



Crl.A.(MD).No.218 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

WEB COPY

RESERVED ON : 08.08.2023

DELIVERED ON : 29.09.2023

CORAM

**THE HON'BLE MR JUSTICE M.S.RAMESH
AND
THE HON'BLE MR JUSTICE M.NIRMAL KUMAR**

Crl.A.(MD)No.218 of 2021

Sengaisamy

.. Appellant / Accused No.3

Vs.

State through:
The Inspector of Police,
Thiruppachethi Police Station,
Sivagangai District.
(Crime No.173/2003)

.. Respondent / complainant

Appeal filed under Section 374(2) of Criminal Procedure Code, to set aside the judgment in S.C.No.139/2010, dated 17.04.2021 on the file of the Principal Sessions Judge, Sivagangai and allow this Criminal Appeal.



Crl.A.(MD).No.218 of 2021

For Appellant : Mr.M.Subash Babu,
Senior Counsel for
Mr.C.Susikumar
For Respondent : Mr.A.Thiruvadikumar
Additional Public Prosecutor

JUDGMENT

(Judgment of the Court was delivered by ***M.S.RAMESH, J.***)

The appellant is the third, among the seven accused before the trial Court. The first and second accused had died even prior to the commencement of the trial. Through a judgment dated 17.04.2021, made in S.C.No.139 of 2010, on the file of the Principal Sessions Judge, Sivagangai, the appellant (hereinafter referred to as 'A3') was not found guilty under Section 120(b) IPC, but was found guilty of the offence under Sections 148, 341, 302 r/w 149, 307 r/w 149 IPC and Section 6 of Explosive Substances Act, 1908 and convicted and sentenced to undergo Rigorous Imprisonment for 3 years for the offence under Section 148 IPC, together with a fine of Rs. 500/-, in default, to undergo Simple Imprisonment for 1 month for the offence under Section 341 IPC; life imprisonment and fine of Rs.5,000/-, in default, to undergo Simple Imprisonment for 3 months for the offence under



CrI.A.(MD).No.218 of 2021

Section 302 r/w 149 IPC; Rigorous Imprisonment for 10 years and fine of Rs.3,000/-, in default, to undergo Simple Imprisonment for 3 months for the offence under Section 307 r/w 149 IPC; and Rigorous Imprisonment for 10 years and fine of Rs.2,000/-, in default, to undergo Simple Imprisonment for 3 months for the offence under Section 6 of the Explosive Substances Act, 1908. The period of imprisonment already undergone by A3 during trial, was ordered to be set-off under Section 428 of Cr.P.C and all the sentences were ordered to be run concurrently.

2. The charges against A4 to A7 were held as not proved. The present appeal is filed by A3, who alone has been convicted and sentenced to undergo imprisonment for the various offences detailed above.

3. The brief case of the prosecution, as projected before the trial Court, are as follows:

3.1. A1, A2 and A3, who were relatives, were indulging in illegal sand mining. The brother of A1 viz., Periyasamy also had a dispute with Muthuramalingam / the deceased herein in the illegal sand mining. In



Crl.A.(MD).No.218 of 2021

consequence to this dispute, earlier one Ibrahim / P.W.1, who was an employee of the deceased, was abducted by A1 to A3 and a criminal complaint was also registered against them. Owing to this, A1 to A3 had developed a grudge against the deceased and consequently, had entered into a conspiracy with Narayanan /A7, who had engaged hirelings. The conspiracy is alleged to have taken place at Kukkani Village, Thoothukudi on 01.10.2003.

3.2. In furtherance of the said conspiracy, the accused had gathered near a coconut grove of one Arivazhagan with sickles, bill-hook machete and country bombs, waiting for the deceased.

3.3. On 03.10.2003 at 7.00 a.m., the deceased along with P.W.1 came in a Tractor, bearing Registration No.TN-63-4806 owned by Vellaisamy / P.W.17. P.W.4, who was a Villager, had witnessed them coming.

3.4. According to the prosecution, the deceased and P.W.1 were waylaid by A1 and A2 by hurling country bombs and thereafter, they along with A3 to A6 had indiscriminately attacked the deceased with deadly weapons. The country bomb that was hurled upon by A1 caused injuries to



Crl.A.(MD).No.218 of 2021

P.W.1 and the country bomb hurled by A2 damaged the Tractor. P.W.1, was thereafter taken to the hospital by P.W.6 and one Tamil Sangu, (who died prior to the commencement of the trial) had lodged a complaint (Ex.P34) at around 8.00 a.m., on 03.10.2003. The said complaint (Ex.P34) was recorded by the Inspector of Police (P.W.33), who registered the FIR (Ex.P33) in Crime No.173 of 2003 for the offence under Sections 147, 148, 341, 324, 307 and 302 IPC, apart from Sections 3 and 5 of Explosive Substances Act, 1908. The FIR and complaint that were sent to the Judicial Magistrate's Court, was received on 03.10.2003 at 3.30 p.m.

3.5. The Inspector of Police, who had the received the FIR at 9.00 a.m., on 03.10.2003, commenced the investigation by visiting the scene of occurrence on 9.30 a.m., and prepared an observation mahazar (Ex.P1) and rough sketch (Ex.P35), in the presence of P.W.11 and PW.12. After conducting inquest, the body of the deceased was sent for autopsy with a requisition letter (Ex.P23). The soil, with and without blood stains at the scene of occurrence, was taken along with two pairs of slippers, cotton pieces from the top of the engine of the Tractor, 4 pieces of cloth used to cover the bomb, the broken pieces of speedometer of the Tractor (PMO.1 to



Crl.A.(MD).No.218 of 2021

PMO.8) under seizure mahazar (Ex.P2). These articles were sent to the Court under Form 91 (Ex.P19).

3.6. On 06.10.2003, A1 to A3 had surrendered before the Judicial Magistrate, Thirupathur. The Investigation Officer had taken custody of these three accused on 10.10.2003. The confession statement of A1 was recorded under Ex.P3. The Biology Report, dated 03.12.2003 (Ex.P52), Explosive Report, dated 15.12.2003 (Ex.P53) and Serology Report, dated 09.02.2004 (Ex.P54) were received. P.W.28, who conducted the autopsy on the body of the deceased had submitted the Postmortem Certificate (Ex.P24), in which multiple injuries were found. According to P.W.28, the deceased person appears to have died 9 to 12 hours prior to autopsy, on account of shock and haemorrhage, apart from the effect of the injuries on his head and vital organs.

