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Cr1.A. (MD) Nos. 80, 94, 157 & 245 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 01.03.2022

DELIVERED ON : 23.03.2022

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

and

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Cr1.A. (MD) Nos. 80, 94, 157 & 245 of 2019

and

Cr1.M.P. (MD) Nos. 1719 & 4051 of 2020

Pandi @ Sundara Pandi	... Appellant / Accused No.6 in Cr1.A. (MD) No.80/2019
Manoharan @ Tea Kadai Manoharan	... Appellant / Accused No.10 in Cr1.A. (MD) No.94/2019
Guna @ Gunaseelan	... Appellant / Accused No.2 in Cr1.A. (MD) No.157/2019
Murugan @ Duraimurugan	... Appellant / Accused No.8 in Cr1.A. (MD) No.245/2019

Vs.

The State Rep. by:
The Deputy Superintendent of Police,
Thiruverumbur,
Trichy District.
(Crime No.427/2004
Ramji Nagar Police Station)

... Respondent / complainant
in Cr1.A. (MD) No.80/2019

1.State by
Deputy Superintendent of Police,
Thiruverumbur, Tiruchirapalli District.

2.Inspector of Police,
Ramji Nagar Police Station,
Tiruchirapalli District.
(Crime No.427/2004)

... Respondents / complainant
in Cr1.A. (MD) No.94/2019

State Rep. by:
The Deputy Superintendent of Police,
Thiruverumbur,
Investigation Officer in Crime No.427/2004
Ramji Nagar Police Station,
Tiruchirapalli.
(in Crime No.427 of 2004)

... Respondent / complainant
in Cr1.A. (MD) No.157/2019



The State Rep. by:
The Deputy Superintendent of Police,
Thiruverumbur,
Trichy District.

... Respondent / complainant
in Crl.A. (MD) No. 245/2019

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COMMON PRAYER: Criminal Appeals filed under Section 374(2) of Cr.P.C. against the judgment of conviction and sentence passed by the learned I Additional District and Sessions Judge (PCR), Tiruchirapalli, made in Special Session Case No. 35 of 2005 dated 31.01.2019.

For Appellants:

Crl.A. (MD) No. 80/2019 : Mr. M. Mariappan
for Veera Associates

Crl.A. (MD) No. 94/2019 : Mr. M. Karunanithi

Crl.A. (MD) No. 157/2019: Mr. Gopalakrishna Lakshmana Raju,
Senior Counsel
for N. Anandakumar

Crl.A. (MD) No. 245/2019: Mr. V. Kathirvelu,
Senior Counsel
for Mr. B. Jameel Arasu

For Respondents : Mr. A. Thiruvadi Kumar,
(In all Crl.As) Additional Public Prosecutor.

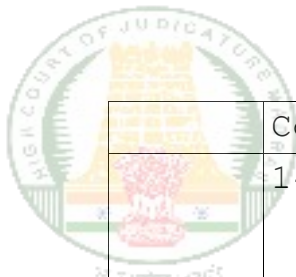
COMMON JUDGMENT

R. SUBRAMANIAN, J.

AND

N. SATHISH KUMAR, J.

All these four appeals arising out of the judgment passed in Special Session Case No. 35 of 2005 on the file of I Additional District and Sessions Court (PCR), Tiruchirapalli, dated 31.01.2019. Originally, final report was filed as against 12 accused for the offences under Sections 120(b), 147, 148, 149, 302, r/w 34, 302, 201 IPC, u/s 3(1) (x) and 3(2) (v) of SC/ST (POA) and Section 4 of TNPPD Act for meticulous execution of brutal attack and killing three persons of the opposite group. During pendency of the criminal trial, A1, A3 and A9 died. Therefore, the charges against them were abated. The trial Court found A2, A6, A8 and A10 guilty of the offences under Sections 148, 341 r/w 149 (3 counts) and Section 302 r/w 149 IPC (3 counts). The appellants/A2, A6, A8 and A10 stood convicted and sentenced to undergo imprisonment as detailed hereunder:



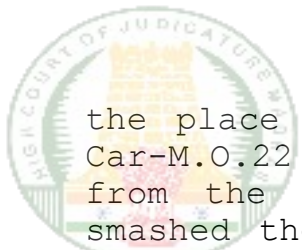
	Conviction U/s.	Sentence	Fine amount
A-2, A-6, A-8 & A-10	148 IPC	To undergo three months simple imprisonment	To pay a fine of Rs.1,000/-, in default, to undergo three months simple imprisonment.
	341 r/w 149 IPC (3 counts)	To undergo one year simple imprisonment under each count	To pay a fine of Rs.1,000/- under each count, in default, to undergo three months simple imprisonment under each count.
	302 /w 149 IPC (3 counts)	To undergo life imprisonment under each count	To pay a fine of Rs.5,000/- under each count, in default, to undergo three months simple imprisonment under each count.

(All the sentences were directed to run concurrently.)

Challenging the said conviction and sentence, the present appeals have been filed by the appellants. As all these appeals arising out of the same judgment, all these appeals have been heard together and disposed of by this common judgment.

2. Totally 12 accused charged for various offences for eliminating three of their rival gang viz., Settu (deceased No.1), Suresh (deceased No.2) and Dingi (deceased No.3).

3. It is the case of the prosecution that the accused all together were operating as a gang in Tiruchirappalli under the leadership of Al-Muttai Ravi, who appears to have died in an encounter by the police, during the pendency of the case. Deceased No.1-Settu was operating a different gang. There was rivalry between the two groups for taking control over the market known as Puthur Market. Similarly, there were also rivalry between two groups for taking contract of the Chinthamani Market. Similarly, there was also rivalry between two groups on account of the murder of one Kuttai James, the younger brother of Settu (deceased No.1) by Al. Due to elimination of Kuttai James, who is the brother of the deceased No.1- Settu, it appears that they decided to eliminate the accused group, particularly Al on the ensuing death anniversary of Kuttai James on 09.08.2004. Accordingly, accused group learnt that the deceased gang planned to kill Al during his visit to Tiruchirappalli Court. Therefore, the accused group planned and conspired prior to the occurrence day to eliminate the deceased on 26.07.2004. P.W.1 is one Lenin, who was working as Driver under deceased No.1, Settu. On 26.07.2004, he drove the Ambassador Car, bearing registration No.TMQ 4599-M.O.23, in which deceased No.1-Settu, deceased No.2-Suresh and deceased No.3 Dingi were travelling along with one Saleem and Thomas. When they were proceeding near



the place called Manikandam on Madurai-Trichy Main Road, a Qualis Car-M.O.22 waylaid their Car and A1 to A4 and A6 to A11 got down from the Car with deadly weapons viz., billhook and sword and smashed the windshield of M.O.23. P.W.1 panic stricken, got down from the car and escaped from the clutches of assailants. The deceased No.3-Dingi fell down, while he ran away from the place. P.W.1 ran some distance from the place of occurrence and thereafter, he came back to the car and found that Suresh/D2 and Settu/D1 were found dead with severe injuries inside the car and Dingi/D3 was found dead in the field next to the highway.

4. P.W.17, while in the place of occurrence, had also seen that A1 was driving the Car and seven or eight persons were there in the car at the relevant point of time. Immediately, the brother of Settu one Augustin lodged a complaint-Ex.P60 before P.W.43-Inspector of Police. On receipt of Ex.P60, P.W.43, registered a case in Crime No.427 of 2004 for the offence under Sections 147, 148, 341, 324, 307 307 and 302 IPC r/w 3(2)(v) of SC/ST (POA), 1989 under Ex.P.61-FIR and immediately, he has forwarded the complaint and FIR through P.W.30. P.W.30 handed over the FIR on the same day at 2.50 p.m. to the Judicial Magistrate No.1, Tiruchirappalli, which is situate about 20 km away from Manikandam. P.W.2 is the sister-in-law of Settu. P.W.4 is one James. According to him, Settu was owning an Ambassador Car and immediately after the occurrence, he went to the place and found three dead bodies in the place of occurrence. P.W.5-Santhiagu was working as a watchman in Swasthika Flour Mill, which is situate near the place of occurrence and he has also seen the damaged Ambassador car and P.W.5 has turned hostile. P.W.6- has also turned hostile. P.W.7 had seen the dead bodies and also the car in the place of occurrence and due to the fear, immediately, he went away from the place. P.W.8 has also seen the dead bodies and in his evidence, he has stated that he has already seen A2 in the jail. P.W.9 is the wife of Suresh/Deceased No.2. According to her, her husband also travelled in the Car on the date of occurrence.

