

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 29/10/2004

Coram

The Honourable Mr. Justice V. KANAGARAJ
and
The Honourable Mr. Justice T.V. MASILAMANI

C.A. No.76 of 2002
and C.A.Nos, 535 and 1261 of 2002

Gundan @ Venkatachalam .. Appellant in
C.A.No.76/2002

1. Mottaiyan @ Muthusamy
2. Kadai Govindaraj .. Appellants in
C.A.No.535/2002

Madhu @ Tharagu Madhu .. Appellant in
C.A.No.1261/2002
-Vs-

State by Inspector of Police,
Valapadi Police Station,
Salem District.
(Crime No.300 of 1997) .. Respondent in the
above C.As.

Criminal Appeal against the judgment dated 20.12.2001 made in S.C.
No.287 of 1998 on the file of the II Additional Sessions Judge, Salem.

!For Appellant : Mr.N.A.Ravindran
in C.A.76/2002

For Appellants : N.A.
in C.A.535/2002

For Appellant : Mr.K.Selvakumaraswami
in C.A.1261/2002

^For Respondent : Mr.E.Raja,
in the above CAs Addl.Public Prosecutor.

JUDGMENT

T.V. MASILAMANI, J.

The appellants in these appeals are the accused 2 to 5 in S.C.No.287 of 1998 on the file of the II Additional Sessions Judge, Salem.

2. The appellants 1 and 2 in C.A.Nos.535 of 2002 are accused 2 and 3 , the appellant in C.A.No.1261 of 2002 is the 4th accused and the appellant in C.A.No.76 of 2002 is the 5th accused. They are referred to hereunder in the same order along with the deceased first accused as they were arrayed before the Sessions Court.

3. The appellants along with the first accused Gullu Govindaraj (since deceased) were charged with the offences punishable under Sections 148, 147, 307, 307 r/w 149, 302 r/w 34 and 302 r/w 149 I.P.C. After trial, A2 and A3 were convicted under Section 148 I.P.C. and sentenced to undergo R.I. for 3 months. A4 and A5 were convicted under Section 147 and sentenced to undergo R.I. for 3 months. A3 and A4 were convicted under Section 307 and sentenced to undergo R.I. for 5 years and also to pay a fine of Rs.1,000/- each, in default to undergo R. I. for one month. A2 and A5 were convicted under Section 307 r/w 149 and sentenced to undergo imprisonment for 5 years and to pay a fine of Rs.1,000/-, in default to undergo R.I. for one month. Further A2 and A5 were convicted under Section 302 r/w. 34 I.P.C. and sentenced to undergo imprisonment for life and also to pay a fine of Rs.3,000/- each, in default to undergo R.I. for 3 months. Similarly, A3 and A4 were convicted under Section 302 r/w. 149 I.P.C. and sentenced to undergo imprisonment for life and also to pay a fine of Rs.3,000/- each, in default to undergo R.I. for 3 months. Sentence of imprisonment imposed on the accused was ordered to run concurrently.

4. The prosecution was launched originally against 7 accused persons and since one of them died before committal of the case to the Sessions Court and another died before the charges were framed, the trial Court proceeded with the trial of the case after framing charges against the accused 1 to 5.

5. Since the first accused was reported dead after framing of the charges pending trial, the charges framed against him stood abated and therefore, the learned Sessions Judge on the basis of the recorded evidence found A2 to A5 guilty and rendered the judgment of conviction and sentence as noted above against them.

6. The substance of the charges levelled against the accused 1 to 5 may be briefly stated as follows:-

On account of an altercation that ensued between Kullu Govindaraj (A1) and the witness Raja (P.W.10) on 25.2.1997 when the said Raja and his supporters went on a picnic to Madheswaran hill in Hogenakkal falls, A1 assaulted the witness Raja at the fag end of the picnic at Hogenakkal falls. On the return journey also at Omalur both parties picked up quarrel and A1 sustained injury and therefore the party headed by Raja left in some other bus and reached their village.