3.7. The trial Court had placed reliance on the ocular testimonies of P.W.1, P.W.2 and P.W.24 to substantiate the motive behind the occurrence. For the purpose of convicting A3, reliance was placed on the testimony of the injured eyewitness viz., P.W.1, as well as the other eyewitnesses viz.,



Crl.A.(MD).No.218 of 2021

P.W.2 to P.W.4 and P.W.6. The testimony of P.W.9, who had witnessed the accused leaving the scene of occurrence was also relied upon as an incriminating evidence against him. The trial Court had also taken into account the reference to A3's name in the complaint (Ex.P34) for the purpose of substantiating the prosecution's case. On an over all appraisal of these evidences as well as the postmortem certificate, A3 was convicted and sentenced to undergo imprisonment.

4. The learned Senior Counsel for the appellant made the following submissions:

a) that the trial Court had acquitted A4 to A7, the offence under Section 148, 302 r/w 149 and 307 r/w 149 IPC cannot be made out;

b) that P.W.1, who is not a trustworthy witness, since he had deposed that A3 was one of the accused in the motive case. But, however, his name was not disclosed either in the FIR or chargesheet, as per Ex.D1;

c) that P.W.2 was also not a trustworthy witness, in view of the discrepancies in his deposition with regard to the distance between the place of occurrence and the house of the deceased;



d) that P.W.3 is not an eyewitness, but a planted witness, in view of the discrepancies in her testimony with regard to the distance between the place of occurrence and the house of the deceased and the discrepancy in the number of persons involved in the occurrence as per her testimony;

e) that P.W.4 has not supported the prosecution's case owing to the discrepancy in his chief and cross examination with regard to the number of persons he had witnessed at the scene of occurrence;

f) that P.W.5 to P.W.8, who have been touted as eyewitnesses, turned hostile and had not supported the prosecution's case and hence, no credence can be given to their testimony;

g) that P.W.9 is also not trustworthy in view of her statement that the accused persons had threatened her near Durga temple, but subsequently contradicted the statements by stating that she was threatened near the place of occurrence;

h) that P.W.10 is only a hearsay witness and did not support the prosecution case;



Crl.A.(MD).No.218 of 2021

i) that P.W.11 and 13 are hostile witnesses and P.W.12 did not support the prosecution case;

j) that P.W.24 is only a hearsay witness and does not support the prosecution case; and

k) that P.W.35, the Investigation Officer, had admitted in his cross examination that he did not conduct investigation with regard to the accident Register and the statement given before the Magistrate by P.W.1 and hence, there is a flaw in the investigation;

5. Per contra, the learned Additional Public Prosecutor countered the appellant's arguments in the following manner:

a) even though the conviction under Section 302 r/w Section 149 IPC may not be sustainable since the members of the unlawful assembly is reduced to less than 5, A3 is liable to be convicted under Section 34 IPC, since A3 had acted in concert with A1 and A2, for which purpose, he relied upon the decision of the Hon'ble Supreme Court in the case of ***Mohan Singh Vs. State of Punjab*** reported in (1963) 1 CriLJ 100;



Crl.A.(MD).No.218 of 2021

b) the motive behind the occurrence is substantiated by the testimony

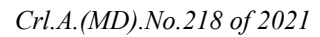
of P.W.1 and P.W.24;

c) the appellant was arrayed as A3 in Ex.P33-FIR and his name was spelt out in Ex.P.34-complaint which strengthens the case of the prosecution;

d) the prosecution case is established through the direct evidence of P.W.1, who is an injured witness and that all the other eyewitness viz., P.W. 2, P.W.3, P.W.4 and P.W.6;

e) In view of the testimony of P.W.2, who saw A3 fleeing from the scene of occurrence, the same is an incriminating evidence against him; and

f) by placing reliance on various decisions of the Hon'ble Supreme Court, the learned Additional Public Prosecutor stressed upon the evidentiary value of an injured eyewitness and other eyewitness and as to how the minor contradictions of the witnesses will not affect the case of the prosecution.



6. The respondent had filed a final report against seven accused,

Charge Nos.	Offence	Against the accused
1	Section 120 B IPC	A3 to A7
2	Section 148 IPC	A3 to A6
3	Section 341 IPC	A3 to A6
4	Section 6 of Explosive Substances Act, 1908	A3 to A6
5	Section 307 r/w 109 IPC	A7
6	Section 307 r/w 149 IPC	A3 to A6
7	Section 302 r/w 109 IPC	A7
8	Section 302 r/w 149 IPC	A3 to A6

7. The trial Court had acquitted the accused Nos.4 to 7 for want of

(i) For the offence under Section 148 IPC, to undergo 3 years RI and

(ii) For the offence under Section 302 r/w 149 IPC, to undergo Life



Crl.A.(MD).No.218 of 2021

Imprisonment and to pay a fine of Rs.5,000/-, in default to undergo 3 months SI;

(iii) For the offence under Section 307 r/w 149 IPC, to undergo 10 years RI, and to pay a fine of Rs.3,000/- in default to undergo 3 months SI; and

(iv) For the offence under Section 6 of Explosive Substances Act, to undergo 10 years RI, and to pay a fine of Rs.2,000/-, in default to undergo 3 months SI and all sentences were directed to run concurrently.

8. We have given our anxious consideration to the submissions on both sides and the same are dealt with in the following manner:

Section 6 of the Explosive Substances Act, 1908:

9. The trial Court had convicted A3 for having committed an offence under Section 6 of ES Act and sentenced him to undergo 10 years RI and fine of Rs.2,000/- in default, to undergo Simple Imprisonment for 3 months. According to the trial Court, A3 was an accessory to the commission of offence under ES Act.



