



Crl.A(MD) No.301 of 2020

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 26.09.2024

Pronounced on : 30.10.2024

Coram:

**THE HONOURABLE MR. JUSTICE C.V. KARTHIKEYAN
AND
THE HONOURABLE MS. JUSTICE R. POORNIMA**

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1.Syed @ Syed Abdhahir

2.Refeek @ Kalandhar Rafeek .. Appellants/ Accused Nos.2&3

Vs.

State rep. by

The Inspector of Police,

S.P.Pattinam Police Station,

Ramanthapuram District

Crime No.70/2011 .. Respondent/Respondent/Complainant

Prayer: Criminal Appeal filed under Section 374 (2) of the Criminal Procedure Code, to set aside the conviction and sentence dated 30.07.2020 passed in S.C.No.49 of 2012 on the file of the learned Additional District and Sessions Judge, Ramanathapuram.



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For Appellants : Mr.A.Ravichandra Ramavanni

For Respondent : Mr.S.Ravi,
Additional Public Prosecutor

J U D G M E N T

(Judgment of this Court delivered by R.POORNIMA,J.)

This Criminal Appeal is filed against the conviction and sentence passed against the accused Nos. 2 and 3 / appellants in the judgment dated 30.07.2020 passed by the Additional District and Sessions Judge, Ramanathapuram, in S.C.No.49 of 2012 by convicting and sentencing the appellants for the offences punishable under Sections 302 to undergo imprisonment for life and to pay a sum of Rs.5000/- and in default of payment of fine , further undergo punishment for 2 years.

2. The appellants herein are the accused 2 and 3 in the trial Court in S.C.No.49 of 2012. They have preferred this Criminal Appeal, against the judgment of conviction, under Section 374 (2) Cr.P.C, 1973.



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3. The appellants / accused Nos. 2 and 3 were convicted under Section 302 I.P.C and sentenced to undergo for life imprisonment and to pay a fine of Rs.5,000/-, in default of payment, to undergo 2 years simple imprisonment. The appellants paid the fine amount. Aggrieved by the above conviction order and sentence, this Criminal Appeal has been filed by the appellants A2 and A3.

4. For the sake of convenience, the parties are referred to as per their rank before the trial Court.

5. As per the case of the prosecution, all the accused are relatives. They had previous enmity, with the deceased due to a civil dispute. On 04.09.2011, the deceased – Mohammed Yusuf and his friend Hammed Mahaboob, had gone to Ramanathapuram to deposit money to contest the elections. After knowing the same, the Accused Nos. 1 to 6 unlawfully assembled with deadly weapons and were waiting for the deceased near S.P.Pattinam bus stand near Siddika Beevi House. On the same day, at about 09.30 pm, the deceased – Mohammed Yusuf and his friend



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Hammed Mahaboob came in a bus and got down in S.P.Pattinam Bus stand, took their two wheeler. They started moving towards their house.

A2 was driving the two wheeler belonging to the third accused. Both A3 and A6 were also sitting in the vehicle and came in the opposite direction to the bike of deceased and dashed against the vehicle, in which, the deceased Mohammed Yusuf and his friend Hammed Mahaboob were traveling.

6. P.W.1 who was waiting near the road side for his son, witnessed the occurrence. Mohammed Yusuf fell down from the vehicle. He was surrounded by A1 to A6 and A6 shouted to A1 that he should not leave Mohammed Yusuf alive. A1 took a knife which was hidden in his hip and stabbed the victim on his chest. The said Mohammed Yusuf, in order to save his live, rushed into house of the witness - Siddhik Beevi. A1 to A3 chased him and went inside the said house and locked the door from inside and indiscriminately inflicted injuries all over the body viz below left chest, near the left nipple, above the ribs, near the cheek, near the right ear etc.



