

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.10.2018

DELIVERED ON : 12.12.2018

CORAM:

THE HONOURABLE MR.JUSTICE C.T.SELVAM
AND

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Criminal Appeal Nos.92, 93, 94 and 95 of 2017

Viji @ Vijayakumar
S/o.Krishnasamy ... Appellant in Crl.A.No.92/2017

Nallu @ Nallendiran
S/o.Kailasam ... Appellant in Crl.A.No.93/2017

Rajan
S/o.Mahalingam ... Appellant in Crl.A.No.94/2017

Santhosh @ Santhoshkumar
S/o.Sundaram ... Appellant in Crl.A.No.95/2017

Vs

State by
Inspector of Police,
M4 - Thudiyalur Police Station,
Coimbatore District.
Crime No.668/2012 ... Respondent in all appeals

Criminal Appeals filed u/s.374(2) Cr.P.C. against the
judgment of learned III Additional District and Sessions
Judge, Coimbatore, passed in S.C.No.5 of 2014 on 05.11.2016.

For Appellants :Mr.N.R.Elango, senior counsel
for Mr.A.Suresh Sakthi Murugan
[Crl.A.Nos.92, 93 and 95 of 2017]
Mr.D.R.Arunkumar [Crl.A.No.94 of 2017]

For Respondent:Mr.R.Prathap Kumar,
Additional Public Prosecutor

COMMON JUDGMENT

[Judgment of the Court was made by C.T.SELVAM, J]

These appeals arise against the judgment of learned III
Additional District and Sessions Judge, Coimbatore, passed in
S.C.No.5 of 2014 on 05.11.2016.

2. Case of prosecution is that on 07.10.2012 at about 05.00 p.m. while the accused were taking liquor in a TASMAC shop, PW-10, who was also drinking in the Bar vomitted on the table. When accused scolded PW-10, deceased, PWs.1 and 3, who were also in the Bar, questioned the accused as to why they did so. All were sent out by the owner of the Bar. Thereafter, deceased, PWs.1 and 3 were talking with their friends. Accused persons, with an intent to murder them, assaulted them with knives owing to which the deceased died, PW-3 sustained grievous injuries and PW-1 sustained injuries. The accusation against accused persons are :

(i) A1 stabbed deceased on the chest using a knife owing to which he died while A4 and A5 caught hold of deceased.

(ii) A2 stabbed PW-3 on his stomach owing to which he sustained grievous injuries while A6 and A7 caught hold of him.

(iii) A3 attempted to assault PW-1 using a knife and in the attempt to save himself, PW-1 sustained simple injuries.

A case was registered in Crime No.668 of 2012 on the file of respondent police for offences u/s.147, 148, 294(b), 342, 324, 307 and 302 IPC. Upon completion of investigation, a charge was filed informing commission of offences u/s.147, 148, 341, 302, 302 r/w 109, 307, 307 r/w 109 and 324 IPC before learned Judicial Magistrate I, Coimbatore and on committal, the case was tried in S.C.No.5 of 2014 on the file of learned III Additional District and Sessions Judge, Coimbatore.

3. Before trial Court, prosecution examined 19 witnesses and marked 27 exhibits and 11 material objects. None were examined on the side of defence nor were any exhibits marked.

3.1. PW-1, spoke to having drink at a TASMAC shop along with deceased and PW-3, of a quarrel between them and accused persons and thereafter, when they were chatting with their friends at a shop, accused persons quarrelled with them and A1 assaulted deceased with knife owing to which he died, A2 assaulted PW-3 on his stomach causing grievous injuries and A3 stabbed PW-1 using a knife and in

an attempt to ward him off, PW-1 sustained simple injuries. PW-1 also spoke to having taken treatment at a hospital, of police enquiring and recording his statement and that he identified Mos.1 to 3 - Knives. PW-3 has also spoken on the same lines.

3.2. PW-2 spoke to chatting with deceased and PWs.1 and 3 and that accused persons came, quarrelled and assaulted them with knives. PW-2 also spoke to PW-3's admission in the hospital, of death of deceased and of identifying MOs.1 to 3, knives.