5. P.W.11 is the brother of deceased No.3 Dingi. P.W.12 is also the brother of Dingi. He has also seen the dead body of his brother, where his head was severed and found separately. P.W.15 is running a hotel near the place of occurrence and on hearing the sound, he rushed to the spot and found two persons have been dead inside the Ambassador car and immediately, ran away from the place. P.W.19 changed the Car sheet of A1. P.W.20-Raja, is a painter and at the relevant point of time, he changed the colour of Qualis Car from red to white. P.W.21 to P.W.27-VAOs stood as witnesses to the admissible portion of the confession statements of various accused and also witnessed the seizure mahazar and recovery of the material objects. P.W.33 Head clerk of Magistrate Court has spoken about the material objects sent to the forensic lab, Chemical Analysis report-Ex.P.29, Superimposition report-Ex.31, Chemical Analysis (DNA) report-Ex.P.32 and Serology Report-Ex.P.33.



lower end of both bones present.

7. An oblique cut wound, 10 cm x 4 cm x cavity deep, on the front of left side of chest. O/E the edges are clean cut. The muscles, blood vessels, intercostal muscles, pleura and pericardium are cut. Cut fracture of 3rd and 4th ribs on the left side and body of sternum on the left side present. Stab wounds, of varying dimensions, on the upper lobe of left lung and both ventricles of the heart, obliquely. The cavities contain fluid blood.

8. A transverse cut wound, 31 cm x 5 cm x exposing the underlying structures, on the neck, at the level of C4 Vertebra. O/E the edges are clean cut. The soft tissues, muscles, blood vessels, nerves, wind pipe, oesophagus, body of C4 vertebra bone and spinal cord are clean cut. Skin is intact on the nape of the neck.

9. An oblique stab wound, 4 cm x 2 cm x cavity deep, on the front of lower part of right side of neck. O/E the edges are clean cut. The lower outer end is obtuse and inner upper end is acute. The soft tissues, muscles, blood vessels and nerves are clean cut. Cut fracture of right collar bone present.

10. Four overlapping cut wounds, of varying dimensions and of varying directions, on the face. Cut fracture of all the underlying facial bones, lower jaw bone, left orbital bone and floor of anterior cranial fossa present.

11. A vertical cut wound, 14 cm x 2 cm x exposing the underlying structures, on the left side of head. O/E the edges are clean cut. Pinna of left ear is cut and cut fracture of left parietal bone present. Sub scalpular bruising- Dark red. The meninges is torn. The brain is exposed. Sub arachnoid haemorrhages on both cerebral hemispheres present.

Blood is diffused into the wound track of all the wounds and are ante-mortem in nature. No other external, internal or bony wound present.

Post-mortem report of the severed head of Dinki @ Arockiyaraj

Appearance found at the postmortem. Dried blood on the head and face. Facial disfigurement present. The height of the Head - 20 cm. The circumference - 56 cm. Hairs - Black in colour and matted with blood. Third molars erupted in the both sides of upper jaw.

Wounds :

The head traumatically amputated from the trunk at the level of the mouth by overlapping cut wounds, of varying dimensions, transversely placed. O/E the edges

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- ## Opinion

3. *TEOUISITION SENT FOR D.N.A PROFILE.*

Appearance found at the postmortem - Decapitated trunk and traumatic amputation of right upper limb. Dried blood stain on the trunk and left upper limb. The height of the trunk - 162 cm, breadth - 36 cm. Penis - Not circumcised and Scrotum - Normal.

1. Decapitation of the trunk at the level of the mouth by transverse overlapping cut wounds. The lower jaw is attached with trunk. O/E the edges are serrated. Cut fracture of lower jaw none is present. Third molars are erupted on both sides. The remaining cervical vertebrae i.e. from third are with the trunk. All other structures of the neck are cut. Cut fracture of the hyoid bone present. The decapitated trunk corresponds



with the head, by colour, contour and complexion.

2. Traumatic amputation of right upper limb at the middle third of right arm. O/E the edge is irregular. Blood is adherent at the cut fracture end of right arm bone and is not washable. The intact portion of the right upper limb with the trunk corresponds with the amputated portion of the right upper limb, by colour, contour and complexion.

3. A slash incised wound, 24cm x 4cm x exposing the bones, on the front of left forearm. The skin is hanging downwards, from the upper portion of the right forearm.

Blood is diffused into the wound track of all the wounds and are ante-mortem in nature. No other external, internal or bony wound present.

Post-mortem report of Dinki @ Arockiyaraj

Dried blood present on the amputated portion of the right upper limb. Nails - intact and pale. The length of amputated portion 53 cm, circumference 27 cm.

Wounds :

1. Traumatic amputation of right upper limb from the trunk at the middle third of right arm. O/E the edges are irregular. Blood clots are found adherent at the cut fracture end of right arm bone and it is not washable. All the underlying structures are found cut.

2. A vertical cut wound, 14cm x 3cm d exposing the underlying structures, on the right palm and forearm. Cut fracture of the carpal bones, blood vessels, nerves and tendons present. The above mentioned wounds are ante-mortem in nature. No other external, internal or bony wound present.

1. SOURCE - HUMAN ORIGIN (Anatomical configuration)

2. COLOUR OF THE SKIN - BLACK; COLOUR OF THE HAIRS - BLANK

3. AGE - AROUND 30 YEARS (No wrinkling of skin, No grey hairs, moderately built)

4. sex - MALE (Anatomical configuration)

5. Time 12.00 to 24.00 hours prior to Autopsy.

6. BY COLOUR, CONTOUR AND COMPLEXION OF THIS AMPUTATED PART CORRESPONDS WITH THE INTACT PORTION OF THE RIGHT UPPER LIMB WITH THE TRUNK OF THE DECEASED DINKI @ AROCKIYARAJ - NO DISPARITY WITH THE INTACT PORTION OF RIGHT UPPER LIMB.

Post - mortem report of Settu @ Iruthiyaraj

Appearance found at the postmortem Moderately nourished body of a Male. Dried blood on the head, face, both upper limbs and front of the trunk present. Finger and toe nails - intact and pale Penis - Not circumcised.



Scrotum - Normal. Facial disfigurement present.

Wounds :

1. An oblique stab wound, 8cm x 3cm x cavity deep, on the front of right side of chest. O/E the edges are clean cut, the upper outer end is obtuse and the lower inner end is acute. Cut fracture of second and third ribs present. The intercostal muscles, blood vessels and nerves are clean cut. A stab wound, 4cm x 1cm x 3cm, on the upper lobe of right lung; Right Lung - Collapsed and on C/S pale. Thoracic cavity contains fluid blood.

2. A transverse cut wound on the back of proximal phalanx of all the fingers. O/E the edges are clean cut. Cut fracture of proximal phalanx of all the fingers.

3. A transverse cut wound, 4cm x 1cm x bone deep, on the lower third of left forearm. O/E the edges are clean cut.

4. A transverse cut wound, 7cm x 4cm x exposing the underlying structures, on the back of lower third of left arm. O/E the edges are clean cut. Cut fracture of lower end of left arm bone present.

5. Multiple punctured wounds, of varying dimensions, on the side and back of left side of abdomen. O/E the edges are irregular and all the wounds are skin to muscle deep.

6. A transverse incised wound, 11cm x 0.5cm x skin deep, on the back of left side of chest.

7. An oblique cut wound 6cm x 2cm x cavity deep, on the left supra clavicle region of the neck. O/E the edges are clean cut. Cut fracture of left collar bone present.

8. A punctured wound, 2cm in diameter, muscle deep, on the left side of neck. O/E the edges are irregular.

9. An oblique cut wound, 12cm x 3cm x bone deep, on the left side of neck and face, upto left nostril. O/E the edges are clean cut. Cut fracture of mandible present.

10. An oblique cut wound, 11cm x 3cm x bone deep, on the left side of face and forehead. O/E the edges are clean cut. Cut fracture of underlying facial, orbital and frontal bones present.