Crl.A.(MD).No.218 of 2021

10. Any person who either supplies or solicits or abets etc., for the commission of an offence under the Explosive Substances Act, 1908, (hereinafter referred to “ES Act”) would be an abettor for committing the offence under Section 6 of the ES Act and shall be accordingly punished. The case of the prosecution is that on 03.10.2003 at 7.00 a.m., while A1 and A2 were armed with country bombs each in their hand, A3 and others were holding bill-hook machete in their hands and had unlawfully assembled for the purpose of committing the murder of the deceased. When the tractor of the deceased along with P.W.1 approached them, A1 and A2 threw the country bombs, targeting the deceased. While one country bomb had hit the left thigh of P.W.1 and exploded which resulted in a grievous injury, leading to amputation of his leg, the other country bomb fell on the front portion of the tractor and exploded, owing to which the tractor went out of control from the road and stopped. Immediately, A3 along with others had attacked the deceased with bill-hook machetes on various part of his body, thereby causing his death.

11. The trial Court, while placing reliance on Ex.P53 and Ex.P27, as well as the oral evidence of P.W.1, had come to the conclusion that P.W.1



Crl.A.(MD).No.218 of 2021

had suffered injuries on account of the bomb attack and that A3 was an accessory to the commission of an offence under Section 3 of the ES Act by A1 and A2 and therefore, had held A3 to be guilty for the offence under Section 6 of the ES Act and Section 307 r/w 149 IPC.

12. Section 7 of the ES Act places a restriction on trial for offences under this Act, except with the consent of the District Magistrate. The Superintendent of Police, Sivagangai, had given a requisition to the District Magistrate / District Collector, Sivagangai, stating that A1 to A7 were involved for commission of various offences under the Penal Code including Section 3(a) of the ES Act, 2001 and therefore, sought for consent for prosecuting these 7 accused, through his letter dated 11.05.2005 (Ex.P50 series). However, the District Magistrate, on perusal of the CD file, had come to the conclusion that A1 and A2 alone had committed the offence punishable under Section 3(a) of the ES Act, 2001 and therefore, had accorded sanction for prosecution of A1 and A2 alone for the offence under the ES Act, 2001.



Crl.A.(MD).No.218 of 2021

13. When Section 7 of ES Act places a restriction on trial of an offence under the Act without the consent of the District Magistrate, all further investigation against A3 for implicating him for any offence under this Act in general or for an offence of abetting under Section 6, would stand vitiated, in the absence of a consent from the District Magistrate in accordance with Section 7 of ES Act. The trial Court had however, discarded the absence of the consent of District Magistrate on the ground that it is only an irregularity and not an illegality. We are unable to endorse the view of the trial Court. The prior consent under Section 7 of the ES Act is a mandatory requirement for any investigation against an accused for the offence under the ES Act and thus, the conviction under Section 6 of ES Act without such a consent of the District Magistrate, cannot be legally sustainable.

14. This apart, the only evidence available to attract an offence under the ES Act, is against A1 and A2 alone. None of the witnesses have spoken about A3 of having supplied or solicited for money or provided his premises or supplied materials or in any manner procured, counseled, aided, abetted or that he was accessory to the commission of an offence under the ES Act



Crl.A.(MD).No.218 of 2021

against A3. This fact is not in dispute. While that being so, the requirement for constituting an offence under Section 6 of the ES Act is conspicuously absent in any of the oral and documentary evidences before the trial Court. On this ground also, the charge against A3 for the offence under Section 6 of the Act, cannot be sustained and thus, the guilt of A3 for this offence, would stand absolved.

15. Thus, it requires to be held that the prosecution has failed to prove the guilt against A3 for the offence under Section 6 of ES Act and therefore, the trial Court ought to have found A3 as not guilty for this offence.

Unlawful Assembly:

16. Insofar as the conviction of A3 for the offence under Sections 148 and the applicability of Section 149 IPC are concerned, the learned Senior Counsel appearing for the appellant submitted that since there was no unlawful assembly in view of the death of A1 and A2 as well as the acquittal of A4 to A7, the trial Court ought not to have convicted A3 for the offence under Sections 148, 302 r/w 149 and 307 r/w 149 IPC. To such a



Crl.A.(MD).No.218 of 2021

submission, the learned Additional Public Prosecutor submitted that though Sections 148 or 149 IPC may not have been made out, yet the crime was committed with A3's common intention with A1 and A2 and therefore, is deemed to have committed an offence under Section 302 IPC read with Section 34 IPC.

17. Under Section 141 IPC, only five or more persons constitute an unlawful assembly, provided the other requirements of the Section as to the common object of the persons comprised in the assemblage to commit a crime or an illegality, are satisfied. The essential conditions of an unlawful assembly is that its membership must be five or more with the common object of committing a criminal offence.

18. Section 149 IPC implicates vicarious or constructive criminal liability on all the members of an unlawful assembly, when an offence is committed by any member of such an unlawful assembly, in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object. The essential ingredients of Section 149 IPC are that the offence must have



Crl.A.(MD).No.218 of 2021

been committed by any member of an unlawful assembly in order to implicate the criminal liability on the other members of such an assemblage.

19. A1 and A2 had died prior to framing of charges and thus, the trial Court had framed the charges against the remaining five accused viz., A3 to A7. In view of the death of A1 and A2, the proceedings against them were declared to have abated, by the trial Court. So also, the trial Court had acquitted A4 to A7 under Section 235(1) Cr.P.C. from all the charges against them and convicted A3 alone, for having committed the offences under Sections 148, 302 r/w 149 and 307 r/w 149 IPC, among other offences.

20. When one or more of the accused in an assembly of five or more persons, who are accused or charged of having assembled in prosecution of a common object to commit a crime or any other illegality dies, the charge against him / them would abate and the proceedings are discontinued against them. In ***Gurmail Singh and another Vs. State of Uttar Pradesh*** reported in (2022) 10 SCC 684, the effect of abatement was discussed as follows:

“27. The term “abatement” or “abate” has not been defined in Cr.P.C. In the said circumstances, its dictionary



meaning has to be looked into. As relates criminal proceedings going by the meaning given in Black's Law Dictionary, 10th Edition, abatement means "the discontinuation of criminal proceedings before they are concluded in the normal course of litigation, as when the defendant dies". Thus, it can be seen that the meaning of "abatement" can only be taken in criminal proceedings as "discontinuation of such proceedings owing to the death of the accused/convict pending such proceedings".....".