On 28.2.1997, on information from the first accused to the other accused, they planned to attack the witness Sampathkumar (P.W.1) and others who were the supporters of the said Raja. On the same day, when an election was held to elect the office bearers of the Milk Producers' Co-operative Society at Authanoorpatti at 2.00 P.M., and the accused party worked against the candidate proposed by the deceased Ramasamy and other members of his faction, all the 7 accused formed themselves into an unlawful assembly with a common object of causing the death of Ramasamy and the witness Sampathkumar and also to commit other offences like rioting. While so, A1, A2 and deceased accused Sampath armed with aruvals and A3 armed with iron rod and A4, A5 and another deceased accused Musal @ Murugesan armed with sticks attacked the witness Sampath Kumar and his father Ramasamy while they were coming out of the house of Lakshmanan at the instigation of the first accused. A1 cut Sampathkumar with aruval on his head and A2 cut him with aruval on his right cheek and A3 beat him with iron rod on his left hand. A4 pushed him down and dragged on the floor. A2 inflicted the fatal cut injury on the head and A5 and Murugesan (since deceased) beat him with sticks thereby causing the death of the deceased Ramasamy. Hence, the charges.

7. The accused, namely, Sampath, who was arrayed as A3 and Musal @ Murugesan, who was arrayed as A5 in the F.I.R. died and therefore, the remaining 5 accused have been arrayed as A1 to A5 before the Court of Sessions.

8. Since the accused denied the charges, the prosecution examined 18 witnesses, marked 34 documents and produced 11 material objects. On the side of the defence, 2 documents were marked as Exs.D-1 and D-2.

9. The prosecution case as discerned from the evidence may be set out as hereunder:-

(a) On 28.2.1997, the occurrence took place at about 2.00 P.M. on account of the enmity between the accused party on the one hand and the deceased family on the other on account of an election dispute and also due to an altercation between the rival groups prior to that date when they had gone to Madheswaran hill and Hogenakkal falls on picnic, the accused formed themselves into an unlawful assembly in front of the house of Lakshmanan @ Pothiraj and armed with deadly weapons, aruvals, iron rod and sticks, assaulted P.W.1 and his father Ramasamy (since deceased) causing grievous and fatal injuries.

(b) After the occurrence, P.W.1 and his father were taken to the hospital at Salem wherefrom the Inspector of police, P.W.18 received intimation and went to the hospital on 1.3.1997 in the early hours and recorded the statement of P.W.1 at 2.30 A.M. He registered the case in Cr.No.300/97 of Vazhapadi police station under Sections 147, 148, 323, 324 and 307 I.P.C. and prepared the printed F.I.R., Ex.P-31.

(c) P.W.18 proceeded to the scene of occurrence at 7.00 A.M. He prepared the observation mahazar, Ex.P-2 and rough sketch, Ex.P-32 in the

presence of witnesses and also arranged to take photograph of the scene of occurrence. He examined the witnesses present and recorded their statements. Thereafter, he proceeded to the hospital and recovered the cloth worn by the deceased under cover of mahazar in the presence of witnesses and also recorded their statements.

(d) On 2.3.1997 at about 6.00 A.M., P.W.18 arrested the accused Sampath (since deceased) and recorded his voluntary confession in the presence of witnesses and on the basis of the same, he recovered M.O.10 aruval under cover of mahazar, Ex.P-5 in the presence of witnesses.

(e) After the death of Ramasamy, on 3.3.1997 at 7.45 A.M., P.W.18 obtained the death report from the hospital and altered the crime into one under Section 302 I.P.C. and prepared the express report, Ex.P-3 3 and sent the same to the Court and higher authorities. Thereafter, he conducted inquest over the dead body of Ramasamy in the presence of witnesses and prepared the inquest report Ex.P-34 and then despatched the dead body to the Government Mohan Kumaramangalam Hospital, Salem for post-mortem along with his requisition, Ex.P-27.

(f) P.W.16 Autopsy Surgeon conducted post-mortem on the dead body of Ramasamy on 3.3.1997 at 1.30 P.M. and found the following injuries and issued the post-mortem certificate, Ex.P-28.