11. Six overlapping cut wounds, of varying dimensions and of varying directions, on the left side and back of the head. O/E the edges are clean cut. The brain matter is exposed. Cut fracture of underlying bones present. O/D bruising of the scalp - Dark red. The meninges is torn. The underlying brain matter is made into a semisolid mass. Sub arachnoid haemorrhage on the right cerebral hemisphere present.

Blood is diffused into the wound track of all the wounds

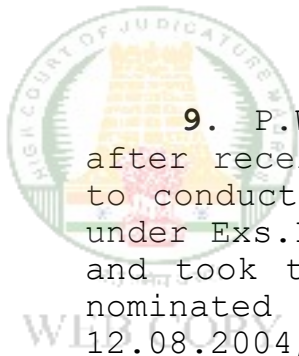


and are ante-mortem in nature. No other external, internal or bony wound present.

Other findings : Peritoneum - intact; Cavity - Empty; Pleura and cavities - vide would column, Pericardium - intact; cavity - straw colour fluid; Heart- myocardium-normal; Chambers - fluid blood, Valves - normal; Coronary Vessels - patent; Great Vessels - Normal; Left Lung- C/s pale; Larynx, Trachea and Hyoidbone - intact; Stomach - Partially digested cooked rice particles, no specific smell; Mucose-pale; Liver, Spleen and Kidneys - c/s pale, Small intestine-Yellowish chyme, no specific smell; mucosa-pale; Urinary bladder - intact and empty; Pelvis - intact; Scalp, Bones, Membrances, brain Vessels, Sinuses and Brain - Vide would column; CSF - blood stained; Vertebral column and cord-intact; All other internal organs on c/s pale;

7. P.W.43, in continuation of his investigation, went to the place of occurrence and conducted inquest over the dead body of Settu and prepared inquest report Ex.P62. P.W.21 is VAO, who went to the place of occurrence and he was present while preparing observation mahazar-Ex.P1 and also witnessed the collection of material objects M.O.1 to 18. Thereafter, on 08.08.2004, he was also present while examining A2 and A3 by the police and pursuant to their confession, M.O.19 was seized under Ex.P2 and also witnessed the seizure of M.O.20 under Ex.P4-seizure mahazar. P.W.43, in continuation of his investigation, examined A1 in the presence of P.W.23-VAO and recorded his confession statement under Ex.P.63. Pursuant to the same, P.W.43 seized material objects under Ex.P.10-seizure mahazar and also seized the Qualis car under Ex.P11-seizure mahazar. P.W.42-Durai Manickam, who is a retired Inspector has conducted inquest over the dead body of Dingi and prepared Ex.P59-inquest report and sent the head and torso of Dingi to the Government Hospital. Thereafter, on 06.08.2004, he examined A8 and recorded his confession under Ex.P8 and pursuant to the same, recovered material objects and handed over the same to the DSP.

8. P.W.41-Anbunesan, while he was working as the Inspector of Police at Somarasampettai Police Station, as per the instructions of the Superintendent of Police, went to the place of occurrence and conducted inquest over the torso of the Dingi and prepared inquest report Ex.P57 and seized the severed head and hand and sent the body to the postmortem. Thereafter examined A4 and recorded his confession. Pursuant to the same, he also seized the sword from him and handed over the same to the DSP. P.W.46-Inspector of Police examined A8 and recorded his confession and the admissible portion of A9 was marked as Ex.P.86 and pursuant to the same, seized the knife.



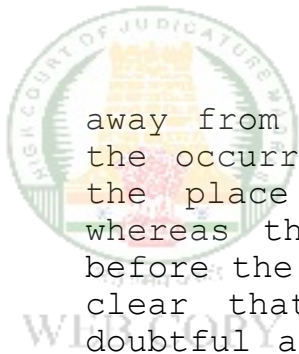
9. P.W.47-retired DSP also rushed to the spot on 10.30 a.m, after receipt of the wire message. He has nominated other officers to conduct inquest over the dead bodies and received their reports under Exs.P90 to Ex.P92. He has also examined the postmortem Doctor and took the custody of the accused from the judicial custody and nominated other officers to examine each of the accused. On 12.08.2004, he has arrested A10 and recorded his confession. The admissible portion of confession statement of A10 was marked as Ex.P96 and pursuant to the same, P.W.47 seized billlook. The admissible portion of the confession statement of A7 is Ex.P95. He has also arrested A11-Ravi @ Goodshed Rai and recorded his confession. The admissible portion of the confession of statement of A11 is Ex.P.97, seized the material objects and also arrested A11 and recorded his confession. Pursuant to the confession statement of the accused, he seized the material objects and also seized the Qualis Car-M.O.22. After sending all the material objects to the Court, finally laid the final report.

10. The prosecution, in order to bring home the guilt of the accused examined as many as 48 witnesses as P.W.1 to P.W.48, marked 101 documents as Ex.P1 to Ex.P.101, material objects as M.O.1 to M.O.23 and Court documents were marked as Ex.C1 and Ex.C.2.

11. The trial Court, after considering the oral and documentary evidence, has found the accused guilty and accordingly, convicted and sentenced the accused as stated *supra*. Aggrieved over the said conviction and sentence, the appellants have come up with these appeals.

12. Though P.W.1 to 17 were examined as eyewitnesses, except P.W1 and P.W.17, others turned hostile.

13. Learned counsel appearing for the appellants mainly submits that except P.W.1 and P.W.17, there are no materials available on record to prove the complicity of the accused with the crime. Further, there is no evidence to prove the motive of the accused to eliminate the deceased. The alleged rivalry between the two groups also not been established. It is the contention of the learned counsel appearing for the appellants that P.W.1's evidence is totally unreliable, because if really he was an eyewitnesses, he would have identified the accused in the test identification parade, whereas no such identification parade was conducted with P.W.1. Further, there is no evidence to show that P.W.1 was a Driver and working under the deceased No.1, Settu at the relevant point of time. Hence, P.W.1 was a planted witness and his entire evidence itself goes to show that he has never seen the accused prior or after the occurrence. The fact that he has identified the accused first time before the trail Court is highly unbelievable and improbable. The evidence of P.W.1 itself clearly shows that he ran

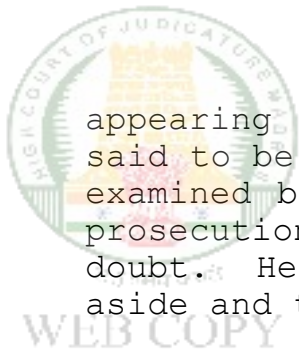


away from the Car quite a long distance, therefore, he witnessing the occurrence is highly improbable. If really he was present in the place of occurrence, he should have lodged the complaint, whereas the complaint was lodged by one Augustin, who also died before the trial. The non-filing of the complaint by P.W.1 makes it clear that his presence in the place of occurrence is highly doubtful and further his evidence also shows that when he returned to the Car, police officials came there and also started enquiry. Therefore, it is the contention of the learned counsel appearing for the appellants that the FIR was an after thought and came much later after due deliberation.

14. It is further submitted by the learned counsel appearing for the appellants that in the absence of any other materials, the trial Court has given undue importance to P.W.1's evidence. P.W.17's evidence also does not support the prosecution particularly complicity of the accused with the crime at the relevant point of time. P.W.17 never spoken anything about the other accused persons, who were travelling in the Car at the relevant point of time. Hence, the learned counsel for the appellants submitted that the trial Court erred in relying upon the evidence of P.W.1 and P.W.17 to convict the accused for the grave crime and the same is not in accordance with law.

15. It is also the submission of learned counsel appearing for A6, who is the appellant in Cr1.A.(MD)No.80 of 2019, that as the trial Court has found only four persons guilty, he should not have been convicted under Section 149 IPC. According to him, to maintain the conviction under Section 302 r/w 149 IPC, five or more persons should have been convicted in the trial. If the Court finds that lesser number of persons are alone guilty, such persons cannot be brought under Sections 302 r/w 149 IPC. It is his further contention that the trial Court during the judgment altered the charges invoking Section 216 of Cr.P.C. However, no opportunity was given to the accused to explain the charges. Hence, it is his contention that such exercise of the trial Court has caused great prejudice to the accused. Therefore, the finding of the trial Court is liable to be set aside. Further it is his contention that recovery of the material objects also would not show any incriminating evidence against the accused. The learned counsel further submitted that the name of A8 is not found place in FIR, therefore, the trial Court has been swayed by irrelevant materials and imposed the conviction. Further it is also not established who is the owner of the Cars M.O.22 and M.O.23. No attempt has been made to find the owner of the Car. Further some of the deadly weapons were also seized from the Ambassador Car which has not been subjected to forensic examination. There was no explanation about the same.