21. However, when more than five persons are charged for the offence punishable under Sections 148, 302 r/w 149 IPC or 307 r/w 149 IPC and some of them have been acquitted, bringing the total number of the accused below 5, the offence under Sections 148 or 302 r/w 149 or 307 r/w 149 IPC, will not be attracted. In ***Amar Singh and Others Vs. State of Punjab*** reported in (1987) 1 SCC 679, this position was discussed thus:

"8.....It is submitted that after the acquittal of the three accused persons out of seven, the appellants who are the remaining four, cannot be held to have formed an unlawful assembly within the meaning of section 141 IPC and, accordingly, the charges under Sections 148 and 149 IPC were not at all maintainable.

9. In our opinion, there is much force in the contention. As the appellants were only four in number, there was no question of their forming an unlawful assembly within the meaning of section



141 IPC. It is not the prosecution case that apart from the said seven accused persons, there were other persons who were involved in the crime. Therefore, on the acquittal of three accused persons, the remaining four accused, that is, the appellants, cannot be convicted under Section 148 or section 149 IPC for any offence, for, the first condition to be fulfilled in designating an assembly an "unlawful assembly" is that such assembly must be of five or more persons, as required under Section 141 IPC. In our opinion, the convictions of the appellants under Sections 148 and 149 IPC cannot be sustained."

22. In *Nethala Pothuraju and others Vs. State of Andhra Pradesh* reported in **(1992) 1 SCC 49**, this ratio was reiterated by holding that after the acquittal, when the member of the unlawful assembly is reduced to less than 5, the remaining accused cannot be convicted under Section 148 or for commission of any offence with the aid of Section 149 IPC. The relevant portion of the order is as follows:

"4.....The appellants being only three in number, there was no question of their forming an unlawful assembly within the meaning of Section 141 I.P.C. It is not the prosecution case that apart from the seven accused persons there were some other unidentified persons who were involved in the crime. The High Court clearly fell into error in confirming the conviction and



sentence of the appellants under Sections 148 and on applying 149 I.P.C. on the ground that they formed an unlawful assembly along with some unidentified persons. The prosecution case from the very beginning was that A1 to A7, the named persons, formed the Unlawful assembly. A-4 to A-7 having been acquitted, the remaining three appellants cannot be convicted under Sections 148 and on applying 149 I.P.C. We, therefore, set aside the conviction of the appellants under the said sections.”

23. The learned Additional Public Prosecutor placed reliance on the decision in ***Mohan Singh Vs. State of Punjab*** reported in (1963) 1 CriLJ 100, and submitted that even when the ingredients of Section 149 IPC are not attracted to convict A3 for an offence under Sections 302 or 307 IPC, he can still be convicted for these primary offence with the aid of Section 32 of IPC, since there was a common intention between A1 to A3 to commit the criminal act.

24. The facts before the Hon'ble Supreme Court in this case was that five accused were charged to have committed an offence of Section 302 r/w Section 149 IPC, among other offences. The trial Court had acquitted two of the five persons and convicted the remaining three. However, it was felt



that in view of the large number of injuries inflicted on the deceased and the complete absence of injuries on the accused, it was inferred that the assault must have been the work of more than four members and therefore, the charge under Section 147 IPC was established and consequentially, the accused were convicted for an offence under Section 302 r/w 149 IPC. The Hon'ble Supreme Court had found that in the absence of five or more members of the assembly that committed the offence, Section 149 IPC was held to be inapplicable and accordingly, altered the conviction into one under Section 302 r/w Section 34 IPC and the conviction and sentence for the offence under Section 147 IPC was set aside and the accused were ordered to be acquitted in respect of that offence. The relevant portion of the order reads as follows:

“13..... But, nevertheless, the common intention which is the basis of s. 34 is different from the common object which is the basis of the composition of an unlawful assembly. Common intention denotes action-in-concert and necessarily postulates the existence of a pre-arranged plan and that must mean a prior meeting of minds. It would be noticed that cases to which s. 34 can be applied disclose an element of participation in action on the part of all the accused persons. The acts may be different; may vary in their character, but they are all actuated by the same common intention. It is now well-settled that the common intention

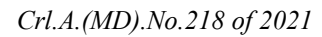


*required by s. 34 is different from the same intention or similar intention. As has been observed by the Privy Council in **Mahbub Shah v. King Emperor ((1945) L.R. 72 I.A. 148.)**, common intention within the meaning of s. 34 implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan and that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case.*

14.....

15. *The result is, the conviction of the appellants is accordingly altered into one under section 302, read with section 34 of the Indian Penal Code. This modification in the order of the conviction does not require any change in the order of sentence at all. For the offence under section 302, read with s. 34 of which we are convicting them, they would be sentenced to imprisonment for life. The conviction and sentence for the offence under section 147 is, however, set aside and they are ordered to be acquitted in respect of that offence.”*

25. The facts of **Mohan Singh's case** is quite different and distinct from that of the case in hand. In **Mohan Singh's case**, two of the five accused were acquitted and the remaining three accused were convicted under Sections 302 r/w 149 and 147 IPC. The order of the trial Court was



“11..... It was also urged that in coming to the conclusion that the unlawful assembly consisted of ten to thirteen persons, the High Court was making out a case of a new unlawful assembly and that was not permissible in a criminal trial. Both these arguments were repelled by this Court and it was held that there was no legal bar which prevented the High Court from coming to the conclusion that apart from the persons who were acquitted and excluding them, evidence adduced by the prosecution showed the presence of more than five persons who composed the unlawful assembly. The assembly about the existence of which the High Court has made a finding is not a new assembly but the same assembly as alleged by the prosecution. The only difference is that according to the charge, all the members of the assembly were alleged to be known, whereas on the evidence the High Court has reached the conclusion that the identity of all the members of the assembly has not been established, though the number of the members composing the assembly is definitely found to be five or more. It is on this reasoning that this Court confirmed the conviction of the appellants under Section 302/149. Thus, this decision illustrates how Section 149 can be applied even if two or more of the persons actually charged are acquitted.”



26. From the above extract, it could be seen that the Hon'ble Supreme Court had taken into consideration the evidence adduced by the prosecution about the existence of an unlawful assembly.