Injuries:

- (1) A cured sutured wound present over right fronto parieto temporal region of scalp, 24 cms in length. O/D, a plate of bone on temporal region absent, 8 cms x 6 cms (Surgical).
- (2) Gel foam backing present, dura sutured, 5 cms in length.
- (3) Subdural and Subarachnoid haemorrhage on both cerebral hemispheres.
- (4) Laceration right temporal lobe of brain, 5 cms x 3 cms x 0.5 cm.
- (5) A contusion on left temporal region of scalp, 7 cms x 5 cms x 0.5 cm.
- (6) Fissured fracture left temporal bone 13 cms in length extending on to left anterior cranial fossa.
- (7) Black eye present on upper lids of both eyes.
- (8) A contusion on right shoulder, 5 cms x 3 cms x 0.5 cm - Dark red.
- (9) A contusion on right forearm, 3 cms x 2 cms x 1 cm - Dark red."

(g) On 5.3.1997 at about 5.00 A.M. at Perur-Kurichi road junction near the bus stand, P.W.18 arrested the first accused (since deceased) and recorded his voluntary confession and in pursuance of the same, he recovered M.O.1 aruval under cover of mahazar, Ex.P-8 in the presence of witnesses.

(h) On 7.3.1997, P.W.18 examined P.W.16 post-mortem doctor and

recorded his statement. On 8.3.1997 at about 3.30 P.M., he arrested A5 at Perur-Salem Road junction near rice mill and obtained his voluntary confession, Ex.P-9 and on the basis of the same, M.O.4 stick was recovered under cover of mahazar, Ex.P-10 in the presence of witnesses.

(i) On 10.3.1997 at about 6.00 P.M., P.W.18 arrested A4 and remanded him to custody. On 14.3.1997, he learnt that A2, A3 and Musal @ Murugesan (since deceased) surrendered before the Court. He obtained police custody on 18.3.1997 and recorded their voluntary confessions, Exs.P-11 to P-13 and on the basis of the same, he recovered aruval M.O.2 iron rod M.O.3 and stick M.O.5 under cover of mahazars, Exs.P-14 to P-16 in the presence of witnesses. The said accused were again remanded to judicial custody.

(j) After examining other witnesses and the Medical Officer, P.W.18 completed the investigation and filed the final report against the accused on 9.5.1997 under Sections 147, 148, 302, 302 r/w 149 I.P.C.

10. When the accused were questioned under Section 313 Cr.P.C. with regard to the incriminating circumstances in the evidence tendered by the prosecution, they denied the same. According to them, a false case has been foisted against them due to enmity and they have not committed the offences as put forth by the prosecution.

11. The contentions put forth by the learned counsel appearing for the appellants/accused may be set out briefly hereunder:-
The learned Sessions Judge failed to consider the undue delay of 12 hours in preferring the complaint and therefore during the interregnum between the time of occurrence and the registration of F.I.R. innocent persons were falsely implicated by attributing overt acts. Similarly the evidence of P.W.1 and P.W.3 stands uncorroborated besides the fact that they themselves give contradictory versions in their evidence. The trial Court also erred to appreciate the fact that there was a group clash between the rival parties to the election and in the occurrence, the accused also sustained injuries. The prosecution has miserably failed to establish that the appellants were members of the unlawful assembly whose common object was to commit the offence of attempted murder, in addition to share the common intention with the other accused to commit the murder of Ramasamy. The learned Sessions Judge failed to take into consideration that the Investigating Officer had not collected the blood stained earth or other materials from the scene of occurrence and no steps had been taken by him in that regard. Similarly, the prosecution has produced only 6 weapons instead of 7 weapons and the explanation for the same is not acceptable. The mahazar witnesses have given false evidence. Since the first accused (since deceased), who instigated the other accused to commit the murder of the deceased, was not alive on the date of questioning either to deny or affirm, the common intention to commit the murder on the part of the accused has not at all proved.

12. In the above circumstances, it has become necessary to consider whether the prosecution has proved the charges levelled against the appellants herein (A2 to A5) beyond all reasonable doubts.