16. It is the further contention of the learned counsel

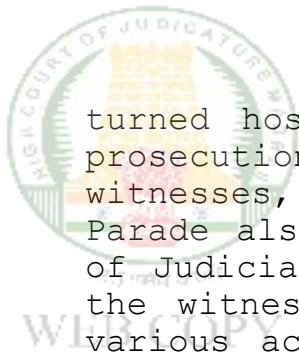


appearing for the appellants that one Thomsan and Saleem who also said to be travelling in the Car and suffered injuries have not been examined by the prosecution and these facts clearly shows that the prosecution has failed to establish the charges beyond reasonable doubt. Hence, submitted that the trial Court finding has to be set aside and the accused are entitled to benefit of doubt.

17. The learned Additional Public Prosecutor submitted that though all other eyewitnesses turned hostile, P.W.1's evidence would reveal a ring of truth. If really, P.W.1 is planted as an eyewitness, he could have implicated all the accused, while identifying the accused in the Court, whereas he has identified only four of the accused. It is his further contention that P.W.1's presence in the place of occurrence is quite natural and his name was also very much found in the FIR. Therefore, merely because the test identification parade was not conducted with him, the same is not a ground to hold that he was not an eyewitness. It is his contention that the accused have unleashed violence, in such a brutal manner which created fear psychosis among the various witnesses. One such witness viz., P.W.1 to safeguard his life, left immediately from Trichy and was residing in Tirupur. Only for that reason, he could not be subjected to the Test Identification Parade.

18. It is the further contention of the learned Additional Public Prosecutor that the informant is none other than the brother of one Settu/deceased No.1 he was also following the Ambassador Car in his bike. He has lodged the complaint and FIR was registered at 10.30 a.m, and it reached the Court in time. There is hardly any delay for manipulation. It is his further contention that informant was also murdered by the same group. Therefore, he could not be examined as witnesses. Taking this totality of the circumstances and the fear psychosis created by the accused gang eliminating one by one, the witnesses have turned hostile. When the accused as a group, operate as dons, unleash violence and create fear psychosis among the public and also other witnesses, it is normal for the ordinary witnesses to panic and not turn up to speak against such powerful rowdy elements. Only after elimination of one of the witness, all the witnesses turned hostile due to the fear of their life. The close relatives of the deceased also did not support the prosecution, only because of the fear psychosis created by the accused gang.

19. Further it is the contention of the learned Additional Public Prosecutor that the demeanor of witnesses has also been observed by the Court. Even before looking at the accused in the witness box, some of the witnesses has stated that they do not know the accused that itself clearly shows that the fear exerted on the mind of the witnesses by the accused. Therefore, it is the submission of the learned Additional Public Prosecutor that merely because when P.W.1 alone has supported the prosecution and others

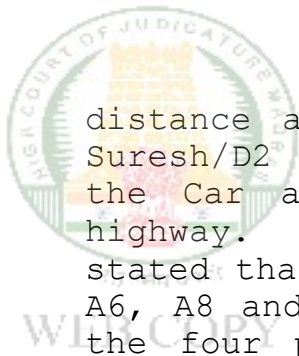


turned hostile that cannot be a ground to disbelieve the entire prosecution story. It is his further submission that some of the witnesses, who identified the accused in the Test Identification Parade also turned hostile. The Test Identification Parade report of Judicial Magistrate clearly corroborates the version of some of the witnesses. That apart, the material objects seized from the various accused were found to have stains human blood group 'O', which belonged to one of the deceased. Therefore, the nature of the crime and fear psychosis that has been created by a day light murder committed in national highway, minute details cannot be expected from the prosecution witnesses. He further submitted that the trial Court has appreciated the evidence properly and has arrived at the right conclusion.

20. Further, with regard to the submission of the learned counsel appearing for the appellants, the fact that the trial Court has found less than five persons guilty and therefore, the accused should not have been convicted under Section 149 of IPC, it is the submission of the learned Additional Public Prosecutor that the mere acquittal of some of accused persons will not necessarily disable the charges under Sections 149 of IPC. Hence, according to him all the appeals deserve to be dismissed. It is his further contention that though the learned counsel for the appellants would rely upon Ex.C1 and Ex.C2, the same cannot be a proof of alibi. It is further submitted that after committing the offence, the possibility of appearing before the Judicial Magistrate's court on the same day for some other cases cannot be ruled out. Hence, he prays for dismissal of these appeals.

21. We have given our anxious consideration to the entire materials available on record and also the rival contentions made by the respective counsel.

22. On a perusal of the records, it is seen that the trial Court has convicted the appellants mainly relying upon the evidence of P.W.1 and P.W.17 and it is well settled that no particular number of witnesses, shown in any case, be required for the proof of any fact. Therefore, there is no bar for the Court to act on the evidence of the solitary eyewitness, if such evidence is cogent, reliable, in tune with probabilities and inspires confidence. When the court is convinced that such a solitary eyewitness is a truthful witness, mere minor contradictions cannot be blown out of proportion. P.W.1 in his evidence, has stated that he was working as Driver under Settu/D1. On 26.07.2004, when he along with three deceased and one Thomson and Sallem were travelling in Ambassador Car, bearing registration No. TMQ-4599, a Qualis Car waylaid them in the place of occurrence in the highway and A1 to A4 and A6 to A11 got down from the Car with deadly weapons viz., bill hook and sword and smashed the windshield of Ambassador car and on the seeing the assailants, P.W.1 to save his life, ran away from the car for quite



distance and thereafter, he came back to the Car and found that Suresh/D2 and Settu/D1 were found dead with severe injuries inside the Car and Dingi/D3 was found dead in the field next to the highway. In the cross examination, though he has specifically stated that he cannot identify them by name, he has identified A2, A6, A8 and A10. But, the fact remains that he has identified all the four people in the chief examination. His evidence further indicates that after the occurrence, he left the Town and was residing in Tripur. It is submitted that if really he was an eyewitness, there was no reason as to why the prosecution has not put him in the Test Identification Parade.

23. It is relevant to note that it is not a case of ordinary murders. Though the motive alleged by the prosecution has not been spoken, from the evidence of the witnesses it could be seen that both the groups were having several criminal cases against each other. Though the relatives have seen the dead body and Ambassador Car, the fact remains that accused group waylaid the Car and indiscriminately attacked the deceased with deadly weapons. It is also relevant to note that one of the eyewitness viz., P.W.5-Watchman in his evidence has stated that he saw the dead bodies and three people had died and when he was examined before the Court even before turning towards the accused, the immediate reaction of that witness was that he had never seen the accused. That itself clearly shows the fear psychosis in the mind of the witnesses over the activity of the accused and the deceased group in the area.