27. In the instant case, the prosecution had laid a final report against seven accused of which A1 and A2 had died even prior to the commencement of the trial. In view of their deaths, the charges against A1 and A2 were declared to have abated by the trial Court. The remaining five stood for trial before the Court and the trial Court had framed charges against these five persons. After the trial, the accused 4 to 7 were acquitted from all the charges for want of evidence and A3 alone was convicted. Thus, the ratio laid down in *Mohan Singh's case*, wherein three of the accused were convicted by the trial Court cannot be quoted to the present case in hand in which two of the accused had died before framing of charges and the evidence against these dead persons cannot be used for implicating A3 of having had a common intention with them for committing the crime.



Crl.A.(MD).No.218 of 2021

28. In this background, the main requirement of Section 141 IPC has not been met and thus, A3, who is a member among the three, cannot be guilty of an offence committed in prosecution of a common object under Section 149 IPC. To this extent, the judgment of the trial Court, convicting A3 for an offence under Sections 302 or 307 with the aid of Section 149 IPC, cannot be sustained.

Conviction under Section 148 IPC:-

29. In the preceding paragraphs, we have substantiated the non-applicability of Section 149 IPC for convicting A3 for the offences under Sections 302 or 307 IPC. In consonance with the principles laid down by the Hon'ble Supreme Court in all the decisions referred therein, the same principle would also be made applicable for the offences under Section 148 IPC for rioting with deadly weapons, for which A3 has been convicted. Section 146 of IPC makes rioting applicable to every member of an unlawful assembly, who in prosecution of a common object, uses force or violence. When such member of the unlawful assembly uses force or violence armed with deadly weapons, he is deemed to have committed an



Crl.A.(MD).No.218 of 2021

offence under Section 148 IPC. As stated above, in view of the acquittal of A4 to A7, the number of accused involved in the crime is reduced to less than five and therefore, the main ingredient to constitute an unlawful assembly has not been met. Hence, the consequential offence under Section 148 IPC will not be attracted.

30. In **Gurmail Singh's case**, the Apex Court had referred to the dictum in **Amar Singh's case** and **Nethala Pothuraju's case** and held that in cases where the acquittal of some of the co-accused reduced the number of persons in the assemblage to less than 5, the offence under Section 148 or Section 302 r/w Section 149 IPC will not be made out. The relevant portion of the order reads as follows:

“22.The next question to be looked into to appreciate the contentions of the appellant is whether the reduction in number of the convicts below five on account of death of the co-accused got any impact or effect on the surviving convict(s) in the matter of consideration of his/their, vicarious liability in view of Section 149, I.P.C. There can be no two views on the position that reduction of number of accused/convicts in an appeal, below five on account of acquittal of co-accused/co-convicts and such reduction in numbers below five due to death of co-convicts are different and distinct. The impact and effect of the former



WEB COPY



Crl.A.(MD).No.218 of 2021

situation is no longer res integra. In the decision in Amar Singh & Ors. Vs. State of Punjab ((1987) 1 SCC 679) seven persons were charged for offences punishable under Section 148, Section 302 read with Section 149, IPC. There was no case for the prosecution that other persons had also involved in the commission of the offence. It was held that because of the acquittal of three out of the seven accused the remaining four could not have been convicted under Section 148 read with Section 149 IPC.

23. In Nethala Pothuraju & Ors. Vs. State of Andhra Pradesh ((1992) 1 SCC 49) also this position was reiterated. That was a case where the case of the prosecution was that seven accused persons formed an unlawful assembly and committed murder in pursuance of a common object and they were charged under Section 302/149, IPC. Four of them were acquitted. In the appeal this Court held that in the said factual situation the remaining three accused could not have been convicted by applying Section 149, IPC. At the same time, it was further held that the non-applicability of Section 149, IPC would not be a bar for convicting accused/appellants if evidence would disclose commission of offence in furtherance of a common intention.”

31. In the light of the law laid down by the Hon'ble Supreme Court, the conviction of A3 for the offence under Section 148 IPC, cannot be sustained.



Crl.A.(MD).No.218 of 2021

Offence under Section 341 IPC:

WEB COPY

32. Based on the oral evidences adduced, the trial Court had come to the conclusion that P.W.1 and the deceased were obstructed, while they were coming in the Tractor at the time of the incident. The attack on the deceased and P.W.1 was immediately after a wrongful restraint and therefore, had held that the prosecution was able to prove the charge under Section 341 I.P.C. against A3 without reasonable doubt. However, on a perusal of the oral testimonies of all the eyewitnesses, it is seen that none of them have spoken about any wrongful restraint of the deceased or P.W.1 at the instance of A3. The trial Court had not referred to any particular oral evidence against A3 for his involvement in the act of wrongful restraint. In the absence of any specific evidence to implicate A3 for having indulged in wrongful restraint, his conviction for the offence under Section 341 IPC, also cannot be sustained.

33. The next question that would arise is when Section 149 IPC has not been attracted, whether A3 would still be liable for conviction under Sections 302 or 307 IPC?.



Offence under Section 307 IPC

WEB COPY

34. The categorical statement of the prosecution is that the deceased and P.W.1 were waylaid by A1 and A2, who hurled country bombs on them. One of the country bomb, hurled by A1, had fell on the left thigh of P.W.1 and caused severe crush injury. The bomb hurled by A2 fell on the Tractor and exploded, whereby, the deceased lost control of the Tractor and stopped it. The injuries sustained by P.W.1 was treated by the Doctor (P.W.30). In the accident Register (Ex.P27), it was stated that the three crush injuries sustained by P.W.1 may have been caused by explosion of a country bomb. In his oral testimony, the Doctor (P.W.30) had reiterated that there were crush injuries of 7x3x2 cm in the left wrist, left femur and another crush injury of 25x10x10 cm in the left gluteus and the left upper thigh, owing to explosion of bomb. This testimony of P.W.30 could not be discredited by the defense.

35. It is not the case of the prosecution that either A3 or the other accused had attacked P.W.1 in any manner. In the complaint (Ex.P34) also, the complainant had implicated the injuries of P.W.1 only on A1 and A2.



Crl.A.(MD).No.218 of 2021

No overt act has been attributed to A3 of having caused any sought of injury on P.W.1. P.W.1, the injured witness, had also affirmed in his oral testimony that the injuries caused to him, leading to amputation of his leg, was owing to the country bomb hurled by A2 and A1 on the Tractor. The other eye-witnesses, in particular P.W.2 and P.W.24 had also connected the injuries of P.W.1 with the overt acts of A2 and A1.