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7. P.W.1 raised a hue and cry and tried to enter into the house but was prevented by A6 to A8 from entering into the house. Thereafter, all the accused fled away from the place of occurrence. P.W.1 rushed to the spot and saw his son in a pool of blood. He lodged the complaint. The F.I.R was registered in Cr.No.70/2011 under section 147, 148, 302 IPC and the same was sent to the Judicial Magistrate, Thiruvadanai.

8. The Inspector of Police, Ramanadapuram, P.W.23 took the case for investigation, visited the place of occurred on 05.9.2021 at 12.30 p.m. It was noticed that the relatives had staged dharna with the dead body. He seized the dead body and sent it to the Thiruvadanai Government Hospital for Postmortem. He prepared observation mahazar Ex.P.2 in the presence of witnesses Sagubar Sadiq, Syed Abdhahir and also drew rough sketch under Ex.P19. He seized the two wheeler TN-09-AR-0290 used by the accused. He seized the blood stained concrete and ordinary concrete from the place of occurrence under recovery mahazar in the presence of witnesses. He had examined witnessesn Shek Mahaboob,



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Hameed Mahaboob, Abdul Hameed, Mohammed Nissak, Naina Mohammed, Siddika Beevi, Syed Meerasa, Farook Ali, Sualaika Beevi and Jannathammal recorded their statement. He conducted inquest on the deadbody between 07.00 and 09.00 am in the presence of Panchayathars. In order to conduct post mortem a request was given through Gopalakrishnan, Head Constable. After completion of post mortem, the said Gopalakrishnan handed over a dhothi with black, white, red border, white shirt, vest and red colour brief recovered from the dead body and the same was recorded in Form – 91.

9. He then arrested A3-Kalandar Rafiq @ Rafiq, A6 Kalanthar Ali at 6.00 am near S.P.Pattinam in the presence of witnesses Rajapandian, Subramaniam. A3 voluntarily gave a confession statement and the same was recorded in the presence of the above witnesses and a knife was recovered under recovery mahazer. He arrested Mohammed Abdulla - A4 at 9.30 hours near Enathi Pambaru, Karuvaikadu and obtained confession statement in the presence of Rajapandi and Subramani and recovered the wooden log under recovery mahazer.



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10. Thereafter, he examined Kaja Mohideen, Ahamedsha, Mohammed Abubakkar, Sulaikaammal, Arockiyasamy and H.C.1614 - Gopalakrishnan and recorded their statements.

11. On 08.09.2011, A5 surrendered before the Devakottai Judicial Magistrate and A4-Sahubar Ali surrendered before the Aranthangi Judicial Magistrate Court on 09.11.2011.

12. On 14.09.2012, a request was made to handover the accused for custodial interrogation and the same was granted. He recorded the confession statement of A4 in the presence of Rajapandian and Subramanian and recovered a weapon, wooden log.

13. On 15.09.2011, A2 handed over a knife from the seashore near S.P.Pattinam and the same was seized under recovery mahazer. A5 handed over a wooden log and the same was also recovered under Mahazer. He examined the witness Muruganantham, Grade I Constable.



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14. The investigation was further continued by P.W.25, Thiru.Dhanapalan, He examined all the witnesses but had not recorded their statement as the witnesses repeated the same statements which were stated to P.W.23. He recorded the confession statement of A1, who had surrendered before the Judicial Magistrate No.II, Trichy and recovered knife from the accused near a bridge at Enathi Pambaru in the presence of the Village Administrative Officer and Village Assistant. He sent all the material objects through Form – 95 to the Judicial Magistrate. He recorded the statement of Dr.Senbagadevi, who had conducted the post mortem, the Head Clerk of Thiruvadanai, who had sent the materials to Forensic Department and Vairmuthu, the Scientific Officer. Thereafter, he filed final report against A1 to A3 under Sections 302 I.P.C, against A4 to A6 under Section 302 r/w. Section 34 and 506(ii) I.P.C, against A1 under Section 302 r/w. Section 109 I.P.C., before the Judicial Magistrate, Thiruvadanai.