24. P.W.7 though has turned hostile, in his evidence he has stated that to due to fear, he ran away from the place of occurrence immediately. P.W.8 though has turned hostile in his evidence, he has stated that he has identified A2 in the Court and he has also stated that he has identified some of the accused in the Test Identification Parade. He has denied that he identified as per the instructions of the police. Further, he has stated that he has identified as per the instructions of the informant one Augustin. P.W.7 has identified A1, which is also clearly spoken by the Magistrate in her reports. P.W.8, in fact, has identified A1, A7 and A10. P.W.16 though turned hostile, in the cross examination, he has stated that he has identified A1 and A4, whereas Judicial Magistrate's report indicates that he has identified not only A1 and A4, but also A2, A6 and A10. Therefore, these two witnesses though stated that they identified some of the accused before the trial Court, the manner in which they turned hostile clearly indicates that only due to fear, they turned hostile. The identification report certainly corroborates the evidence of P.W.8 and P.W.16 that they identified some of the accused. In this regard, it is useful to refer to the judgment of Hon'ble Apex Court in **Ram Nath Mahto Vs. State of Bihar** reported in (1996) 8 SCC 630, wherein the Hon'ble Apex Court in paragraph 4 has held as follows:

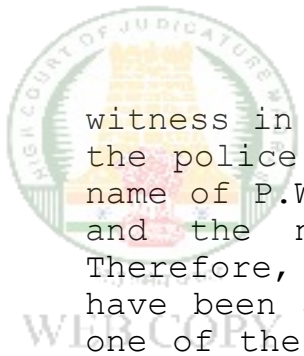
"4. As was done before the courts below, learned



counsel for the appellant has relied upon a decision of this Court in *Budhsen & Anr. vs. State of U.P.* - AIR 1970 SC 1321 to contend that the evidence of identification parade does not constitute by itself substantive evidence which is governed essentially by the provisions of Section 162 of the Code of Criminal Procedure. In that case, this Court took the view that on the facts established, the Test Identification Parade could not be considered to provide safe and trustworthy evidence on which conviction could be sustained. That case was distinguished by the courts below and in our view rightly, by taking into account the substantive evidence of the Magistrate, P.W.7, supported by the remarks of the trial court regarding demeanour of P.W.6 there can be no dispute to the proposition that oral evidence led at the trial may by itself be substantive evidence whereas evidence of Test Identification Parade may per se be not. In that situation, the Court would certainly be entitled to rely upon such evidence as that would be relevant under Section of the Evidence Act. Here we have, as said before, the evidence of the Magistrate, P.W.7 to support the prosecution evidence to that he conducted the identification parade and before him P.W.6 had correctly identified Ram Nath to be one of the dacoits. And the word of P.W.7 In the context has been believed by the courts below."

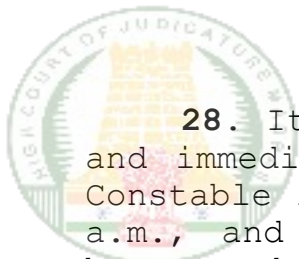
25. Therefore, though the evidence in the form of Test Identification Parade is not by itself substantive evidence and only the evidence given in the court is substantive evidence. The two witnesses referred to above have spoken about the identification of accused Nos.A1, A2 and A4. The identification parade also corroborates the substantive evidence of P.W.8 and P.W.16. Therefore, we are of the view that the evidences of P.W.8 and P.W.16 clearly shows that A2 was identified by P.W.8 in his substantive evidence. Apart from that he has also identified A7, A10 and A11 before the Magistrate. This corroborative piece of evidence i.e., Test Identification Parade is seen with the evidence of P.W.1, P.W.8 and P.W.16 who has identified the appellants, this court has come to a definite conclusion that the appellants were present in the place of occurrence with deadly weapons and the occurrence took place within the fraction of few minutes in the highway and three people were killed and the brutal attack on the three deceased was also clearly established by the medical evidence. One of the deceased's head and hand severed. This by itself shows the nature of the injuries which were so brutal, bringing the entire traffic as a busy National Highway to halt at the relevant point of time.

26. It is relevant to note that it is the case of the ~~service court~~ the informant one Augustin, who was also shown as



witness in the final report, has lodged a complaint at 10.30 a.m. in the police station. On a perusal of the FIR, it is seen that the name of P.W.1, who was driving the Car along with the three deceased and the name of the other two injured witnesses are found. Therefore, the contention of the appellants that P.W.1 could not have been an eyewitness cannot be countenanced. P.W.9 wife of the one of the deceased has also stated that on the date of occurrence her husband travelled in the Ambassador Car. When the brutal murder took place in a highway and creating panic among the passers by halting the traffic, there could have been a chaotic situation. P.W.1 also ran away to save his life on seeing the assailants with deadly weapons and immediately saw the dead bodies and he has recollected the name of the persons, who were present and identified them in his substantive evidence. When such gruesome incident took place within a few minutes, such incident normally will not be forgotten by any human being. Such incident will in fact remain imprinted in the mind of the persons, who witnesses it. Therefore, when his presence is not doubtful and his name finds a place in the very first FIR, we are unable to disbelieve his entire evidence, merely because P.W.1 has not properly identified the number of the accused in the Court, we express our displeasure not only the way in which the public prosecutor has conducted trial but also the conduct of the trial Judge in this matter. Trial Court should have actively participated in the trial proceedings.

27. It is relevant to note that when the accused was sought to be identified in the witness box, there must be a proper array of accused or change of row of the accused etc., which has not been followed either by the Court or the Public Prosecutor. It is also relevant to note that except putting some suggestions, there is no cross examination by the accused side disputing the identification of the four accused by P.W.1 in the cross examination. In fact, they have not even offered to change the array of accused in the Court. That is also one of the circumstances and the same cannot be ignored all together. It is also relevant to note that in such a panic situation, P.W.1, ran away from the place of occurrence to save his life and therefore, it cannot be expected from him to go to the police station immediately and lodge the complaint. The informant one Augustin has filed complaint at 10.30 a.m. within one hour. He has seen the dead body of his own brother and he has also witnessed the occurrence. Therefore, it cannot be expected from any person that in such a situation to lodge the complaint within a minute or few minutes. Therefore, merely because the police reached the spot as per the evidence of P.W.1 after the occurrence that will not have any relevance. It is bound to happen when a murder took place in a busy highway which resulted in bringing the traffic in halt and creating a chaotic situation. Therefore, merely because the FIR was lodged after one hour itself cannot be a ground to disbelieve the entire prosecution theory.



28. It is also relevant to note that P.W.43, registered the FIR and immediately sent it to the Court through P.W.30. P.W.30-Head Constable in his evidence, has stated that he received FIR at 11.15 a.m., and produced the Court at around 2.00 p.m. The distance between the Court and the police station is 20 km and he went to the Court by bus which took about one hour journey. Therefore, the delay in despatching the FIR to the Court is also properly explained by the prosecution. Therefore, we are of the view that in the very FIR itself, it is mentioned that P.W.1 drove the Ambassador Car and P.W.1 also has spoken about the incident despite the danger to his life, his evidence cannot be rejected in toto. There was no motive whatsoever suggested or established by the accused against P.W.1 for false implication. If really, P.W.1 was planted as witnesses, he could have identified all the accused with one stroke in his substantive evidence. His evidence apart from being natural is also corroborated by the evidence of P.W.17. P.W.17 in his evidence, has stated that A1 drove the Qualis car, in which 7 or 8 persons were there. The substantive evidence of P.W.17 also proves the fact that the gang led by A1 brutally killed the opposite gang in the national highway.

29. It is also relevant to note that though there was alleged rivalry between the two groups, none of the witnesses have spoken about the same and they have also turned hostile. The fact remains that the informant was also done to death by the same group immediately, after lodging of the complaint. In respect of which, a case was registered in Crime No.513 of 2004 by the Manikandam Police Station. This is not disputed during the arguments. That may be the reason for the witnesses totally turning hostile. We have also expressed our displeasure over the way in which the Public Prosecutor conducted trial. Though the witnesses turned hostile, their statements before the Judicial Magistrate in the Test Identification Parade have not been brought to their notice and no questions were put to the witnesses. The trial has been conducted, in such lethargic manner. It is also relevant to note that the occurrence took place in the year 2004 and P.W.1 was examined after four years i.e., on 06.08.2008. The Hon'ble Apex Court in the judgment in **State of Rajasthan Vs. Daud Khan** reported in **(2016) 2 SCC 607** in paragraph 26 has held as follows:

"26. The interpretation of Section 157 CrPC is no longer *res integra*. A detailed discussion on the subject is to be found in *Brahm Swaroop v. State of U.P.* which considered a large number of cases on the subject. The purpose of the "forthwith" communication of a copy of the FIR to the Magistrate is to check the possibility of its manipulation. Therefore, a delay in transmitting the special report to the Magistrate is linked to the lodging of the FIR. If there is no delay in lodging an FIR, then any delay in communicating the special report to the



Magistrate would really be of little consequence, since manipulation of the FIR would then get ruled out. Nevertheless, the prosecution should explain the delay in transmitting the special report to the Magistrate. However, if no question is put to the investigating officer concerning the delay, the prosecution is under no obligation to give an explanation. There is no universal rule that whenever there is some delay in sending the FIR to the Magistrate, the prosecution version becomes unreliable. In other words, the facts and circumstances of a case are important for a decision in this regard."