13. The admitted case of both sides is that the deceased Ramasamy is the father of P.W.1, Sampathkumar and P.W.10. Raja and P.W.2 Murugan is the nephew of the second appellant (A3) in C.A.No.535 of 2002. Similarly, it is not in controversy that the sister-in-law of P.W.1 and Kamalammal, mother of the accused Sampath (since deceased) contested in the election to the post of President of the Panchayat and succeeded. Similarly election to the post of the President of the Cooperative Milk Producers Society was held on the date of occurrence, (i. e.,) 28.2.1997 and that in the said election, the accused party candidate was declared elected as President of the said Society. In both the elections the faction led by deceased Ramasamy had worked against the candidates of the accused party. In the above circumstances, it has become necessary to analyse the evidence, both oral and documentary adduced by both sides in this case.

14. The fact that the deceased Ramasamy died on account of homicidal injuries is spoken to by P.W.16, the doctor who conducted the postmortem on the dead body of the deceased on 3.3.1997 and issued the post-mortem certificate, Ex.P-29. Ex.P-26 is the report of the Toxicologist to the effect that the organs of the deceased, namely, liver and kidney as well as the sample of saturated saline were examined and no poison is detected in either of them. As has been rightly pointed out by the learned Additional Public Prosecutor, the evidence of the post-mortem doctor is categorical that the deceased would have died on account of head injuries which could have been caused by the weapons like M.Os.1, 2 and 10 and the other injuries could have been caused by any weapon such as M.Os. 3 to 5. He has stated in his cross-examination also that the above said injury Nos.1 to 6 enumerated in Ex. P-28 are fractures in the skull of the deceased which could not have been caused by one and the same weapon. It is therefore urged by the learned Additional Public Prosecutor that in view of the evidence of P.W.16 coupled with Exs.P-26 and 28, it can be safely concluded that the deceased died on account of homicidal injuries. We have gone through the evidence of P.W.16 and Exs.P-26 and P-28 and there is no reason to disbelieve such evidence. It follows that the corollary conclusion would be that the deceased died of homicidal injuries.

15. The prosecution has examined P.Ws.1 to 3 as eye-witnesses to the occurrence and P.W.2 has been cross-examined by the prosecution as he turned hostile. As has been rightly pointed out by the learned Additional Public Prosecutor, the fact that P.W.1 sustained injuries in the course of the same occurrence is spoken to by P.W.17, doctor who treated the injured on 28.2.1997 at the private clinic where he was admitted. According to him, on enquiry at the time of admission, P.W.1 informed that he was attacked by 10 known persons at about 2.00 P.M. on the same day with weapons like aruval, iron rod and stick. Further he examined him and after X-ray has been taken with regard to the head injuries, he detected fracture of right temporal bone of scalp and Ex.P-29 is the wound certificate issued by him with reference to the injuries found on the person of P.W.1. It is proved by the evidence of P.W.17 coupled with Ex.P-29, wound certificate that the injuries enumerated in the said certificate could have been caused by weapons like aruval and iron rod.

16. Similarly, P.W.17 has also treated the deceased Ramasamy

immediately after the occurrence on the same day and according to him, the injured was unconscious at that time and P.W.10 informed that the injured was attacked by known persons at about 2.00 P.M. on the same day with aruvals, iron rod and sticks. Further, according to P.W.17, it was detected from the X-ray that there was vertical laceration over vertex frontal region of scalp resulting in the fracture of the scalp and he had sustained other injuries as narrated in the wound certificate, Ex.P-30. In this context, he has stated that injury No.1 noted in Ex.P-30 could have been caused by any sharp edged weapon. We are therefore of the opinion that the above evidence of P.W.17 coupled with the evidence of P.W.16, the post-mortem doctor would go to show and prove that on account of the fatal injury inflicted on the head, the deceased succumbed to the same.

17. The learned counsel for the appellants/accused 2 to 5 have argued at the outset that the First Information Report, Ex.P-31 has been brought into existence after a delay of 12 hours and that during the interregnum between the time of occurrence and the lodging of the complaint, there was every possibility for embellishment in implicating innocent persons by attributing overt acts after much deliberations with the prosecution side. It is therefore urged on the part of the accused that a genuine doubt arises on account of such unreasonable delay especially when the same was not explained by the prosecution.

