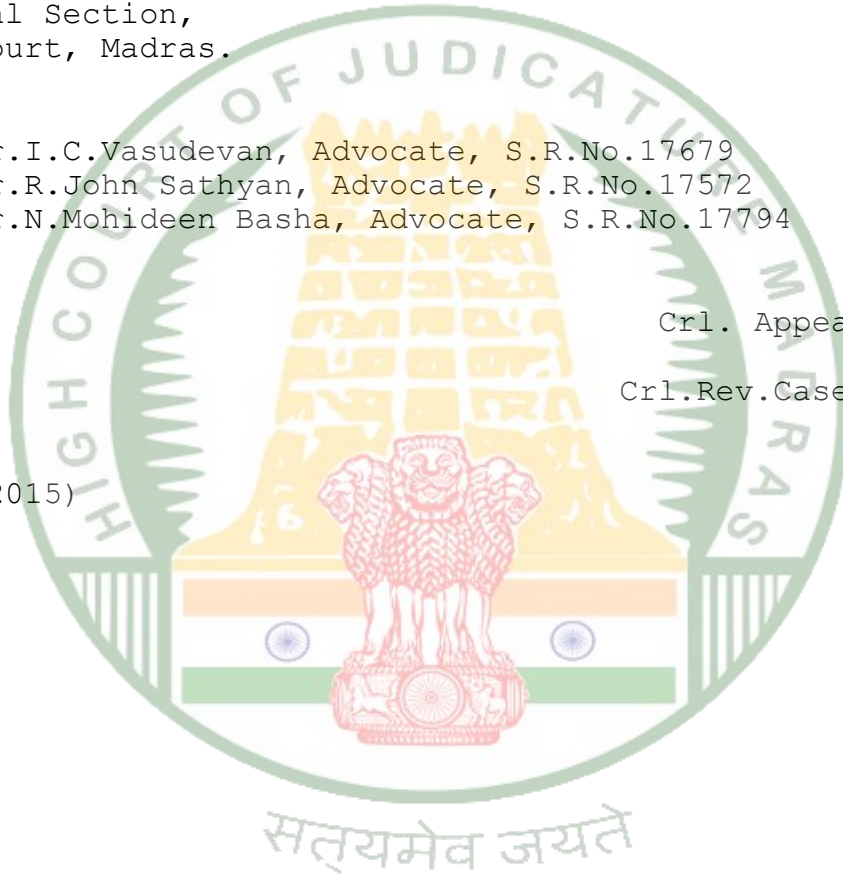
6. The Additional Public Prosecutor,
High Court, Madras.

7. The Section Officer,
Criminal Section,
High Court, Madras.

+1cc to Mr.I.C.Vasudevan, Advocate, S.R.No.17679
+1cc to Mr.R.John Sathyan, Advocate, S.R.No.17572
+1cc to Mr.N.Mohideen Basha, Advocate, S.R.No.17794

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and
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GR(CO)
CA(09/04/2015)



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