3.3. PW-4, a resident of Kovumdampalayam, spoke to seeing the body of deceased along with his friend and of attesting in Ex.P3 - seizure mahazar (M.O.4 - blood stained earth and M.O.5 - sample earth).

3.4. PW-5, Owner of TASMAC shop, spoke to knowing the accused persons as well as deceased and PWs.1 and 3. PW-5 spoke to all of them having liquor at his shop, of quarrel between them, of sending them out of the shop and on hearing of occurrence, he went and saw the body of deceased.

3.5. PWs.6 and 7 are attesting witnesses. PW-8, who is running a chicken stall, spoke to the death of deceased. PW-9, neighbour of deceased, spoke to attending the police station with another upon information, of attesting the confession statement of A3 and Ex.P13, Seizure Mahazar.

3.6. PW-10 spoke to having a drink in the TASMAC Bar and of vomiting on the table owing to which there was a quarrel. PW-10 also spoke to having lost control owing to excess consumption of liquor and of having heard about the death of deceased.

3.7. PW-11 spoke to having been on his way to work on 19.11.2012 at about 10.30 a.m. and on instructions of Police, attesting Ex.P14, confession statement of A5.

3.8. PW-12, Doctor, who treated PW-1, spoke to handing over Ex.P15, Wound Certificate to police and opined that the injury would have been caused by a sharp weapon.

3.9. PW-13, Doctor, who conducted postmortem, opined that deceased would appear to have died of shock and haemorrhage due to stab injury to the chest and its corresponding internal injuries and that death would have occurred 12 to 24 hours prior to autopsy.

3.10. PW-14, Constable (Grade I), spoke to handing over the body of deceased to PW-13, Doctor, towards conduct of postmortem and on completion thereof, handing over the same to the relatives of deceased.

3.11. PW-15, Doctor, spoke to issuing Ex.P21, Wound Certificate, informing that the injuries suffered by PW-3 were grievous in nature.

3.12. PW-16, Sub-Inspector of Police, spoke to recording the statement of PW-1 at the hospital and of registering a case in Crime No.668 of 2012 for offences u/s.147, 148, 294 (b), 342, 324, 307 and 302 IPC and of forwarding the same to Court.

3.13. PW-17, Assistant Director and Assistant Chemical Examiner, spoke to conducting chemical examination on material objects sent to him and of issuing Ex.P23 – Biological Report.

3.14. PW-18 spoke to issuing Ex.P24, Serological Report and Ex.P25, Serological Final Report.

3.15. PW-19, Inspector of Police, who conducted investigation in the case, spoke to visiting the place of occurrence, preparation of mahazars, examination of witnesses, arrest of accused and of obtaining various reports. PW-19 also deposed that on completion of investigation, he filed a charge sheet informing commission of offences u/s.147, 148, 341, 302, 302 r/w 109, 307, 307 r/w 109 and 324 IPC before learned Judicial Magistrate I, Coimbatore.

4. On appreciation of materials before it, trial Court, under judgment dated 05.11.2016, while acquitting accused 5 and 7, convicted and sentenced the other accused as follows:

Accused	Offence	Sentence
A1	302 IPC	Life Imprisonment and fine of Rs.1,000/-
A2	307 IPC	10 years R.I. and fine of Rs.1,000/- i/d 3 months R.I.
A3	324 IPC	3 years R.I. and fine of Rs.1,000/- i.d 3 months R.I.
A1, A2 and A3	148 IPC	3 years R.I. and fine of Rs.1,000/- i/d 3 months R.I.
A1, A2, A3, A4 and A6	307 r/w 149 IPC	10 years R.I. and fine of Rs.1,000/- i/d 3 months R.I.
A1, A2, A4 and A6	324 r/w 149 IPC	3 years R.I. and fine of Rs.1,000/- i/d 3 months R.I.
A2, A3, A4 and A6	302 r/w 149 IPC	Life Imprisonment and fine of Rs.1,000/-
A4 and A6	147 IPC	2 years R.I. and fine of Rs.1,000/- i/d 3 months R.I.