18. Per contra, the learned Additional Public Prosecutor would point out the evidence of P.W.10 to the effect that he was anxious to save the life of P.W.1 and his father and that therefore he took both of them to Salem for being admitted to S.K.S. Hospital for treatment. It is in his evidence that even though the police stations at Vazhapadi and Ammapettai are situate enroute from the place of occurrence at Vazhapadi to Salem, he did not think about giving any complaint to the police for the reason that the condition of the deceased was very critical and that therefore he took both of them to Salem so as to give better treatment in a reputed hospital despite the fact that there are hospitals at Vazhapadi and Kariapatti on the way to Salem. It is therefore urged by the learned Additional Public Prosecutor that when regard being had to the normal course of human conduct one would be anxious to save the life of the injured persons by giving better treatment at the earliest opportunity.

19. In the above circumstances, he has submitted that on intimation from the hospital, P.W.18, the Inspector, Vazhapadi Police Station came to the hospital at 2.30 A.M. in the early hours on 1.3.1997 and obtained the complaint, Ex.P-1 from P.W.1. Similarly, the recorded evidence would indicate that besides the complaint Ex.P-1, the F.I.R. Ex.P-31 had also been despatched by P.W.18 to the concerned Judicial Magistrate immediately. In this context, he has cited the decision rendered by the Hon'ble Supreme Court in BALRAM SINGH v. STATE OF PUNJAB (2004 S.C.C. (CRI) 149 wherein it was held that if the prosecution explains satisfactorily the delay in sending the F.I.R. to the court, such delay is not material ground so as to affect the basis of the case. Here also we are of the opinion that the delay has been satisfactorily explained by the prosecution. We are therefore of the considered view that the contention put forth on behalf of the accused

regarding the delay in lodging the First Information Report has to be heard to be rejected.

20. The next argument advanced on the side of the accused is that the prosecution has miserably failed to establish that the accused 2 to 5, who are the appellants in these appeals, were members of the unlawful assembly and that they in furtherance of the common object committed the attempted murder of P.W.1, in addition to share the common intention of committing the murder of Ramasamy. On this aspect of the matter, the learned counsel for the accused has pointed out the evidence of both P.Ws.1 and 3 with reference to the sequence of events culminated in the commission of the offences in support of such contention. The learned Additional Public Prosecutor has argued that both P.Ws.1 and 2 have clearly stated in their evidence that A2, Mottaiyan cut the deceased with aruval on the head and it is seen from Ex.P-28, post mortem report and the evidence of P.W.16, doctor who conducted the post-mortem that a cut injury was found on the right fronto parieto temporal region of scalp measuring 24 cms in length (vide) injury No.1 in Ex.P-28 and the corresponding fracture to the temporal bone to which the deceased succumbed later in the hospital in spite of the medical treatment.

21. Further he has pointed out that in view of the fact that P.W.1 is an injured witness and his evidence being corroborated by the medical evidence of P.W.17 and accident register, Ex.P-29, cannot be brushed aside. According to P.W.1, the deceased accused Sampath had cut him with aruval on his head and that since he tried to escape, the said injury was inflicted on his right temporal region of the scalp resulting in a fracture (vide) Ex.P-29. Similarly, he has stated in his evidence that when A3 attempted to attack on his head with iron rod, he prevented the same with his left forearm and sustained the injury and therefore his evidence is unequivocally corroborated by P.W.17 and Ex.P-29 (vide) injury No.3 enumerated therein. On a careful scrutiny of the above evidence, we are of the opinion that the evidence of P.W.1 is cogent and reliable in so far as the injuries sustained by the deceased and that of the injuries sustained by him at the hands of A2 and A3.