36. However, the trial Court had held that A3 was an accessory to the commission of offence under Section 3 of ES Act and found him guilty under Section 6 of ES Act and Section 307 r/w Section 149 of I.P.C. We have, in the earlier portion of this judgment, had substantiated that both Section 6 of the ES Act as well Section 149 I.P.C. will not be attracted, insofar as it relates to A3. If that be so and in the absence of any specific overt act against A3 of having caused any sought of injury on P.W.1, we have no hesitation to hold that A3 did not involve himself in any act with the intention or knowledge of attempting to commit the murder of P.W.1 and thus ingredients for constituting an offence under Section 307 IPC have not been made out. Thus, the judgment of the trial Court, convicting A3 for the offence under Section 307 r/w 149 IPC, cannot be sustained.



Crl.A.(MD).No.218 of 2021

Offence under Section 302 IPC:

WEB COPY

37. The motive alleged by the prosecution against the accused is that A1, A2 and A3, being relatives, were involved in illegal sand mining business. A1's brother Periyasamy had a previous enmity with the deceased. In connection with this, P.W.1, who was associated with the deceased was abducted by A1 to A3, which was followed by registration of FIR against them. In view of this, A1 to A3 had conspired with A5 for arranging mercenaries viz., A4 to A7 to murder the deceased. On the date of incident i.e., on 03.10.2003 at 7.00 a.m., P.W.1 and the deceased had come in a Tractor owned by P.W.17, near the coconut grove of one Arivazhgan, wherein all the accused, armed with deadly weapons and country bombs, were waiting for their arrival. As per the testimony of P.W.1, P.W.2 and P.W.24, who were eyewitnesses, there existed a previous enmity between the accused and the deceased in connection with illegal sand mining. This testimony of the motive attributed by P.W.1, P.W.2 and P.W.24, were not discredited by the defense. This apart, A3 had examined himself as D.W.1 and had confirmed about the earlier incident of the abduction of P.W.1 and had marked the judgment in S.C.No.141 of 2010, dated 07.03.2015 on the



file of the Additional Sessions Court, Sivagangai as Ex.D1, which establishes the registration of the criminal complaint of P.W.1 against A1 and A2 and others. It is a case of A3 that in Ex.D1, he was not a named accused. However, the testimony of P.W.1, P.W.2 and P.W.24 implicates A3 of having involved in illegal sand mining, along with A1 and A2, in connection with which, a case of criminal abduction was registered. This testimony of P.W.1 and P.W.24 was also not discredited by the defense witness. Merely since A3 was not arrayed as an accused or charged in the case under Ex.D1, it cannot lead to a conclusion that he had nothing to do with the earlier incident, in view of the clear statement of these two witnesses linking A1 and A2 with A3 in the illegal sand mining, owing to which the criminal case in Ex.D1 was registered. In this background, the defense taken by A3 that the prosecution has failed to establish the motive for the occurrence cannot be sustained.

38. Above all, it is a settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available. In the case of *State of Uttar Pradesh Vs. Kishan Pal and others* reported in **(2006) 16 SCC 73**, it was held that even if there may be a very strong



Crl.A.(MD).No.218 of 2021

motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive, but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction.

39. The trial Court has found A3 to be guilty of the offence under Sections 302 r/w 149 and 307 r/w 149 IPC, among other offences and accordingly sentenced him to various imprisonments. We have already dealt with the applicability of the offence under Section 149 IPC and held that in the absence of 5 or more persons in having committed the crime, Section 149 IPC will not be attracted, but rather the commission of the primary offence under Section 302 IPC. This leads us to explore the evidences touching upon the charge against A3 for having committed the offence under Section 302 IPC.

40. The learned Senior Counsel for A3 made a submission that P.W.2, who is an eyewitness, had not disclosed A3's name in his testimony and even from the statement of P.W.1, there is nothing to establish that A3 had



Crl.A.(MD).No.218 of 2021

caused injuries. The presence of A3 in the scene of occurrence has been spelt out in the very first statement made in this case, which is the complaint / Ex.P.34 by deceased Tamil Sangu, wherein, he has stated that A3 along with three known persons were armed with deadly weapons and country bombs and attacked the deceased and P.W.1. In the FIR / Ex.P.33, the appellant was arrayed as A3. The time of occurrence was at 7.00 a.m., on 03.10.2003. The incident was reported at 8.00 a.m., on the same day and after the FIR was registered, it was sent and received by the Jurisdictional Magistrate's Court at 3.30 p.m. of the same day. We do not find any delay in either the complaint or registration of FIR or the FIR being sent to the Court. Thus, the involvement of A3 in the crime has been revealed in the very earliest stage of the case.

41. This apart, the presence of P.W.2 and P.W.3, who are the villager and wife of the deceased respectively and also the other eyewitnesses to the incident, have also been referred to in Ex.P34 and Ex.P33 and this also establishes the presence of P.W.2 and P.W.3 in the scene of occurrence.



Crl.A.(MD).No.218 of 2021

42. P.W.6, who hails from the village of the deceased, had witnessed the crime and in his testimony, he had implicated the role of A3 of having caused injuries with Aruval on the deceased. Thereafter, he had taken the injured P.W.1 to Madurai Government Hospital and the Accident Register / Ex.P.27 also refers to his name thereby strengthening the case of the prosecution. On an over all appreciation of the testimony of P.W.1, P.W.24 and P.W.6, the presence of A3 in the scene of occurrence and the overt act attributed by him in the crime stands further strengthened.

43. Above all, the entire incident is spoken about by P.W.1, who is an injured witness, apart from the other eyewitnesses viz., P.W.2, P.W.3, P.W.4 and P.W.6.