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15. After perusing the charge sheet, the case was taken cognizance by the Judicial Magistrate. He issued summons to the accused. The accused were directed to appear before the Court and free copies were served on them under Section 207 Cr.P.C. After perusing the records and after hearing the parties, since the case was exclusively triable by the Sessions Court, the Judicial Magistrate committed the case under Section 209 Cr.P.C to the Principal District and Sessions Court, Ramanathapuram.

16. The case was taken up by the District and Sessions Judge, Ramanathapuram and made over to the Sessions Judge, Ramanathapuram. The said court took the case on file as S.C.No.49 of 2012. During the trial proceedings, A1 died and the charges against him abated.

17. The trial Judge framed charges against A2 to A4 under Sections 148, 302 r/w. Section 149 and 506 (ii) r/w. 149 I.P.C., and against A5 and A6 under Sections 147, 302 r/w. 149, 506 (ii) r/w. 149



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I.P.C. All the accused denied the charges and claimed to be tried. The trial then commenced.

18. On the side of the prosecution, P.W.1 to P.W.25 were examined and Ex.P1 to Ex.P42 were marked and Material Objects M.O.1 to M.O. 12 were produced.

19. After full trial, the trial Court on the basis of records and evidence, pronounced judgment on 30.07.2020 and convicted A2 and A3 under Section 302 I.P.C and sentenced them to undergo life imprisonment and to pay a fine of Rs.5,000/-, in default, to undergo two years simple imprisonment each. A2 to A4 were acquitted of charges under Sections 148 and 506 (ii) r/w. 149 I.P.C., and A5 and A6 were acquitted of charges under Sections 147, 506 (ii) r/w. 149 I.P.C., and A4 to 6 were acquitted of charges under Section 302 r/w. 149 and 506(ii) r/w. 149 I.P.C., under Section 235(1) Cr.P.C.



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20. The learned Additional Public Prosecutor appearing for the State argued that on the side of prosecution P.W.1 to 15 were examined, exhibits P1 to P.14 marked and M.O-1 to 12 were produced. P.W.1, who is an eye witness clearly stated about the occurrence without any contradictions. His evidence is clear and cogent and without any suspicion. The motive for the crime was that both the accused and the deceased had previous enmity due to a civil dispute. This was spoken by P.W.1, P.W.8, P.W.14. The certified copy of the civil case judgment was produced under Ex.P42. It was argued that the prosecution had categorically proved that both the accused and deceased had previous enmity. The occurrence happened in the house of P.W.4. The adjoining house owner P.W.5 and P.W.6 and the person, who had accompanied the deceased P.W.3 failed to support the prosecution due to fear. However, P.W.1 who came to Ramnad to celebrate Ramzan had witnessed the occurrence. He clearly stated that since his son had not returned from Ramnad, he came to the place of occurrence and witnessed the occurrence. He also clearly deposed before the trial Court. His evidence was supported by P.W.2. He further argued that F.I.R was registered



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without any delay and reached the Court the next day, since the occurrence had taken place in the night hours, and the same was not fatal to the prosecution case.

21. The appellants' counsel raised the following grounds:

(a) That P.W.1 is the sole witness for the occurrence as per pages 43 and 44 of the judgment

(b) That P.W.1 is a chance witnesses as per the pages No. 47 of the judgment.

(c) That P.W.1 is the father of the deceased. He has also admitted that he had civil dispute with A1, who is no more.

(d) That the lower Court had not examined with care and caution, the evidence of P.W.1, who is an uncorroborated, chance witness, interested and also inimical towards the appellants.

(e) That the lower Court had failed to note that though the genesis of the occurrence is dashing of one vehicle driven by deceased, by another vehicle driven by some of the accused, the vehicle that has been seized is alleged to have been driven by the accused person and the



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particulars of ownership have not been obtained from the office of the R.T.O. Even the one vehicle seized had not been sent to the Motor Vehicle Inspector for inspection and Report.