Though in the chief examination, P.W.1 has mentioned the name of the accused and identified only four accused, it is relevant to note that he was examined after 4 ½ years of the incident, particularly in the absence of any previous acquittance. In this regard, it is useful to refer the judgment of the Hon'ble Apex Court in **Pargan Singh Vs. State of Punjab and another** reported in (2014) 14 SCC 619, wherein the Hon'ble Apex Court in paragraph 18 to 20 has held as follows:

"18. Before entering upon the discussion on this aspect specific to this case, we would like to make some general observations on the theory of "memory". Scientific understanding of how memory works is described by Geoffrey R. Loftus while commenting upon the judgment dated January 16, 2002 rendered in the case of Javier Suarez Medina v. Janie Cockrell by United States Court of Appeals, Fifth Circuit in Case No.01-10763. He has explained that a generally accepted theory of this process was first explicated in detail by Neisser (1967) and has been continually refined over the intervening quarter-century. The basic tenets of the theory are as follows:

18.1. First, memory does not work like a video recorder. Instead, when a person witnesses some complex event, such as a crime, or an accident, or a wedding, or a basketball game, he or she acquires fragments of information from the environment. These fragments are then integrated with other information from other sources. Examples of such sources are: information previously stored in memory that leads to prior expectations about what will happen, and information-both information from external sources, and information generated internally in the form of inferences- that is acquired after the event has occurred. The result of this amalgamation of information is the person's memory for the event. Sometimes this memory is accurate, and other times it is inaccurate. An initial memory of some event, once formed, is not "cast in concrete." Rather, a memory



is a highly fluid entity that changes, sometimes dramatically, with the passage of time. Every time a witness thinks about some event-revisits his or her memory of it-the memory changes in some fashion. Such changes take many forms. For instance, a witness can make inferences about how things probably happened, and these inferences become part of the memory. New information that is consistent with the witness's beliefs about what must have happened can be integrated into the memory. Details that do not seem to fit a coherent story of what happened can be stripped away. In short, the memory possessed by the witness at some later point (e.g., when the witness testifies in court) can be quite different from the memory that the witness originally formed at the time of the event.

18.2. Memory researchers study how memory works using a variety of techniques. A common technique is to try to identify circumstances under which memory is inaccurate versus circumstances under which memory is accurate. These efforts have revealed four major sets of circumstances under which memory tends to be inaccurate. The first two sets of circumstances involve what is happening at the time the to-be-remembered event is originally experienced, while the second two sets of circumstances involve things that happen after the event has ended.

18.3. The first set of circumstances involves the state of the environment at the time the event is experienced. Examples of poor environmental conditions include poor lighting, obscured or interrupted vision, and long viewing distance. To the degree that environmental conditions are poor, there is relatively poor information on which to base an initial perception and the memory that it engenders to begin with. This will ultimately result in a memory that is at best incomplete and, as will be described in more detail below, is at worst systematically distorted.

18.4. The second set of circumstances involves the state of the observer at the time the event is experienced. Examples of suboptimal observer states include high stress, perceived or directly inflicted violence, viewing members of different races, and diverted attention. As with poor environmental factors, this will ultimately result in a memory that is at best incomplete and, as will be described in more detail below, is at worst systematically distorted.

18.5. The third set of circumstances involves what



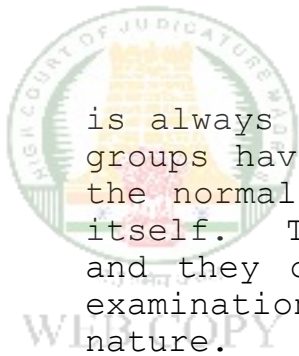
occurs during the retention interval that intervenes between the to-be-remembered event and the time the person tries to remember aspects of the event. Examples of memory-distorting problems include a lengthy retention interval, which leads to forgetting, and inaccurate information learned by the person during the retention interval that can get incorporated into the person's memory for the original event.

18.6. The fourth set of circumstances involves errors introduced at the time of retrieval, i.e., at the time the person is trying to remember what he or she experienced. Such problems include biased tests and leading questions. They can lead to a biased report of the person's memory and can also potentially change and bias the memory itself.

19. While discussing the present case, it is to be borne in mind that the manner in which the incident occurred and description thereof as narrated by PW-2, has not been questioned on the ground that narration should not be believed because of lapse of time. Instead, the appellants have joined issue on a very limited aspects viz. their identification on the ground that faces of the culprits could not have been remembered after 7½ years of the occurrence as memory fades by that time.

20. We are of the opinion that under the given circumstances and keeping in view the nature of incident, 90 seconds was too long a period which could enable the eye-witness (PW-2) to watch the accused persons and such a horrible experience would not be easily forgotten. Death of a friend and near death experience by the witness himself would be etched in the memory for long. Therefore, faces of accused persons would not have been forgotten even after 7½ years."

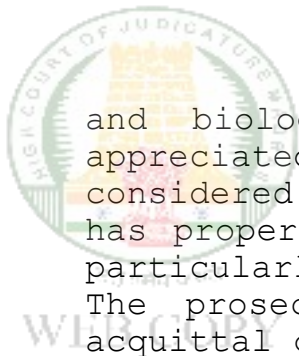
30. Despite the fear psychosis in the mind created by the accused group, which has eliminated the deceased group, the identification by P.W.1 in the substantive evidence cannot be ignored all together. He was no way connected with the crime and he was not attached to the other group. He was just working with the deceased for some period. Therefore, there is no reason to disbelieve the evidence of P.W.1. It is also relevant to note that much emphasis was made for non examination of one Thomson and one Saleem. They are also said to be injured. It is relevant to note that it is the case of the prosecution that despite the best efforts, they could not be traced. Such explanation also cannot be ignored all together. The accused and the injured belonged to different gangs, there were already many cases pending against each group and the two groups have tried to attack each other and there



is always a threat to their lives. Further main leaders of the two groups have been eliminated. Therefore, in such a situation it is the normal conduct of the henchman to flee away from the very city itself. Therefore, because their whereabouts could not be known and they could not be secured. We are of the view that such non examination will not be a fatal, particularly in the cases of this nature.

31. It is relevant to note that the Investigating Officer has seized the Qualis Car used by A1. P.W.19 has changed the Car seat of A1 and he has clearly spoken in his evidence that he has changed the Car seat of A1. His evidence remains unchallenged. It has not been denied by the accused. Similarly P.W.20, in his evidence has clearly spoken that the Qualis car was originally in red colour which was changed into white colour and he handed over the same to A1. The substantive peace of evidence also shows that the Car seized by the Investigating Officer belongs to A1 and it is also relevant to note that due to the three murders in a Public National Highway, several Investigating Officers were appointed immediately, to conduct inquest and also conduct the investigation.

32. From the evidences of P.W.21 to P.W.27, it is seen that they have clearly spoken about the portions of the confession given by accused and recovery of material objects. Different Investigating Officers have clearly spoken about the recovery of the material objects. Ex.P.2 is a seizure mahazar, which related to D2 and the Investigating Officer has seized 49 cm length of bill hook under Ex.P2 and the same tallies with item No.39 of Ex.P.29-Chemical Analysis report, which contains human blood. Similarly Ex.P4 relating to A3, tallies with item No.38 of Ex.P.29-Chemical Analysis report, which contains human blood. Ex.P7 relating to A8, tallies with item No.42 of Ex.P.29-Chemical Analysis report, which contains human blood. Ex.P9 relating to A7, tallies with item No.41 of Ex.P.29-Chemical Analysis report, which contains human blood. Ex.P13 relating to A4, tallies with item No.33 of Ex.P.29-Chemical Analysis report, which contains human blood. Ex.P16 relating to A6, tallies with Item No.36 of Ex.P.29-Chemical Analysis report, which contains human blood. Ex.P20 relating to A5, tallies with item No.34 of Ex.P.29-Chemical Analysis report, which contains human blood group of 'O'. Similarly, Ex.P22 relates to A10, tallies with item No.42 of Ex.P.29-Chemical Analysis report, which contains human blood. Ex.P24 relating to Ex.A11 tallied with item No.34 of Ex.P.29-Chemical Analysis report, which contains human blood. The biological and serological reports make it clear that each of the deceased have different blood groups. One deceased has 'A' group, other deceased has 'B' group and another one has 'O' group. In some of the seized material objects seized as indicated above also contain human blood 'O' group, which is the blood group of one of the accused. These facts have never been considered by the trial Court also. This piece of evidence particularly serological report



and biological report have not been properly considered and appreciated by the trial Court. The trial Court has mainly considered the evidences of P.W.1 and P.W.17. If the trial Court has properly appreciated the evidence, in fact some of the accused particularly A4 would not have been acquitted by the trial Court. The prosecution has also not filed any appeal as against the acquittal of other accused.