Trial Court directed that sentences run concurrently. Against such finding, the present appeal has been filed.

5. Heard learned senior counsel for appellants in Crl.A.Nos.92, 93 and 95 of 2017, learned counsel for appellant in Crl.A.No.94 of 2017 and learned Additional Public Prosecutor for respondent.

6. Learned senior counsel for appellants submitted that while according to prosecution First Information Report in Ex.P22 was registered pursuant to PW-16, Sub-Inspector of Police going over to the hospital where PW-1 and others were undergoing treatment, recording PW-1's statement and registering case in Crime No.668 of 2012 at 06.40 p.m. on

07.10.2012, Ex.P22 - FIR has reached the Magistrate only at 06.00 a.m. on 08.10.2012. PW-16 had denied knowledge of a related case registered in Crime No.667 of 2012. PW-19, Investigation Officer, had admitted that Crime No.667 of 2012 had been registered on the complaint of a constable. Such constable has not been examined. It is the admission of PW-19 that such complaint was in respect of accused persons having been seen carrying weapons at the scene. In response to query whether he had conducted any investigation on such complaint, PW-19 had stated that Sub-Inspector of Police by name Rajendra Prasad had conducted investigation. He admitted that he ascertained that both cases viz., Crime Nos.667 and 668 of 2012 were related and that he acquired such knowledge when this case was under investigation. PW-19 has deposed that Crime No.667 of 2012 was pending investigation. PW-19 claimed that there was no need to produce before Court all the documents relating to such case in the present case since the same related to a separate complaint preferred by a constable. Learned senior counsel drew our attention to the appreciation on this aspect by the trial Court. The same is to be found in Paragraph Nos.14 to 16 of the judgment of Court below and reads as follows:

'14. However, as the FIR in Cr.No.667 of 2012 was not before this court, this court was in dark as to whether the said FIR was related to the incident mentioned in Cr.No.668 of 2012 (Ex.P22). The learned counsel for the accused would claim that PW19 has admitted that both FIR's are related and therefore, the non production of the same has to be treated as suppression of the first FIR besides that Ex.P22 is nothing but a previous statement which does not have any evidentiary value. However, it is seen that, PW19 had also stated that both the FIR's are in respect of two different incidents. In order to decide as to whether the FIR in Cr.No.667 of 2012 is not relevant to the present case as claimed by the PW19, the case which was reserved for judgment was reopened suo motu and the said FIR was summoned by this court under Section 91 Cr.P.C. This court, obvious of the requirement to subject the complainant and other witnesses related to the said FIR for cross examination by the accused in the event of the said FIR being marked as evidence in the present case, and of the prejudice that would be caused to the accused, if they were not given such an opportunity, had circumscribed the said order summoning the said FIR, by stating that the FIR was being summoned only for the purpose of deciding whether the said FIR is relevant for the present case or not, and whether the non production of the same amounts to suppression of facts as claimed by the learned counsel for the accused. Except for this limited purpose, FIR in Cr.No.667 of 2012 is not looked into for any other purpose. It is to be noted

here that it is possible for the accused to refer to any previous FIR registered in the said Police station as being related to the present FIR and claim that the said FIR is related to the present FIR, and the non production of the same is a suppression of fact. The accused persons were admittedly served with a copy of the said FIR, as pointed out in the cross examination of PW19. Though, this court could have held that they ought to have established that the said FIR is relevant for the present case, in support of their contention that the same has been suppressed by the prosecution, this court did not do so, but chose to satisfy itself as to whether the FIR in Cr.No.667 of 2012 was related to FIR in Ex.P22 and is relevant for the present case. For this reason, as the said FIR was summoned suo motu from the respondent police.