(f) That the lower Court had failed to appreciate the defence argument that since there was no blood in the first place of occurrence and no trace of blood on the way of the injured to the second place of occurrence, and the inference is that no occurrence has taken place in the first place.

(g) That there was a delay of about 12 hours from the time of occurrence to the time, the F.I.R reached the Court, which may take only a travel time of 45 minutes times. The defence suggestion was that since P.W.1 was doing business in Chennai, he came to the place of occurrence on the next day only and hence there was delay. There was also no explanation for the delay.

(h) That the lower Court had failed to notice that there were serious omissions in the F.I.R and statement under Section 161 (3) Cr.P.C to the police about the presence of P.W.1 in the village on the day of occurrence and his presence at the place of occurrence at the relevant



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time. This contradiction has been proved by the defence. This inconsistent version in the evidence of P.W.1 was not looked into by the lower court.

(i) That none of the other witnesses including wife of P.W.1, wife of deceased or other relatives of P.W.1 have deposed about the presence of P.W.1 in the place of occurrence.

(j) That the prosecution has suppressed the Accident Register of the Government Hospital where the deceased was said to be taken earlier.

The learned counsel therefore, prayed that the judgement of trial Court must be set aside.

22. The records were carefully scrutinized.

23. In the final report, the investigating officer relied upon 25 witnesses. During trial, 18 witnesses alone were examined. In the list of witnesses L.W.1 to L.W.6 were cited as eye witness. However, except for L.W.1, who had been examined as P.W.1, the father of the deceased, none of the other witnesses supported the prosecution case.



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24. P.W.1 in his evidence stated that he came to S.P.Pattinam on 04.09.2011. His son went to Ramnad to deposit money for contesting the Panchayat Election. While returning he came in a bus and got down in S.P.Pattinam bus stand and took his vehicle bearing Registration No. 3614 and was moving towards his house. At that time, P.W.1 was standing in the bus stand.

25. He came over there to see why his son had not returned to home till 09.00 pm. While he was standing, he saw his son and Hammed Mahaboob going in a motorcycle. At that time, A1, A2 and A6 also came in another two wheeler and dashed against the deceased, near an electric post, situated near Siddhika Beevi's house. His son fell down. A6 shouted to A1 that he should not leave him alive. Then A1 took a knife and stabbed him on his chest.

26. His son/deceased ran into the house of Siddhik Beevi with injuries. A1 to A3 chased him and they also went inside the house and



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locked it from inside. P.W.1 and others raised a hue and cry. A4 to A6 blocked them and prevented them from entering into the house. After some time, A1 to A3 opened the door and fled away on the western side. He rushed into the house and found his son in a pool of blood with injuries on his chest, hip, stomach, kidney. He found around 10 injuries on his person. He had then lodged the complaint Ex.P1 at about 11.00 pm.

27. Except the above witness, none of the other witnesses supported the prosecution case. The learned counsel for the appellants contended that the presence of P.W.1 is doubtful as he was not residing in the place of occurrence, as he was running a shop in Chennai. He argued that P.W.1 came to S.P.Pattinam only after hearing the death news of the son and lodged the complaint. Therefore, there was a delay in lodging the complaint and delay in handing over the same to the Judicial Magistrate Court, as it is evident that the FIR had reached to the Magistrate Court only the next day. There was no proper reply from the Investigating Agency.



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28. It is seen that during cross examination, P.W.1 admitted that he was running a shop at Chennai and was residing there. He stated that he came to S.P.Pattinam for celebrating Ramzan festival.

29. During cross examination, the defense counsel raised a question whether his son was taken to hospital soon after the occurrence, P.W.1 admitted that his son was taken to Government Hospital and one Dr.Radhakrishnan examined him and declared his death. He further admitted that he informed the cause of injuries to the Doctor. He further stated that his son was taken to Hospital at 10.00 pm. At that time, he was also present in the hospital. Thereafter, he informed the same to the police. Since they did not turn up, P.W.1 and others came with the dead body near Chatram and staged a road roko. This important fact was not brought to knowledge of the Court by the investigating officer. It is noticed that even P.W.1 did not state anything about the same in his chief examination or in his 161 Cr.P.C statement. This fact was admitted by the investigating officer in his cross examination.