33. Be that as it may, the serological report clearly shows that all the material objects, except few, contain human blood and some of the blood tallies with the human blood group of 'O'. These facts coupled with the identification made in the Court strengthens the case of the prosecution. Further the evidence of the witnesses P.W.8 and P.W.16 is also corroborated by the test identification report, we are of the view that in the cases of this nature, these evidence are sufficient to establish the complicity of the accused. With regard to the submission of learned counsel for the appellants that one of the assailants name is not found in the FIR, it is relevant to note that FIR has been lodged by brother of one of the deceased. He has also witnessed the brutal attack. Therefore, when kith and kin was killed brutally, it is quite normal for any person who is in the state of shock and such a chaotic situation to omit certain names at the first instance. Therefore, mere non mentioning the name of A6 at the relevant point of time and the fact that his name surfaced in the statement later, it cannot be said that A6 is not involved in the occurrence. FIR is not an encyclopedia of the incident describing the minuscule details and instances of how the crime was committed. Therefore, the contention that one of the assailants name has not been mentioned in the FIR will not make any difference. In this regard, it is useful to refer the judgment of the Hon'ble Apex Court in **Latesh Alias Dadu Baburao Karlekar Vs. State of Maharashtra** reported in **(2018) 3 SCC 66**, wherein paragraph 38, the Hon'ble Apex Court has held as follows:

"38. The value to be attached to the FIR depends upon facts and circumstances of each case. When a person gives a statement to the police officer, basing on which the FIR is registered. The capacity of reproducing the things differs from person to person. Some people may have the ability to reproduce the things as it is, some may lack the ability to do so. Some times in the state of shock, they may miss the important details, because people tend to react differently when they come across a violent act. Merely because the names of the accused are not stated and their names are not specified in the FIR that may not be a ground to doubt the contents of the FIR and the case of the prosecution cannot be thrown out on this count. Coming to the facts of the case, it is nobody's case that P.W.2 was not injured and was not hospitalized for sometime due to the injuries caused to him by the assailants and also lost his brother. It is



most probable that he might have given a general statement for the purpose of registering the complaint which was recorded by police few hours after the incident has taken place. Later, when once he was out of shock, the supplementary statement was recorded, then he has disclosed the names of the accused and has attributed specific overt acts to each of the accused. It is settled law that FIR need not be an encyclopedia of the incident laying out miniscule details and instances of how the crime was committed. Hence, in view of the above discussion we do not find force in the contention put forth on behalf of the accused which is rightly rejected by both the Courts."

Therefore, the contention in that regard also cannot be countenanced.

34. With regard to the submissions of the learned counsel for the appellants that the trial Court has altered the charges during the judgment time and that the charges were not explained to the accused, no opportunity was given to the accused and therefore, the entire conviction is liable to be set aside, we are of the view that such contention has no merit at all particularly in a given case where charges have been framed against all the accused for the offences under Sections 120(b), 148, 341, 324, 307, 341 r/w 149 (3 counts) and 302 r/w 149 (3 counts), 201 and 201 r/w 302 IPC. The comprehensive charges framed by the trial Court originally includes 302 r/w 34 and 302 r/w 149 IPC. Therefore, it cannot be said that the charges under section 302 r/w 149 IPC was included at the first time as against the accused while the trial Court altering the charges. The Trial Court in its judgment in paragraph 7 has held as follows and altered the charges as follows:

"7. On the basis of the above materials, on 08.05.2018, the following charges have been framed against the accused 2 to 12.

- A2 - u/s 120(b), 341, 148, 302 r/w 34, 201 r/w 302 of IPC
- A3 - u/s 120(b), 341, 148, 302 r/w 34, 307, 324 of IPC
- A4 - u/s 120(b), 341, 148, 302 r/w 34 r/w 3(2)(v) of SC/ST Act
- A5 - u/s 120(b), 341, 148, 302 r/w 34 r/w 3(2)(v) of SC/ST Act
- A6 - u/s 120(b), 341, 148, 302 r/w 34 of IPC
- A7 - u/s 120(b), 341, 148, 302 of IPC
- A8 - u/s 120(b), 341, 148, 302 r/w 34 of IPC
- A9 - u/s 120(b), 341, 148, 302 r/w 34 r/w 3(2)(v) of SC/ST Act
- A10 - u/s 120(b), 341, 148, 302 of IPC
- A11 - u/s 120(b), 341, 148, 302 r/w 34 r/w 3(2)(v) of SC/ST Act
- A12 - u/s 201 of IPC



A2 to A11 - u/s 120(b), 201 r/w 302, 341, 324,
307, 302 r/w 34 r/w 149 of IPC

The charges as framed does not appear perfect.
Therefore, by invoking Section 216 of Cr.P.C., the
charges are altered now as follows as against the
accused available now:

Against A2, A4, A5, A6, A7, A8, A10 and A11
under Sections 120(b), 148, 341, 324, 307, 341
r/w 149 (3 counts) and 302 r/w 149 (3 counts) of IPC.

Against 12th accused

under Section 201 of IPC

Against 2nd accused

under Section 201 r/w 302 of IPC."

35. The trial Court has only rearranged the charges and no additional charges have been framed. In this regard, it is relevant to extract Section 216 of Cr.P.C. and the same is extracted hereunder:

"216. Court may alter charge. -

(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

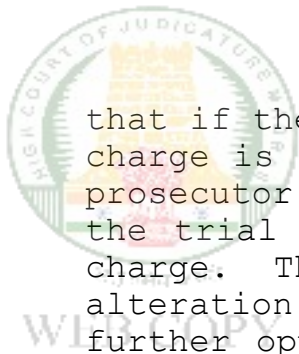
(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded."

36. Sub-clause (3) of the above section makes it very clear
<https://hcservices.ecourts.gov.in/hcservices/>



that if the Court is of the opinion that alteration or addition to a charge is not likely to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may proceed with the trial as if the altered or added charge had been the original charge. The above provision makes it very clear that only when such alteration or addition prejudices the accused in their defence further opportunity is required to be given. Whereas in the given case, the accused were aware of the nature of the charges framed against them including 302 r/w 149 IPC. Therefore, there was only rearrangement of the charges by the trial Court at the time of pronouncing judgment. We are of the opinion that such rearrangement would not cause any prejudice to the accused when the accused defended the above charges. It is also relevant to extract Section 464 of Cr.P.C and the same is extracted hereunder:

"464. Effect of omission to frame, or absence of, or error in, charge.-

(1) No finding sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

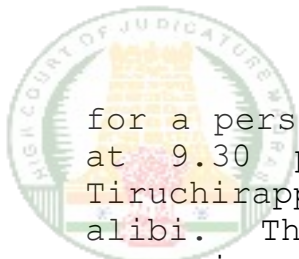
(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommended from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:"

Unless the prejudice shown by the accused, no finding sentence or order by a Court of competent jurisdiction shall be deemed invalid. Such view of the fact, we are of the firm opinion that the contention put forth by learned counsel appearing for one of the accused viz., A6 has no force at all.