15. On a perusal of said FIR, which was produced by the prosecution along with a memo on 18.10.2016, it is seen that the said FIR has been registered on 7.10.2012, at 5.30 pm, on a complaint by one Ponnusamy, Head Constable, Thudiyalur Police Station alleging that, at around 4.40pm on 7.10.2012, when he was regulating traffic near Goundampalayam Junction, one Nallu @ Nallendran, Viji, Veeran, Rajan, Mani, Senthilkumar and Santosh were walking from north to south in Mettupalayam to Coimbatore Road near Goundampalayam Junction, making a big noise. When Ponnusamy questioned them, Nally threatened him by showing a knife and claimed that they finished off a person just then and that, they will kill him also. Besides this, others who accompanied Nallu scolded him with vulgar language. Claiming thus, he was said to have lodged the complaint that the accused name therein had used vulgar language, gave him life threat and thereby, obstructed him from discharging his duty.

16. The above FIR can, by no stretch of imagination, be said to be related to the offence for which the accused persons stand charged in the present case. It is true that the FIR shows that the 1st accused was said to have boasted that they had killed some one. However, this FIR came to be registered only in respect of the alleged offence committed by the accused persons against the complainant therein viz., Mr.Ponnusamy. It does not, in any way, relate to the offences for which the present FIR in Ex.P22 has been registered. It is to be noted that, in the FIR in Cr.No.667 of 2012, the name of the person killed or the place in which he was killed etc., have not been mentioned. In such

circumstances, this cannot be considered as the first FIR related to the incident for which Ex.P22 has been registered. Therefore, the arguments put forth by the learned counsel for the 1st accused cannot be accepted. For the same reason, the reliance placed by the learned counsel for the 1st accused on PSO 588(A) (presently PSO 566) would not come to the aid of the accused, as the said police standing order or the principles underlying therein, can be invoked only if the two FIRs arise out of the same transaction. Therefore, as already pointed out, the FIR in Crime No.667 of 2012 and Crime No.668 of 2012 (Ex.P22) cannot be said to arise out of the same transaction and the FIR in crime No.667 of 2012 is not relevant to the present case. Consequently, non production of the said FIR or the complainant and the other witnesses connected to the said FIR in the present case is not fatal to the prosecution case.'

7. The reasoning of the trial Court reveals that it has gone out of its way in avoiding the marking of the First Information Report in Crime No.667 of 2012 and avoiding cross-examination of the prosecution witnesses there regards, which if permitted may have caused much discomfiture to the prosecution. The observation that it (trial Court) could have required learned counsel for appellant to prove the relevancy of the First Information Report in Crime No.667 of 2012 when copies thereof have been furnished to the accused u/s.207 Cr.P.C. totally is unsustainable. Avoiding cross-examination which might be uncomfortable to the prosecution is not only unjust, it also works against the principle of 'Innocent until proven guilty'.

8. Learned senior counsel submitted that as against Ex.P22 informing registration of case u/s.302 IPC, it was the admission of PW-1 that when his statement/complaint was recorded, he was not aware that the deceased Perumal had died and that he had not informed so. As against Ex.P22 reflecting the aliases of A1 and A2, PW-1 admitted to not informing the same. There was a delay of 12 hours in the Ex.P22, First Information Report, reaching Court and 24 hours in forwarding Ex.P27 - inquest report and Section 161 (3) Cr.P.C. statements of PWs.1 to 7. PWs.1 to 3, allegedly injured witnesses, PWs.4, 6 and 7 being attesting witnesses while PW-5 is a witness to the quarrel between deceased and accused party. PW-12, Doctor, who treated PW-1, had admitted that PW-1 had not informed that he had suffered any injury owing to use of any weapon. He had deposed that PW-1 had left after taking treatment as an outpatient at about 05.30 p.m. and such position had been informed in Ex.P15, Wound Certificate. Challenging the prosecution case of occurrence having been witnessed by PWs.1 to 3, learned senior counsel submitted that PW-1 might have suffered injury in a manner other than that projected by the

prosecution and the same may even be a self-inflicted one. Given PW-1's admission it was clear that the First Information Report was a fabricated one and the possibility of PW-1 having witnessed the occurrence was remote.

9. Learned senior counsel next submitted that PW-2 was a chance witness. In chief, he has deposed to being at the scene with one Marimuthu, (not examined) both of them having gone to purchase rice and having waited in the shop, which was then closed, to be opened. In cross, PW-2 had admitted that the accused did not belong to his locality and that he did not belong to that which they belonged to. He did not know their addresses or other particulars. No enquiry was made of him regards the approximate age or features of the accused. He admitted that he has seen the accused for the first time after the occurrence only in Court and even then he did not know their addresses or other particulars. Learned senior counsel submitted that in the said circumstances no reliance could be placed on the evidence of PW-2 in the absence of a Test Identification Parade.