22. According to P.W.1, the accused Sampath who died before framing of charges and the 2nd accused Mottaiyan were armed with aruval and A3 Kadai Govindaraj was armed with iron rod. Further according to him, when the first accused Kullu Govindaraj attempted to attack him on his head with aruval, his father came to rescue and at that time A2 Mottaiyan inflicted a cut on the head on his father with aruval. The above evidence of P.W.1 coupled with the medical evidence as referred to above in our opinion inspires confidence and therefore we are unable to see any material contradiction between the evidence of P.W.1 and P.W.3 to eschew the evidence adduced by the prosecution with reference to the occurrence.

23. In this context, the learned Additional Public Prosecutor has drawn our attention to the decision, BALRAM SINGH AND ANOTHER v. STATE OF PUNJAB (2004 S.C.C.(CRI) 149) to support his argument that the accused 1 to 5 had shared the common intention of causing the death of Ramasamy, father of P.W.1 and in the course of such occurrence, P.W.1 sustained injuries as he tried to protect his father and therefore he has contended that the

prosecution has succeeded in establishing that there was a prior concert or meeting of minds among the accused persons 1 to 5 herein in the commission of the offence. It is therefore urged by him that by unequivocal evidence, the prosecution has proved that the accused herein formed themselves into an unlawful assembly with the common object of committing the attempted murder of P.W.1 and also the murder of Ramasamy.

24. Per contra, the learned counsel for the accused has drawn our attention to the evidence of P.W.1, P.W.3 and P.W.16 to demonstrate that A4 and A5 could not have been present at the scene of occurrence and participated in the commission of the offences. Though it is alleged in Ex.P-1, the complaint that A4 dragged P.W.1 on the ground and beat with stick, the medical evidence does not lend credence to such overt act alleged in the complaint. Further it is curious to note that P.W.1 has not stated in the evidence that A4 beat him with stick. Similarly P.W.18, the Investigating Officer who arrested A4 had neither recorded any confession from him nor recovered any weapon much less thadi so as to prove the alleged overt act on the part of A4. In the above circumstances, we accept the contention that the presence of A4 at the scene of occurrence is not proved beyond doubt.

25. As far as A5 is concerned his presence and the overt act alleged have been clearly proved by the evidence of P.W.1, P.W.16 and Ex.P-2 8, post mortem certificate for the simple reason that injury No.8 shows a contusion on the right shoulder of the deceased Ramasamy. Similarly, P.W.18, the Investigating Officer has recovered the weapon, thadi on the basis of the confessional statement of A5 and we are therefore of the view that the contention of the learned counsel projected on behalf of A5 that he was not present at the scene of occurrence is not acceptable. It follows that since the prosecution has failed to prove the presence of A4 at the scene of occurrence by adducing acceptable evidence, we are of the considered view that the ratio in the decision referred supra is not applicable to the facts of this case. Thus it remains to be decided whether the other accused Nos. 2, 3 and 5 are guilty of the charges levelled against them.

26. It is the further contention of the learned counsel for the accused that the Investigating Officer failed to seize the blood stained earth and other materials from the place of occurrence so as to connect the accused with the commission of the offence. On the contrary, the learned Additional Public Prosecutor has rightly pointed out from the recorded evidence that the Investigating Officer P.W.18 had not only recovered the weapons, but also seized blood stained cloths which are marked as Mos.1 to 11 so as to connect the accused on the one hand and the crime committed by them on the other.

27. He has further pointed out that Ex.P-24, report from the Chemical Examiner with reference to the blood stain found on the material objects and it is seen therefrom that in the cloths as well as towel, bed sheet and two aruval blood of human origin was detected and in the shirt and dothi recovered from the deceased Ramasamy was also subjected to chemical analysis and thereafter detected that the blood group of the deceased was 'O' group. Though it is true that the result of grouping test regarding the other material objects was inconclusive and with reference to one aruval, it was

disintegrated, the evidence available on record would indicate unfailingly that the weapons were in fact recovered from the accused 2, 3 and 5 and the other accused (since deceased). It is therefore urged by the learned Additional Public Prosecutor that since P.W.9 has clearly stated in the evidence that on account of the occurrence, blood had spilled over the floor and wall and that she washed the same so as to clean the varandh of her house where the occurrence took place and therefore we are of the opinion that it stands to reason that the Investigating Officer, P.W.18 was unable to recover any blood stained earth or flooring from the place of occurrence. On the basis of the recorded evidence as narrated above, we are of the considered view that the prosecution has proved the overt acts attributed to A2, A3 and A5 beyond reasonable doubt.