37. There is an yet another fact, though it is not urged by the appellants before this Court but the trial Court has discussed the above and summoned C1 and C2. The second accused, who is the appellant in CrI.A.(MD)No.157 of 2019, took a plea of alibi to show that on the date of occurrence, he has appeared before the Judicial Magistrate, Tiruchirappalli at 10.30 am. The trial Court has summoned Ex.C1 and Ex.C2 and found that though the accused has appeared before the Judicial Magistrate Court, it is not possible



for a person who was said to have been near the place of occurrence at 9.30 p.m. to have reached the Judicial Magistrate Court, Tiruchirappalli at 10.30 a.m. Therefore, disbelieved the theory of alibi. Though such contention is put forth by the learned counsel appearing for one of the accused viz., A2, the same has not been urged before this Court still we also gone through Ex.C1 and Ex.C2. Though Ex.C1, the notes paper written by Judicial Magistrate, shows that the accused appeared before the Court on 26.07.2004 i.e., on the date of occurrence, it is relevant to note that there is no time noted as to alleged appearance before the Court. It is also to be noted that normally in the criminal Courts, firstly, calling work will be commenced and the calling work will take some time. Therefore, it cannot be said that only at 10.30 a.m. he was present in Court. Normally after the miscellaneous work and calling work of other important cases, PRC cases would be taken in the judicial Magistrate Court. In such view of the matter, the contention put forth by A2 before the trial Court that he appeared before Judicial Magistrate, Tiruchirappalli cannot be countenanced. In fact, it was rightly pointed out by the trial Court that the occurrence took place around 9.30 a.m. and even after the occurrence itself, it is easy for any one to appear before the Court in some other cases on the same day. Such possibility also cannot be ruled out. Since the accused are facing many charges and they were regularly visiting the Court, the plea of alibi has also no leg to stand. However, the plea of alibi has not been urged by any of the accused before this Court. Despite the same, we satisfied ourselves that such plea has not been proved.

38. Though the motive and rivalry as alleged in the final report has not been spoken about any of the witnesses and not established on record when there is a direct eyewitness to the occurrence, the motive assumes no significance. Therefore, mere lack of evidence to prove the actual rivalry or motive will not make any difference.

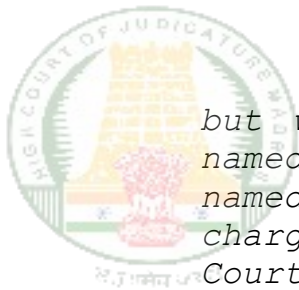
39. Yet another submission as made by learned counsel appearing for A6 is that as the trial Court has found guilty of only four people less than five persons, which required to constitute the offence of unlawful assembly, conviction under Section 302 r/w 149 IPC is not sustainable. Such contention has no leg to stand in the eye of law. In this regard, the judgment of the Constitution Bench of the Hon'ble Apex Court in **Mohan Singh and Another Vs. State of Punjab** reported in **AIR 1963 SC 174** is a direct answer, wherein in paragraph 9, the Constitution Bench of the Hon'ble Apex court has held as follows:

"9. In dealing with the, question as to the applicability of Section 149 in such cases it is necessary to bear in mind the several categories of cases which come before the Criminal Courts for their decision.

If five or more persons are named in the charge as



composing an unlawful assembly and evidence adduced by the prosecution proves that charge against all of them, that is a very where Section 149 can be invoked. It is, however, not necessary that five or more persons must be convicted before a charge under Section 149 can be successfully brought home to any members of the unlawful assembly. It may be that less than five persons may be charged and convicted under Section 302/149 if the charge is that the persons before the Court, along with others named constituted an unlawful assembly; the other persons so named may not be available for trial along with their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the Court does not make Section 149 inapplicable for the simple reason that both the charge and the evidence seek to prove that the persons before the court and others number more than five in all and as Such, they together constitute an unlawful assembly. Therefore, in order to bring home a charge under Section 149 it is not necessary that five or more persons must necessarily be brought before the court and convicted. Similarly, less than five persons may be charged under Section 149 if the prosecution case is that the persons before the Court and others numbering in all more than five composed an unlawful assembly, these others being persons not identified and so not named. In such a case, if evidence shows that the persons before the Court along with unidentified and un-named assailants or members composed an unlawful assembly, those before the Court, can be convicted under section 149 though the unnamed. and unidentified persons are not traced and charged. Cases may also arise where in the charge, the prosecution names five or more persons and alleges that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving, before the court less than five persons to be tried, then Section 149 cannot be invoked. Even in such cases, it is possible that though the charge names five or more persons is composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the trial court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge under section 149 because along with the two or three persons convicted wore others who composed the unlawful assembly



but who have not been identified and so have not been named. In such cases the acquittal of one or more persons named in the charge does not affect the validity of the charge under section 149 because on the evidence the Court of facts is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five. It is true that in the last category of cases, the court will have to be very careful in reaching the said conclusion. But there is no legal bar which prevents the court from reaching such a conclusion. The failure to refer in the charge to other members of the unlawful assembly un-named and unidentified may conceivably raise the point as to whether prejudice would be caused to the persons before the Court by reason of the fact that the charge did not indicate that un-named persons also were members of the unlawful assembly. But apart from the question of such prejudice which may have to be carefully considered, there is no legal bar preventing the court of facts from holding that though the charge specified only five or more persons, the unlawful assembly in fact consisted of other persons who were not named and identified. That appears to be the true legal position in respect of the several categories of cases which may fall to be tried when a charge under section 149 is framed."

40. In view of the Constitution Bench judgment and further the fact that in this case P.W.1's evidence clearly established the fact that apart from the other convicted appellants, A1 was present and many others also were present. Therefore, the evidence of P.W.1 shows that there were more number of people at the relevant point of time, which has also been corroborated by P.W.17's evidence. P.W.17's evidence shows that there were seven or eight persons travelling with A1. Therefore, the above contention of the appellants has also no leg to stand.

41. Considering the over all circumstances and totality of the circumstances obtained in the particular cases and the nature of the act committed by the accused, we are of the view that though there may be exaggeration and some discrepancies in the prosecution and that by itself is not a ground to disbelieve the entire prosecution. Though discrepancies may arise due to error, loss of memory due to lapse of time, mental depression and state of shock at the time of occurrence, such normal discrepancies do not affect the normal credibility of the prosecution's case. The Hon'ble Apex court in **Sheesh Ram and others Vs. State of Rajasthan** reported in **(2014) 3 SCC 689** has held as follows:

"10.....It is true that these witnesses have improved the prosecution story to some extent. But, that improvement or that exaggerated version can be safely



separated from the main case of the prosecution. So far as the main prosecution case is concerned, all the witnesses are consistent. This is not a case where truth and falsehood are inextricably mixed up. Witnesses tend to exaggerate the prosecution story. If the exaggeration does not change the prosecution story or convert it into an altogether new story, allowance can be made for it. If evidence of a witness is to be disbelieved merely because he has made some improvement in his evidence, there would hardly be any witness on whom reliance can be placed by the courts."

42. Considering the totality of the circumstances and the manner in which the witnesses panicked even during the trial and the witnesses totally turned hostile, except only one eyewitnesses viz., P.W.1, who had also fled away from the city and gave evidence after four years and narrated the incidents which is also corroborated by material particulars like seizure and Test Identification Parade, we hold that the prosecution has proved the charges against the appellants beyond reasonable doubt. Accordingly, we do not find any infirmity in the conviction and sentence imposed by the Trial Court finding the accused guilty for the offences as stated *supra*.

43. In fine, the Criminal Appeals are dismissed and the conviction and sentence passed by the learned I Additional District and Sessions Judge (PCR), Tiruchirapalli, dated 31.01.2019, made in Special Session Case No.35 of 2005, against the appellants are confirmed. Consequently, connected miscellaneous petitions are also dismissed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

vsm

Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1.The I Additional District and Sessions Judge (PCR),
I Additional District and Sessions (PCR) Court,

<https://hcservices.tn.courts.gov.in/hcservices/>



2. Deputy Superintendent of Police,
Thiruverumbur,
Tiruchirapalli District.
3. The Inspector of Police,
Ramji Nagar Police Station,
Tiruchirapalli District.
4. The District Collector,
Tiruchirapalli District.
5. The Director General of Police,
Mylapore, Chennai.
6. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

Copy to:

The Section officer,
Criminal Records,
Madurai Bench Of Madras High Court,
Madurai. (2 COPIES)

+1 CC to M/s.VEERA ASSOCIATES, Advocate (SR-13822[F] dated 23/03/2022)

+1 CC to M/s.B.JAMEEL ARASU, Advocate, SR-14084

+1 CC to M/s.M.KARUNANITHI, Advocate, SR-14608

**Cr1.A. (MD) Nos. 80, 94, 157 & 245 of 2019 and
Cr1.M.P. (MD) Nos. 1719 & 4051 of 2020
23.03.2022**

RD(30.03.2022) 31P 12C