10. Turning to PW-3, learned senior counsel submitted that such witness in chief had deposed that A4 and A5 (acquitted by trial Court) had caught hold of the deceased Perumal while A6 and A7 (acquitted by trial Court) had caught hold of him; the deceased suffered a knife injury to his hand in trying to avoid a stab by A1 and A1 again stabbed the deceased on the chest. A2 attempted to stab him, PW-3 and in holding the knife, he suffered injury to the right hand. A2 again stabbed him and immediately his intestine protruded out and holding the same he ran towards a shop and sat therebefore in a faint. He did not know what transpired thereafter and when he came to, he came to know he was undergoing treatment at the Government hospital, Coimbatore. In cross-examination, he had denied the suggestion that in the course of his examination he had informed of having been taken to hospital by an ambulance and that he had informed the duty Doctor of having suffered an attack at the hands of an unknown person. Learned senior counsel submitted that PW-3 had suffered grievous injury viz., jejunal tear as noted in Ex.P21, Wound Certificate. Learned senior counsel submitted that the Accident Register entry relating to PW-3 had been suppressed. PW-3 had been seriously ill and was in no state to tender a statement. However, PW-19, Investigation Officer, claimed to have recorded his statement on 08.10.2012 which had been forwarded to Court on 09.10.2012. PW-1, in cross, had stated that he had been discharged from Kirupa Hospital by 10.00 p.m. on 07.10.2012 and had gone home. Having taken rest for sometime, he, coming to know that the deceased and PW-3 were at the Government hospital, went to see them and reached the hospital at about 02.00 a.m. He was unable to see and speak to them till he was examined by the police at the hospital. He was able to speak to PW-3 only after 2 days. This was so since PW-3 was not able to speak. He admitted that he would have spoken to PW-3 about 10 days after the occurrence. PW-19,

Investigation Officer, however claimed that PW-3 was in fit state to tender a statement on 08.10.2012 and denied that he had failed to mark the Accident Register relating to PW-3 only because the same would reveal that PW-3, on his admission at hospital had stated that he did not know who his assailants were. Learned senior counsel submitted that in circumstances where there was much delay in First Information Report reaching Court and the probability of it being the product of fabrication loomed large, since PW-1/complainant admitted to not informing the death nor providing the aliases of A1 and A2, this Court calling for the Accident Register as also the Case History relating to PW-3 might throw much light on the case. Finding force in such submission, this Court had passed the following order on 27.09.2018:

'We have heard Mr.N.R.Elango, learned Senior Counsel for appellants in Crl.A.Nos.92 to 95 of 2017.

2. At the part-heard stage, we consider it appropriate to require the Dean, Coimbatore Medical College Hospital to produce the original Accident Register Book as also the case sheet in respect of Srinivasan, whose treatment is covered under wound Certificate No.33916 dated 21.11.2012 through Kanagasundaram, S/o.Mokkasamy, who was the investigation officer in case tried in S.C.No.5 of 2014 on the file of learned III Additional District and Sessions Judge, Coimbatore. Copy of this order shall be furnished to the office of Public Prosecutor towards immediate forwarding thereof to the concerned through the Investigating Officer, who is present before us.

Post the matter on 05.10.2018.'