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30. The prosecution failed to produce medical evidence to show at what time the son of P.W.1, deceased Mohammed Yousuf was taken to the Government Hospital and whether P.W.1 was present and informed the Doctor about the cause of death. The Accident Register was not produced by the prosecution to show when the son of P.W.1 was taken to the hospital. Further, this fact was also admitted by one of the witness, viz., P.W.8, who claimed to be present in the place of occurrence. He stated that when he had reached the place of occurrence, he found that Mohammed Yusuf was alive. He was kept in a bench and 4 to 5 persons took him to Doctor – Radhakrishnan. The Doctor also came immediately and attended the patient. This fact was concealed by the prosecution. If they had produced the Accident Register, it would have helped the Court to fix the time of death and the presence of P.W.1.

31. Further as per P.W.1, he had lodged the complaint at around 11.00 pm in the police station. He admitted that the police station is situated near by the place of occurrence and he could reach the police



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station within 5 minutes. There was a delay of 2 hours in lodging the complaint. There was a further delay in sending the same to the Judicial Magistrate Court. It had reached the Court the next day at 10.15 am. This delay was not properly explained by the prosecution.

32. During cross examination, P.W.1 further admitted that, the police came to the occurrence place at 11.00 pm and the dead body was taken in an ambulance and thereafter, he alone went to the police station and lodged the complaint.

33. However, P.W.23, who had conducted the major portion of investigation stated that he went to the place of occurrence at 12.30 pm and found the dead body in the place of occurrence, which is contrary to the statement of P.W.1, as P.W.1 stated that the dead body was taken by the police in an ambulance at 11.00 p.m from the place of dharna and thereafter, he went to the police station and lodged the complaint, whereas, P.W.23 stated that when he came to the place of occurrence at around 12.30 pm, he found the dead body in the place of occurrence.



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34. P.W.23- investigating officer stated that he received the F.I.R at around 12.30 pm. Again there is a delay in handing over the F.I.R. to the Investigating Officer. He further admitted during cross examination that the dead body was found in the place of occurrence at 12.30. Since the defense counsel took an important defense by raising a doubt about the presence of P.W.1 and stated that he was present in the place of occurrence only after hearing the death of the deceased, it is the duty of the prosecution to clear this doubt and prove that the father, P.W.1 who is an important eye witness, was available and witnessed the occurrence.

35. But there was a delay in lodging the FIR P.W.1 and the Investigating Officer stated contrary statements about arrival of the Investigating Officer in the place. Further, P.W.2 another witness deposed that A1 to A3 dashed against the two wheeler, in which, the deceased and Hammed Mahaboob were travelling. But, he had not stated that at that time, P.W.1 was present in the place of occurrence. It is noted that as per P.W.1, A1, A2 and A6 dashed against the vehicle of the



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deceased. On the other hand, P.W.2 deposed that A1 to A3 dashed against the deceased. Both statements are contrary.

36. In the above circumstances, suspicions arise about the presence of P.W.1. Any how, the investigation officer P.W.23 deposed that soon after receipt of FIR, P.W.23 - had visited the place of occurrence at 01.30 am and seized the blood stained earth and ordinary earth and conducted inquest at 07.00 a.m, the next day Further, in the inquest report, it was mentioned that the deceased person was last seen by P.W.1 at about 10.00 pm. In view of the above document exhibited by the prosecution, this Court is of the view that the prosecution is able to establish that P.W.1 was present at the time of occurrence. However, it has to be verified that whether the prosecution established other factors to prove the guilt of the accused.