44. As stated earlier, the occurrence took place on the fateful day, leading to the death of Muthuramalingam and with grievous injuries to P.W.1. The overt act attributed by the prosecution while framing the charges is that A3 had trained A1 and A2 to hurl country bombs, with the intention of causing death of deceased and P.W.1 and had caused grievous injuries with a bill-hook machete and thereby committed the offences under



Crl.A.(MD).No.218 of 2021

Sections 302 and 307 IPC, among other offences. During the occurrence, Muthuramalingam had died and P.W.1 suffered from grievous injuries, resulting in loss of his leg. P.W.1, who was an injured witness had categorically asserted in his testimony about the active participation of A3 in the crime. As per his testimony, he had substantiated the previous enmity and motive and had implicated the presence of A1 and A2 along with 5 to 6 unknown persons, who had attacked the deceased with the bill-hook and machete. P.W.2, P.W.3, P.W.4 and P.W.6 are also eyewitnesses to the crime. P.W.2 had spoken about the involvement of 6 persons, including A1 and A2 of hurling the country bomb. P.W.3 had spoken about the overt act of A3 of using the bill-hook and machete on her husband and threatening her to refrain from coming near them. Likewise P.W.4 had specifically implicated A3 of having caused grievous cut injuries on the front and back neck of the deceased. P.W.6 also spoke about the presence of A3 and the knife injuries caused by him on the deceased.

45. The learned counsel for A3 placed reliance on the contradictions in the testimony of the Investigation Officer (P.W.34) with that off the testimonies of P.W.3, P.W.4 and P.W.6 and stated that since P.W.34 had



Crl.A.(MD).No.218 of 2021

deposed that P.W.3 had not given statement to him about the involvement of A3 and that P.W.4 had not deposed to him in the enquiry about A3 carrying an aruval, when he was found standing near his house and that the Investigation Officer had denied the statement of P.W.6 of having illegally restrained the tractor driven by the deceased and thus, submitted that these witnesses have not supported the prosecution's case. He further submitted that since P.W.1 and P.W.2 have not named A3, while deposing before the trial Court and since P.W.5 had also turned hostile and not supported the prosecution case, the evidence of all these witnesses are not trustworthy and requires to be discarded.

46. On an over all appraisal of the testimony of the eyewitnesses viz., P.W.1, P.W.2 and P.W.24, had categorically established the presence of A3 in the scene of occurrence, as well as their witness to the entire occurrence. The defense had not discredited their statements in the cross examination. Thus, each of these three witnesses have corroborated the testimony of the others and hence, we are of the view that their testimony are credible and trustworthy.



WEB COPY

47. Above all, P.W.1 in this case, is an injured eyewitnesses and his evidence stands on a higher pedestal. In the case of ***State of M.P. Vs. Mansigh***, reported in ***(2003) 10 SCC 414***, the Hon'ble Apex Court had observed that “*the evidence of injured witnesses has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly*”. It is further observed in the said decision that “*minor discrepancies do not corrode the credibility of an otherwise acceptable evidence*”. It is further observed that “*mere non-mention of the name of an eyewitness does not render the prosecution version fragile*”.

48. A similar view has been expressed by the Hon'ble Apex Court in the subsequent decision in ***Abdul Sayeed v. State of M.P.***, reported in ***(2010) 10 SCC 259***. It was the case of identification by witnesses in a crowd of assailants. It is held that “*in cases where there are large number of assailants, it can be difficult for witnesses to identify each assailant and attribute specific role to him*”. It is further observed that “*when incident stood concluded within few minutes, it is natural that exact version of incident revealing every minute detail i.e. meticulous exactitude of individual acts, cannot be given by eyewitnesses*”. It is further observed that



“where witness to occurrence was himself injured in the incident, testimony of such witness is generally considered to be very reliable, as he is a witness that comes with an inbuilt guarantee of his presence at the scene of crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone”. It is further observed that “thus, deposition of injured witness should be relied upon unless there are strong grounds for rejection of his evidence on basis of major contradictions and discrepancies therein”.

49. The aforesaid principle of law has been reiterated again by the Hon'ble Apex Court in ***Ramvilas v. State of M.P.***, reported in **(2016) 16 SCC 316** and it is held that *“evidence of injured witnesses is entitled to a great weight and very cogent and convincing grounds are required to discard their evidence”*. It is further observed that *“being injured witnesses, their presence at the time and place of occurrence cannot be doubted”*.

50. In the recent case of ***M Nageswara Reddy v. State of AP*** reported in **2022 SCC OnLine SC 268**, Hon'ble Apex Court has held as follows:

“16. Having gone through the deposition of the relevant witnesses — eyewitnesses/injured eyewitnesses, we are of the



opinion that there are no major/material contradictions in the deposition of the eyewitnesses and injured eyewitnesses. All are consistent insofar as Accused 1 to 3 are concerned. As observed hereinabove, PW 6 has identified Accused 1 to 3. The High Court has observed that PW 1, PW 3 & PW 5 were planted witnesses merely on the ground that they were all interested witnesses being relatives of the deceased. Merely because the witnesses were the relatives of the deceased, their evidence cannot be discarded solely on the aforesaid ground. Therefore, in the facts and circumstances of the case, the High Court has materially erred in discarding the deposition/evidence of PW 1, PW 3, PW 5 & PW 6 and even PW 7.

xxx

19. Having gone through the reasoning given by the High Court, we are of the opinion that the High Court has unnecessarily given weightage to some minor contradictions. The contradictions, if any, are not material contradictions which can affect the case of the prosecution as a whole. PW 6 was an injured eyewitness and therefore his presence ought not to have been doubted and being an injured eyewitness, as per the settled proposition of law laid down by this Court in catena of decisions, his deposition has a greater reliability and credibility.”

51. With regard to the other two eyewitnesses, the Hon'ble Apex Court in a recent decision in ***Ravasaheb @ Ravasahebgouda Etc. Vs. State***



Crl.A.(MD).No.218 of 2021

of Karnataka reported in [2023] 3 Supreme 461, had held that “the general principle of appreciating the evidence of eye-witnesses is that when a case involves a large number of offenders, prudently, it is necessary, but not always, for the Court to seek corroboration from at least two more witnesses as a measure of caution. Be that as it may, the principle is quality over quantity of witnesses.”. It was further held that the evidence, when examined as a whole, must reflect a ring of truth and the minor omissions and discrepancies, which do not shake the foundations of the prosecution's case, must not be given undue importance.

52. In the light of the aforesaid decisions and by taking into account of the corroborated testimonies of the injured / eyewitnesses viz., P.W.1, P.W.2 and P.W.24, we are of the affirmed view that the credible evidence of these eyewitnesses does not become tainted owing to the small omissions and discrepancies.