The matter was next heard on 11.10.2018 when the records called for were produced. The original Accident Register relating to PW-3 informs of an attack by unknown persons. The reverse thereof shows receipt of Accident Register copy on 08.10.2012 at 0.30 hours. Even thereon, alteration of the date is visible. The case sheet of PW-3 reveals that he had undergone surgery on 07.10.2012 and had been sent to the male surgery ward on 08.10.2012 at 05.00 a.m. However, he had taken seriously ill and was transferred to Surgical Intensive Care Unit (SICU) on 09.10.2012 and administered oxygen. It is the submission of learned senior counsel that in the above circumstances, it was hardly likely that PW-3 would have given a graphic description of the occurrence as found in his alleged Section 161 (3) Cr.P.C. statement. Inquest had been held between 7 and 11 a.m. on 08.10.2012 and Ex.P27, inquest report, reached the Court on 09.10.2012 at 09.00 a.m. Section 161(3) Cr.P.C. statement of PW-2 did not accompany the inquest report but was received by the Court only on 04.12.2012. Learned senior counsel would conclude by submitting that appellants erroneously were convicted by trial Court and are entitled to acquittal.

11. This Court has perused Ex.P27, inquest report, which

allegedly contains the signature of PW-3. The signature shown as that of PW-3 therein is in total variance with the attestation of his deposition in Court.

12. We have heard learned Additional Public Prosecutor on the above submissions. Learned Additional Public Prosecutor would place reliance on the judgment of this Court in CrI.A.No.804 of 2016 dated 16.02.2017, whereunder this Court has upheld the conviction of A3 in the case.

13. We consider it appropriate, even in the face of a finding of conviction entered upon by this Court in CrI.A.No.804 of 2016 against A3, to set aside the order of conviction passed by the trial Court and acquit appellants for the following reasons:

- (i) The admission of PW-1 that he had no knowledge and had not informed the death of Perumal nor had he informed the aliases of A1 and A2 necessarily lead to the inference that Ex.P22, First Information Report is not one registered on information had from him. Clearly, Ex.P22, First Information Report is a fabricated document and the fact that the same has reached the Magistrate with a delay of 12 hours points to it being the product of deliberation.
- (ii) The linear muscle deep injury suffered to the right hand by PW-1 for which he was treated as outpatient can, with no definiteness, be held to have been suffered by him in the course of occurrence leading to the death of Perumal.
- (iii) The evidence of PW-2 does not inspire confidence as he has admitted to not knowing the accused or their whereabouts and has identified them in Court on 01.09.2015 i.e. 3 years after the occurrence without even having been subjected to a Test Identification Parade.
- (iv) Though PW-3 has suffered serious injury of jejunal tear, the contemporaneous record i.e. Accident Register which has been suppressed by prosecution, which along with the case sheet, has been called for and examined by this Court reveals that he did not inform who his assailants were. PW-19, Investigation Officer's claim of having examined PW-3 on 08.10.2012 is laid to rest by PW-1 asserting that PW-3 was not in a fit state to speak and he spoke to him only after 10 days of the occurrence. PW-3 having undergone an operation on the night of 09.10.2012 has been in the male ward on 08.10.2012 and having taken seriously ill, had been shifted to Surgical Intensive Care Unit (SICU) on 09.10.2012 and had been administered oxygen. Falsely showing him as a witness to Ex.P27, inquest report, being of date 08.10.2012 only does more damage to the prosecution case. As noted supra, the signature shown as that of PW-3 therein is at total variance with the attestation of his deposition in Court.
- (v) The Supreme Court in Marudanal Augusti v State of Kerala [1980 (4) SCC 425] after stating
'The trial Court appears to have acquitted the appellant on the ground that there were certain

infirmities in the investigation conducted by the police officer. The manner in which the FIR was lodged, the delay in despatch of the FIR and the delay on the part of PW 1 in getting the injuries examined by the doctor, were features which according to the Sessions Judge were so gravely suspicious that they went to the root of the matter. The High Court on the other hand was not impressed by the reasons given by the trial Court and was of the opinion that there was no reason to disbelieve eyewitnesses PWs.1 to 6 against whom the accused bore no animus. The High Court was of the opinion that there was thus no reason to throw out the prosecution due to the infirmities noticed by the learned Sessions Judge.'

observed

'The High Court seems to have overlooked the fact that the entire fabric of the prosecution case would collapse if the FIR is held to be fabricated or brought into existence long after the occurrence and any number of witnesses could be added without there being anything to check the authenticity of their evidence.'