37. In this case, the motive for the offense attributed by the prosecution for the occurrence is that due to civil dispute both A1 and the deceased had previous enmity. P.W.1 in his evidence, deposed that



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deceased had filed a case against A1, alleging A1 had encroached the land of the complainant. Soon after the receipt of the notice from the Court, A1 came with an Aruval and attempted to kill his son. However he was kept locked in the neighborhood house by the female members of the family. On 13.11.2011, when his son came from Thiruvadanai, A1, A2 and their henchmen chased him and since during that time an auto came, they fled away.

38. The copy of the decree in O.S.No.32 of 2009 relied upon by the prosecution has been produced as Ex.P42. This is a judgment rendered by the District Munsif, Thiruvadanai, dated 27.01.2012. But the document when perused, shows that the case was not filed by the deceased, but, it was filed by P.W.1 – Sheik Mohammed as against A1, A3 and others. The case was dismissed on 27.01.2012 against the accused. It was stated by P.W.1 during trial that A1 tried to kill the deceased, soon after receipt of the notice from the Court and that his son was kept locked in the neighborhood house by the women of the family. However, he had not spoken anything about the same in his 161 Cr.P.C.



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statement. Further no such neighbors were cited as witnesses to prove that A1 attempted to kill deceased when a civil case was filed against him. No criminal complaint was lodged by the deceased or the complainant against the accused after the attempt of murder.

39. However, it is well settled law that if a case is based on eye witness, motive behind the crime is usually not relevant and the prosecution need not prove it.

40. As per evidence of P.W.1, soon after his son fell down from the two wheeler, A1 stabbed on the chest of his son near the electric post. Thereafter, in order to save his life, his son rushed into the house of one Siddhik Beevi. A1 to A3 chased him and went inside the house and committed the murder by inflicting injuries with the weapons available with them. This means that the first occurrence took place near electric post and the second occurrence took place in the house of Siddhik Beevi.



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41. P.W.23 – investigating officer deposed in his evidence that he reached the place of occurrence at 12.30 pm and recovered the blood stained earth and ordinary earth from the house of the witness – Siddhik Beevi. He did not recover blood stained mud from the first place of occurrence and there was no explanation on the side of prosecution about non recovery of blood stained earth from the first occurrence place. Even in the rough sketch, the first place of occurrence was not noted and whether blood stains available in that place. No such observation were made by the investigating officer in his rough sketch.

42. Further the vehicle in which the deceased and one Hammed Mahaboob, viz., P.W.3 were travelling, was not seized and produced before the Regional Transport Authority to prove whether there was any damage. The witness - Hammed Mahaboob, who last accompanied the deceased and travelled along with the deceased had not spoken anything about the occurrence. He deposed that he is unaware about the occurrence. P.W.8, P.W.2 did not state who had dashed against the deceased. Therefore, the prosecution failed to establish that the deceased



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was first hit near the electric post by some of the accused and at that place all the accused were waiting with weapons.

43. Further the house owner, Siddhik Beevi in whose house the occurrence has taken place, and the neighbors of the house and the other eyewitnesses, who saw the incident did not speak anything about the occurrence. They turned hostile and pleaded that they were not aware of anything about the incident.

44. Though P.W.1 deposed that he was present at the time of occurrence, he did not state that he witnessed when A1 to A3 inflicted injuries to his son inside the house. When there is no direct evidence about the overt acts against each accused, it is not possible for us to fix the accused by holding that who had inflicted injuries on the vital parts and caused death. It is not possible to fix the specific overt acts against each other, when there no direct evidence.



45. In fact, originally, A2 to A6 were charged under Section 149 r/w. Section 302 I.P.C., by the trial Court, A1 to A6 were said to be present in the place of occurrence and due to injuries inflicted by A1 – A3, the victim sustained injuries and A4- A6 prevented the others from entering into the house.

46. In order to prove the offence 149 I.P.C, the prosecution should prove the offence under Section 141 I.P.C., unlawful assembly. The provision is as follows:

An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is—

First — To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or

Second — To resist the execution of any law, or of any legal process; or

Third — To commit any mischief or criminal trespass, or other offence; or



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Fourth — By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth — By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation — An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

47. Section 149 I.P.C:

“149. Every member of unlawful assembly guilty of offence committed in prosecution of common object —

If an offence is committed by any member of 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, every person who, at the time



of the committing of that offence, is a member of the same assembly, is guilty of that offence.”