28. Similarly, the contention put forth by the learned counsel for the accused that the case of the prosecution does not merit consideration as P.W.18 Investigating Officer recovered only 6 weapons from the accused, even though the evidence is to the effect that all the 7 accused were armed with one weapon each and therefore he has urged that the benefit of doubt should be given to the accused. In this regard, the learned Additional Public Prosecutor has rightly pointed out that no weapon was recovered from A4 and therefore the recovery of 6 weapons by the prosecution instead of 7 as adumbrated in the charges is of no consequence.

29. The next contention of the learned counsel for the accused is that both P.W.1 and the deceased stated to P.W.17, the Doctor who admitted them to S.K.S.Hospital for treatment that 10 known persons attacked P.W.1 with weapons aruval, iron rod, sticks and several known persons attacked the deceased with weapons of the same kind at the time of occurrence. According to him, such circumstance would belie the evidence of P.W.1 and P.W.3 that 7 accused had attacked both of them and therefore he has urged that in this respect also, the prosecution has miserably failed to establish a consistent version.

30. Per contra, the learned Additional Public Prosecutor has drawn our attention to the complaint, Ex.P-1 wherein P.W.1 has narrated the occurrence cogently with reference to the names of all the accused involved in the commission of the offences and that since the same had been recorded by P.W.18 immediately after receipt of V.H.F. intimation from the Salem Fairland Police Station about the admission of both P.W.1 and the deceased to the hospital for treatment. It is therefore urged by him that since both the injured when admitted to the hospital for treatment immediately after the occurrence, could not be in a position to inform the doctor all the particulars of the persons who attacked them as they were suffering from pain and mental agony.

31. Having regard to the totality of evidence on this aspect of the matter, we are of the considered opinion that the explanation projected by the learned Additional Public Prosecutor is convincing for the simple reason that in the normal course of events any prudent injured person could not have furnished the doctor all the particulars of the persons who attacked him. We are therefore of the view that contention raised by the learned counsel for

the accused in this regard is not acceptable.

32. It is no doubt true that the prosecution has clearly established the motive for the occurrence. It is admitted by P.W.1 himself in the cross-examination that the mother of the deceased Sampath, an accused in this case, is the resident of Authanoorpatti panchayat and that during the election, he and other people canvassed against the mother of Sampath and that therefore there had been misunderstanding between both the rival factions in the village. Similarly, it has been brought home by the prosecution evidence that on the date of the occurrence, the election for the post of President of Milk Producers Co-Operative Society was held and that since there was likelihood of breach of peace, police picketing was also posted so as to have smooth conduct of the election.

33. It is in the evidence of P.Ws.1 and 3 that even prior to the date of occurrence on 25.2.1997 when both the faction members had gone for a picnic, there had been scuffle between P.W.10 and the first accused (since deceased) as a result of which the first accused received some injuries on his head. It is relevant to note that Ex.P-18 medical report relating to the treatment of the first accused in the Government Hospital, Salem was issued by P.W.12 and his evidence is to the effect that the injuries found on his head are simple in nature. It is admitted by him in the evidence that he had not enquired about the occurrence and that he issued the report, Ex.P-18 on the basis of the X-ray taken by the Radiologist.

34. Though an attempt has been made on the part of the accused to show that the first accused received such injuries during the occurrence under consideration, the evidence of P.W.12 does not help in any way for the simple reason that he has not recorded the statement of the first accused with reference to the occurrence. Moreover he has not opined about the probable time of causing such injuries and therefore we are of the considered view that the first accused could have sustained such injuries in the occurrence that took place on 25.2.1997 when both the faction members went for a picnic. It is therefore clear that there was sufficient motive for the accused to commit the offences.