14. For the aforesaid reasons, the Criminal Appeals shall stand allowed. The conviction and sentence passed by learned III Additional District and Sessions Judge, Coimbatore, in S.C.No.5 of 2014 on 05.11.2016, shall stand set aside. Appellants are acquitted of all charges. Fine, if any, paid shall be refunded.

Appellants are directed to be released forthwith unless their presence is required in connection with any other case.

15. We are now left with the question of whether we can come to the aid of A3, who has been convicted under judgment of this Court in CrI.A.No.804 of 2016 dated 16.02.2017 but stands on the same footing as appellants. In his Book 'Honeybees of Solomon' Justice K.T.Thomas (as he then was) has shared his experience on his last date of sitting as follows:

'The last sitting as a Judge

My last sitting as a judge, whatever hierarchical level I functioned, was on 29.1.2002. This was because, by mid-night of 29th January, I attained the age of 65. According to Article 124(2) of the Constitution of India, a judge shall hold office in the Supreme Court of India only until he attains the age of 65. Nevertheless my last sitting, for hearing regular appeals in the Supreme Court, happened to be on Thursday the 24th January 2002. Normally, there would be nothing special to be remembered about the last day of sitting in the court as that would be a winding-up day. But in my case that day tuned out to be one of most exciting

days in my judicial life on account of a particular case. I heard arguments in that case along with Mr. Justice Pukhan.

When the case was taken up, the time was about 3.30 p.m. and then neither me nor Justice Pukhan was prepared to take up any new appeal as we had only thirty minutes more to reach the end of the sitting hours. A lady advocate stood up and reminded us that on a previous occasion we agreed that this case would be taken up out of turn as the accused in that case was remaining in jail for nearly eight years. So we thought we could at least hear the facts of the case and thus reach the time limit of 4 p.m. But when the facts of the case were narrated in brief, a flash of thought passed through my mind that it was not a case to be left half baked. The facts in that case, briefly stated, were the following:-

Two accused were convicted of murder and both were sentenced to imprisonment for life by a Sessions Judge. In appeal filed by them, the High Court confirmed the conviction and sentence as against both. The second accused alone filed Special Leave Petition in the Supreme Court, but that petition was dismissed at the admission stage itself as the Supreme Court found no merit in it. Subsequently the other accused in the case filed Special Leave Petition as against the judgment of the High Court, in so far as, it related to his conviction and sentence. During arguments the advocates said that the plea would be confined to a limited point regarding the nature of the offence for which he could have been convicted. Hence notice was issued on that Special Leave Petition to the state concerned. The state of Maharashtra entered appearance through their state counsel.

When the lady advocate began to narrate the facts of the case, a spark of thought kindled in my mind that unless the appeal was allowed in the case, there would be mis-carriage of justice. The admitted prosecution version in that case was like this:-

The victim (the deceased) walked down a staircase while the two accused were standing at the bottom. The deceased asked the accused, "why did you implicate me in a false case?" On hearing this utterance, both assailants took out their knives and stabbed the deceased on the chest. He died later in the hospital. Before he died he gave a dying declaration, in which he narrated the incident which was the same version as the prosecution case. When the postmortem examination was conducted the doctor smelt alcohol from the body.

After hearing the narration of those facts I asked the counsel for the state of Maharashtra; "if the synopsis of the prosecution case was as

narrated, was it not a case for reducing the conviction to the second degree murder. (in which it is not a case of murder under law, but only culpable homicide not amounting to murder)." I asked the counsel whether it was possible for the accused to fear that the deceased was then in a quarrelling mood.

If the accused had ventured to answer the query of the deceased by saying either yes or no, the situation would have been aggravated. If the answer was 'yes' the deceased could have felt greatly angered and if the answer was 'no' that would also have made the deceased angry. In such a situation the accused would have developed apprehension that the deceased might assault them, at least by pushing them down, if not a grievous assault. If the accused apprehended that grievous hurt would be caused to the accused, then the right of the accused under law, being the right of self-defense, could even stretch up to causing the death of the deceased. But, on the contrary, if the conduct of the deceased was not enough to instill the apprehension that grievous hurt would be caused, the right of self-defence would not entitle him to inflict fatal injury to the deceased. Nevertheless, in such an event, the right of self-defence would be restricted to a much lesser degree. Had the accused inflicted only bodily hurt to the deceased the law would protect the accused. So if the accused in such a situation, had inflicted fatal injuries to the deceased, he was liable to be convicted for a lesser offence. (it is known as "exceeding the right of self-defense"). The offence then would go down to a lower degree which is called 'culpable homicide not amounting to murder'. In the present case the situation was such that the accused could have feared that the deceased was in an aggressive mood and hence accused would be justified in giving him a push to thwart the aggression. But the accused inflicted fatal injuries and thus exceeded his right.