48. The Supreme Court in the case of ***Manjit Singh Vs. State of Punjab*** reported in **(2019) 8 SCC 529** has held as under :

“(i) the commission of an offence by any member of an unlawful assembly, and (ii) such offence must be committed in prosecution of the common object of the assembly or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object. Once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the Hotam Singh & Ors. Vs. State of M.P. (Cr.A. No. 620 of 2010) Rajbahadur Singh Vs. State of M.P. (Cr.A. No. 666 of 2010) unlawful assembly must be shown to have committed some overt act. For the purpose of incurring the vicarious liability for the offence committed by a member of such unlawful assembly under the provision, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests



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upon the fact whether the other members knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object.

* * *

17. A "common object" does not require a prior concert and a common meeting of minds before the attack. It is enough if each member of the unlawful assembly has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The "common object" of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be



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determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful.

18. In Masalti v. State of U.P. a Constitution Bench of this Court had observed that: (AIR p. 211, para 17) '17. ... Section 149 makes it clear that if an offence is committed by any member of 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, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment Hotam Singh & Ors. Vs. State of M.P. (Cr.A. No. 620 of 2010) Rajbahadur Singh Vs. State of M.P. (Cr.A. No.666 of 2010) prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has



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been actually committed by every member of the unlawful assembly."

49. If the prosecution is able to establish the offense under Section 149 I.P.C, all the accused are punishable under Section 302 r/w. 149 I.P.C, even if some of the accused inflicted injury and others did not actively participate on the ground of vicarious liability. But the prosecution failed to prove the same as none of the witnesses stated that A1-A6 gathered with common object to commit murder and assembled with deadly weapon. Even P.W.1 did not state the above fact. But, the trial Court convicted A1 to A3 only under Section 302 I.P.C and acquitted them from section 149 I.P.C.

50. P.W.1 did not state the specific overtact of each accused on the body of his son, as the occurrence happened in a closed door. Unless it is established by the prosecution about the overtacts of each A1 to A3 it is unsafe to come to the conclusion that A1 to A3 were alone responsible for the offense.



51. In order to prove the offense, under Section 300 I.P.C, the following ingredients are necessary and the same has to be established by prosecution beyond reasonable doubt.

“300. Murder :

Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

Secondly — If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

Thirdly — If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

Fourthly — If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act



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without any excuse for incurring the risk of causing death or such injury as aforesaid.”

52. To prove the offence under section 300 I.P.C, intention to cause injury with knowledge has to be proved and it should be established that the injuries inflicted were sufficient to cause death and that the accused knew that it is imminently dangerous and it must in all probability cause death. Mere presence of accused in the place of occurrence without proof who had caused the injury on the vital part is not sufficient. Further, evidence of the eyewitness should be specific about the overt acts of each accused to show that the deceased died due to the injuries inflicted by each accused.

53. Further in this case, P.W.8 deposed that the deceased was alive at 8.40 pm and he took him to S.P.Pattinam Hospital and stated that he was examined by Doctor – Radhakrishnan. His evidence is contrary to the evidence of P.W.1. P.W.1 stated that his son was attacked at 9.00 pm and he found the dead body inside the house of Siddhik Beevi. The time of death is not clear.



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54. P.W.12 and P.W.14 spoken about the motive, but P.W.12 is the brother of the deceased and P.W.14 is the mother of the deceased. Both stated that A1 attempted to kill the deceased Mohammed Yusuf, even prior to the occurrence, for which, no criminal complaint was lodged by them. In order to prove the same, no other independent witness had been examined.