35. As has been held above, the prosecution has established the occurrence beyond doubt and consequently the deceased died on account of fatal head injuries inflicted by A2 with aruval. Hence, it has become necessary to consider whether the conviction and sentence imposed by the learned Additional Sessions Judge are sustainable. It is no doubt true that on account of the election dispute on the date of occurrence, there had been a group clash, as has been held by the learned Sessions Judge in the impugned judgment and therefore, we are of the considered view that the accused 3 and 5 who have not caused the fatal injury on the body of the deceased cannot be mulcted with the vicarious liability in so far as the offence of murder of Ramasamy is concerned. Except the deceased Sampath, who was one of the accused in this case originally, the other accused could not have had any personal motive against the deceased.

36. Similarly, the first accused having received some injuries prior to the occurrence as a result of the scuffle between the rival groups as referred to above, could not have entertained any motive to commit the murder of the deceased Ramasamy. It is the admitted case of both the sides that ever since the date of occurrence, three accused involved in the commission of the offences died and therefore it is not beyond comprehension that the family members of the deceased accused as well as that of the accused in prison could have suffered untold misery and mental agony and hardship.

37. Considering the above facts and circumstances, as discerned from the evidence adduced by the prosecution, we have no hesitation to hold that on account of sustained provocation of the deceased first accused against P.W.10 and other members of his faction and also on account of the rivalry between the factions due to election dispute, the sudden clash between the said groups resulted in the commission of the offences.

38. Though P.W.1 has stated that the first accused (since deceased) instigated the other accused to do away with the deceased Ramasamy in the course of the occurrence, the first accused was not alive at the time of trial and also on the date when the accused were questioned under Section 313 Cr.P.C. so as to either deny such evidence of P.W.1 and P.W.3 by cross-examination and therefore, we are of the view that such evidence of P.W.1 and P.W.3 cannot ipso facto lead to the conclusion that there was common intention to commit murder on the part of the accused.

39. It follows that the offence committed by A2 would fall under Exception 1 to Section 300 I.P.C. and therefore he is liable to be convicted under Section 304 Part-II I.P.C. and sentenced to undergo R.I. for seven years, instead of life imprisonment under Section 302 I.P.C. and the fine of Rs.3,000/- imposed by the Sessions Court on A2 is sustained.

A5 is liable to be convicted only under Section 324 I.P.C. and the sentence already undergone by him is held sufficient. A3 is liable to be convicted under Section 324 I.P.C. and the sentence already undergone is held sufficient for him also. A4 is acquitted of all the charges levelled against him.

As the prosecution has failed to prove the unlawful assembly of A1 to A5, the conviction and sentence imposed on the accused, A2 to A5 under Sections 148 and 147 I.P.C. by the trial Court are therefore set aside. The conviction and sentence imposed under Section 307 r/w 149 I.P.C. upon A2 to A5 and the consequent fine imposed under the said provisions are set aside. Similarly, the conviction and sentence imposed by the learned Sessions Judge with reference to A2 and A5 under Section 302 r/w 34 and under Section 302 r/w 149 I.P.C. with reference A3 and A4 are set aside. The fine if any paid by them shall be refunded.

The conviction and sentence imposed under Section 307 I.P.C. as against A3 and A4 and under Section 307 r/w 149 I.P.C. as against A2 and A5 with reference to charge Nos.3 and 4 respectively are set aside. Similarly, the conviction and sentence under Section 302 r/w 34 as against A2 and A5 with reference to charge No.5 and under Section 302 r/w. 149 I.P.C. as against A3 and A4 under charge No.6 are also set aside and the fine amount paid by the accused is ordered to be refunded.

Accused 3 to 5 are ordered to be released forthwith, if they are not required in connection with any other case.

40. In terms of the above modification in the conviction and sentence, these appeals are allowed accordingly.

Index: Yes

Website: Yes

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To

1. The II Additional Sessions Judge, Salem
2. -do- through the Principal Sessions Judge, Salem.
3. The Inspector of Police, Valapadi Police Station, Salem District.
4. The Public Prosecutor, High Court, Chennai.
5. The District Collector, Salem.
6. The Director General of Police, Mylapore, Chennai-4.

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