When the above legal position was discussed in open court, the counsel for the state of Maharashtra very fairly expressed that he did not intend to take up a different stand. As my colleague Justice Pukhan also concurred with my thinking, we decided to alter the conviction from first degree murder to the lesser degree of culpable homicide and reduced the sentence of life imprisonment to the period which he had already undergone. I dictated judgment of the court and ended it by directing the jail authorities "to set the first accused free forthwith".

Normally the case would have ended with the said judgment. But I had another flash of thinking.

If the legal position was what we held regarding the first accused, how the legal position was different as for the second accused on the same set of facts. But the hurdle for the second accused was that the Special Leave Petition filed by him earlier happened to be dismissed without going into the merits of the case. This created an unsavoury situation. On the same set of facts, one of the two accused could be convicted only for the second degree homicide, then how could the other accused be convicted for a higher degree of homicide and direct him to suffer a sentence of a much longer term of imprisonment. This became a baffling question before us.

We then reminded ourselves of the fundamental right enshrined in Article 21 of the Constitution. "No person shall be deprived of his life and liberty save in accordance with the procedure established by law". If according to the procedure established by law, he could only have been convicted of a lesser offence, could he be deprived of his liberty for a period beyond what he would be legally liable. Would the fact that the conviction and sentence passed on him were confirmed by the court earlier render the Supreme Court helpless in granting his fundamental right under Article 21.

After discussion at the Bar we decided to extend the same benefit to the second accused as well. For that purpose I dictated the following portion also in open court. "The spirit of Article 21 beckons us, notwithstanding the finality attached to the earlier order of the Supreme Court by which the Special Leave Petition filed by the first accused was dismissed. He could not be detained in prison even one day more than what he would have been liable under law. Hence we apply the same benefit to the second accused which we had granted to the first accused. We therefore, direct the jail authorities to release the second accused also forthwith, unless he was required to be detained in any other case".

After the above dictation was given I looked at the clock of the court, the needle showed that it was 4 p.m., the end of the day. I cannot, but record here a comment which the Maharashtra state counsel passed in open court.

"Your Lordship cannot have a more befitting finale for the glorious judicial career than what it took place now".'

Although we are tempted to follow the line adopted by the Supreme Court we would refrain from doing so for two reasons:

- (1) The Supreme Court is bestowed with powers under Article 141 of the Constitution of India while we are not and we may be setting a dangerous precedent.

(2)As there is a forum for appeal against our judgment we cannot be oblivious to the possibility of our judgment being held wrong and that in Crl.A.No.804 of 2016 found right by the Honourable Supreme Court.

However, we consider it appropriate to direct the District Legal Services Authority, Coimbatore, to cause a copy of this judgment to be forwarded to A3, who presently is confined at Central Prison, Coimbatore and aid A3 in preferring an appeal against his conviction in Crl.A.No.804 of 2016, if he so desires.

Sd/-

Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

gm

To

- 1.The III Additional District and Sessions Judge,
Coimbatore.
 - 2.The Inspector of Police,
M4 - Thudiyalur Police Station,
Coimbatore District.
 - 3.The Public Prosecutor,
High Court,
Madras.
 - 4.The Superintendent of Central Prison,
Coimbatore.
 - 5.The District Legal Services Authority,
Coimbatore.
- + 4 ccs to M/s. A. Suresh Sakthi Murugan, Advocate Sr.85743

Criminal Appeal Nos.92, 93, 94 and 95 of 2017

GRN(CO)
EU(13/12/2018)