55. Further, no independent witnesses, who were residing near the place of occurrence were examined.

56. Confession, arrest and recovery were not proved. The Village Administrative Officer and the Village Assistant in whose presence the accused were arrested and material objects were seized, did not support the case of the prosecution, but stated that the signature in the confession statement and in the recovery mahazer had been obtained in the police station. The arrest, confession and recovery is therefore not proved by the prosecution.



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57. As per the prosecution, A2 and A3 were holding weapons and chased the deceased P.W.1, in his evidence did not state that A2 and A3 were found with weapons.

58. The injuries sustained by the deceased was spoken by P.W.24 and through her Ex.P13 marked. The injuries were as follows:

“ External injury: Stab injury:

- 1. Infront of the chest left side medial to external at 7th rib 6th Ins. about 3" X 1.5" X 3.5"*
- 2. Left side of left nipple about 1" X 1" X 4" of 3rd rib*
- 3. Below the left side of left nipple about 1" X 1" X 1"*
- 4. Right side below the ribs about 3" X 1.5" X 4"*
- 5. Left side of penis in public rejoin about 1" X 1" X 1.5"*
- 6. In the right cheek about 1" X 0.5" X 1.5'*
- 7. Right maxillary infront of ear about 1" X 0.5" X 0.5"*



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8. Superficial cut injury of size length 1" X width 0.5 cm only skin is separated not in depth. Below this another superficial cut injury about 2" X 0.5 cm, both ends tapering tail.

9. Abrasion seen in left forehead rape of role and right cheek

10. Abrasion seen in both knees. They are only superficial"

59. As far as injuries are concerned P.W.24 Doctor who had conducted post mortem admitted in chief examination that 9th and 10th injuries are lacerated injuries and there is possibility that they would have occurred when a person had a fall. As far as the 8th injury is concerned, there is possibility it could be caused by friction. The injuries 1 to 7 are stab injuries.

60. As per prosecution three knives were seized from A1 to A3. However, under Ex.P17, the acknowledgment received from Serology Department, it is seen that one knife alleged to be seized from A2 alone was sent for analysis. The serology report was not produced on the side



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of the prosecution and it is not understood why the other two weapons were not sent for chemical analysts. The doctor stated that due to excess bleeding and due to shock, the deceased would have died. Injuries 1 to 7 are stab injuries and it is not proved by the prosecution about the specific overt acts of each accused. Nobody knows what happened inside the house. One of the accused- A1 died during trial and charges against the said accused had abated.

61. The trial Court convicted the accused Nos.2 and 3 under Section 302 I.P.C. But the overt act as against each accused has not been proved. Without establishing the specific overtact, the accused could not be punished based on assumption. If two views are possible, on the basis of evidence on record and if one is favorable to the accused, innocence of accused should be adopted. This is applicable in a case relying on circumstantial evidence. But, in this case the only available witness against the accused is P.W.1, and he was not in a position to state what happened inside the house. Hence, the benefit of doubt must be given to the accused.



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62. In the judgment of the Hon'ble Apex Court in Appeal (Crl.) Nos.73 and 74 of 2022 (***Raghunath and Ram Kishan V. State of Haryana, reported in 2003-1-SCC-398***), it had been held as follows:

“ 33. It is now well settled principle of law that if two views are possible, one in favour of the accused and the other adversely against it, the view favouring the accused must be accepted.”

63. Hence, this Criminal Appeal is allowed and the judgment of the trial Court is hereby set aside and the accused are acquitted from the charges. The bail bonds executed are to be cancelled. The fine amount paid should be refunded to the accused.

(C.V.K.J) & (R.P.J)
30.10.2024

Index :Yes/No
Internet :Yes/No
NCC :Yes /No
LS

38/40



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To

- 1.The Additional District and Sessions Judge,
Ramanathapuram.
2. The Inspector of Police,
S.P.Pattinam Police Station,
Ramanthapuram District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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C.V. KARTHIKEYAN,J.

AND

R. POORNIMA,J.

LS

Pre-delivery judgment made in
Crl.A.(MD)No.301 of 2020

30.10.2024