53. Based on the confession (Ex.P3) of A3, the Investigation Officer had recovered the bill-hook machete through Ex.P9. P.W.13, in his oral testimony, had stated that based on the confession statement of A3, the



weapon was recovered from the banana grove of A3. P.W.28, who conducted the autopsy on the body of the deceased, had given the postmortem certificate (Ex.P.24). As per the certificate, the following injuries were found on the body of the deceased:

“External injuries:

- i. An oblique incised gaping wound 14x5x3cms on the left parietal region of the scalp about 2 cms above the left ear served the left parietal bone broken;*
- ii. Oblique incised wound in the chin 12x1x1.5 cms about 2 cms below the lower lip severing in the mandible beneath the wound;*
- iii. An oblique incised wound about 28x5x5cms across the front of neck about 2 cm behind the right ear dividing trachea musculator and all the blood vessel beneath the wound;*
- iv. An oblique incised gaping wound 4 x3 x 3cm on the middle of left shoulder dividing the left collar bone beneath the wound;*
- v. Incised the gaping wound 4 x 2 x 2 cma on the right side of front of neck about 1 cm lateral to Adams apple;*
- vi. Oblique incised gaping wound 20x7x5cma on the top of the left side of the chest severing second of third rib;*
- vii. An oblique incised gupping wound 8 x 2 x 7cms on the left side of the chest abovt 5cms medium to the nibble;*
- viii. An oblique stab injury fold of the left axilla;*
- ix. An oblique incised gaping wound 10 x 5 x 5cms on the*



back of left arm about 10cms above the elbow, severing the humerus beneath;

x. A stab injury on the front of lower part of left arm 3 x 1 x 3cm;

xi. An oblique incised gapping wound 8x4x3cms above middle of back of left forearm;

xii. An oblique incised wound 2 x 1 x 4 cms in the left forearm about 15cms above the wrist;

xiii. The left hand is severed from the wrist and hanging with the piece of skin;

xiv. An oblique incised gapping wound across the middle of left index finger dividing thephalanxes;

xv. The right little and ring finger are found severed at their base and hanging by a piece of skin;

xvi. An oblique stab injury 2 x 2 x 3 cm on the inner aspect of right thigh;

xvii. Stab injury 2 x 2 x 3 cms on the bank of right thigh about 5cm above the knee;

xviii. An oblique incised gapping wound over the right occipital region of scalp 13 x 5 x 3cms about the 1cm below the right ear;

xix. An incised wound 3 x 2 x 3cms across the back of the right wrist; and

xx. A stab injury 0.5 x 0.5 x 0.5cm on the middle of right scrotum.

Internal Examination:



Crl.A.(MD).No.218 of 2021

- *Hyoid bone Severed*
- *Thorax ribs 2x3 found severed on the costal chondral ...*
- *Thorax cavity empty*
- *Lungs pale*
- *Heart all the chambers empty*
- *Abdominal cavity stomach contains 20 onus brownish colour fluid. No food order. Intestine empty.*
- *Liver, spleen, kidney normal*
- *Head parietal bone fracture 10x5x5cms through which part of brain coming out. Membrane covering the brain on the left side found lacerated. The left cerebrum is excised corresponding to the cut injury, left side of the scalp.”*

In his oral testimony, he had reiterated that all these injuries could have been caused with the bill-hook machete used by A3. The Investigation Officer (P.W.37), had marked the acknowledgment received from the Ramanad Forensic Laboratory as Ex.P.51, biology report dated 03.12.2003 as Ex.P.52, explosive report dated 15.12.2003 as Ex.P.53 and serology report dated 09.02.2004 as Ex.P.54. No incriminating or contradictory statements were obtained by the defense on these evidences, from these witnesses. Thus, the testimony of the Postmortem Doctor corroborates the various injuries found on the body of the deceased with the



Crl.A.(MD).No.218 of 2021

ocular evidence. From the postmortem report, it is seen that the third external injury and the corresponding internal injury are fatal injuries, which were caused by A3. These indisputable testimonies affirms the overt act attributed to A3. Thus, on an over all appreciation of the evidence of the injured eyewitness (P.W.1), along with other eyewitnesses viz., P.W.2 and P.W.24, apart from P.W.3, P.W.4 and P.W.6, who were also eyewitnesses and who had also earlier deposed about the overt act of A3, we have no hesitation to hold that A3 had committed the gruesome murder of the deceased for a previous motive and therefore, is liable to be convicted for the offence under Section 302 I.P.C.

54. By taking into account the severity caused and the manner in which A3 had caused murder of the deceased Muthuramalingam, and in the light of our discussion, the conviction and sentence of the trial Court as against the appellant Sengaisamy / A3 in its judgment in S.C.No.139 of 2010, dated 17.04.2021, stands modified as follows:

a) the conviction and sentence of the appellant / A3, finding him guilty of having committed the offence under Sections 148, 341, 307 r/w



Crl.A.(MD).No.218 of 2021

149 and Section 6 of ES Act, are set aside and he stands acquitted for the said offences. Fine amount, if any, paid by the appellant in respect of the said offences, shall be refunded to him;

b) the conviction and sentence of the appellant / A3, finding him guilty of having committed the offence under Section 302 r/w 149 IPC is modified and is hereby held that the appellant /A3 is guilty of having committed the offence under Section 302 IPC and is sentenced to undergo Rigorous Imprisonment for life and to pay a fine of Rs.5,000/-, in default, to undergo Simple Imprisonment for three months.

c) the judgment of the trial Court, holding that the appellant / A3 was not guilty under Section 120(b) IPC is upheld.

53. The Criminal Appeal stands ordered accordingly.

(M.S.R.,J.) (M.N.K.,J.)
29.09.2023

NCC : Yes
Index : Yes
vsm



WEB COPY



Crl.A.(MD).No.218 of 2021

M.S.RAMESH, J.
and
M.NIRMAL KUMAR,J.

vsm

To

- 1.The Inspector of Police,
Thiruppachethi Police Station,
Sivagangai District.
- 2.The Principal Sessions Judge, Sivagangai.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
- 4.The Record Keeper,
Vernacular Records Section,
Madurai Bench of Madras High Court,
Madurai.

Judgment in
Crl.A.(MD)No.218 of 2021

29.09.2023