

Balusamy Vs. State, Represented by the

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Court : Chennai

Decided On : Aug-20-2014

Judge : S. Rajeswaran

Appellant : Balusamy

Respondent : State, Represented by the

Advocate for Pet/Ap. : Mr. R. Sankarasubbu

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED:

20. 08.2014 CORAM THE HONOURABLE MR.JUSTICE S. RAJESWARAN AND THE HONOURABLE MR.JUSTICE T. MATHIVANAN CRL.A.(MD).NO.33 OF2007 Balusamy ...Appellant vs. State, represented by the Inspector of Police, Putthanatham Police Station, Trichy District. ...Respondent Criminal Appeal is filed under Section 374(2) of the Code of Criminal Procedure against the judgment of conviction and sentence passed by the First Additional District and Sessions Judge (PCR), Trichy and made in S.C.No.89 of 1994, dated 2.12.2006. !For Appellant : Mr. R. Sankarasubbu ^For Respondent : Mr. T. Mohan, Addl. Public Prosecutor :

JUDGMENT

T. MATHIVANAN, J.

This Memorandum of Criminal Appeal has been directed as against the judgment dated 2.12.2006 and made in S.C. No.89 of 1994 on the file of the learned First Additional Sessions Judge (PCR), Trichy, convicting the appellant under Section 302 of IPC r/w.34 of IPC and sentencing him to suffer life Imprisonment and also to pay a fine of Rs.1,000/-, in default, to suffer a further period of one month of Rigorous Imprisonment.

2. The appellant herein is the 4th accused in the case in S.C.No.89 of 1994 on the file of the learned First Additional Sessions Judge (PCR), Trichy. Totally four accused were tried in the above said sessions case. After the completion of the trial, the learned trial Judge had found the accused 1 & 2 guilty under Section 341, 302 r/w.34 of IPC and convicted and sentenced them thereunder. Third accused was found guilty under Section 302 of IPC, convicted and sentenced thereunder. In so far as this appellant being the 4th accused is concerned, he is found not guilty and therefore, he was acquitted.

3. Challenging the order of conviction, the accused 1 to 3 had preferred an appeal before this Court in C.A.No.29 of 1995 and PW1, being the son of the deceased had preferred a criminal revision challenging the order of acquittal in respect of the present appellant who is the 4th accused in the above case in Criminal Revision Case Crl.R.C.No.337 of 1995. While the order of conviction recorded against the accused 1 to 3 was confirmed, the appeal preferred by them was dismissed. The criminal revision filed by PW1 in this case was allowed and the order of acquittal was set aside and the case in respect of the appellant was remitted back to the trial court for fresh trial.

4. In pursuant to the direction given by this Court in the criminal revision petition, the learned First Additional District and Sessions Judge (PCR) Trichy had proceeded with the trial afresh and ultimately, he had found the appellant/A4 guilty under Section 302 r/w.34 of IPC and sentenced him to suffer life imprisonment and to pay a fine of Rs.1,000/-, in default, to undergo a further period of one month of Rigorous Imprisonment. The fine amount of Rs.1000/- was paid on receipt.

5. Now challenging the order of conviction and sentence, the appellant being the 4th accused stands before this Court.

6. The learned trial Judge, has discarded the testimony of PW1 suspecting his presence in the place of occurrence and after heavily banking on the evidence of PW2, he had proceeded to found him guilty under Section 302 r/w.34 of IPC. With this back ground, even prior to the taking of this appeal for hearing, Mr. Sankarasubbu, learned counsel appearing for the appellant/A4 has raised a crucial question saying that ?when the evidence of PW1, who had lodged the complaint under Ex.P.1 informing the incident to the police, disclosing the involvement of accused 1 to 4 in this case as well as their overt act, had been discarded by the trial court, the complaint under Ex.P.1 had lost its sanctity. Secondly, he has submitted that PW1 in the complaint had stated, as if the occurrence was taken place in his presence when he was travelling along with his father, who is the deceased herein, in a cycle. In this connection, he had raised another question that when the evidence of PW1 itself was discredited by the learned trial Judge, could the complaint under Ex.P.1 be still believed?.

7. F A C T S I N B R I E F: (i) PW1-Selvam is the son of the deceased Mookan @ Malayandi Konar. They are residing at Mudukkampatti Village. PW2, PW3 and the accused 1 to 3 as well as the appellant herein who is the 4th accused in the case are also the residents of Mudukkampatti Village. (ii) There was a previous enmity between the 3rd accused Ponnusamy, son of Andi Konar and the deceased Malayandi konar with regard to a land. On account of this reason, the 3rd accused Ponnusamy, son of Andi konar acting in concert with the other accused had decided to do away the life of the deceased Malayandi konar as he had obstructed the pathway lying in between their land. (iii) That on 26.11.1992 at about 5.30 p.m., the deceased Malayandi konar @ Mookan and his son PW1-Selvam were returning in their cycle from Marungapuri after purchasing some grocery goods and vegetables and proceeding to their house. The deceased was riding the Bi-cycle , while PW1 was sitting on the pillion. When they were proceeding in a single feet pathway (Othaiyadi Pathai), i.e., inbetween kannimarkovil and Mottaimalai, in pursuant to their pre arranged plan, A1 to A4 with a common intention to cause the death of Malaiyandi Konar and in furtherance of their common intention A1 & A2 armed with stick , had waylaid Malaiyandi konar and PW1. On seeing them, the deceased Malaiyandi Konar had stopped his cycle resting on his left leg and questioned them as to why they had obstructed. Whileso, the 3rd accused

Ponnusamy, s/o. Andi konar had cut Malayandi konar with Aruval over his left leg below the knee, the 4th accused who is the appellant herein came running with Aruval and aimed a cut over the neck of the deceased. When he had warded off, that cut was fallen on his right wrist and on receiving the injuries at the hands of A3 and A4, Malayandi konar had fallen down. Fearing danger, PW1 had run away from that place and after passing some distance, when he had turned and seen, A3 and A4 were still found cutting his father indiscriminately. Whiles, PW2 Palanisamy and one Adaikka konar came to the place of occurrence. On seeing them PW1 also rushed to the place along with them. Even at that time also A3 and A4 were cutting his father indiscriminately and on seeing them, all the accused had started running from that place. When PW1 went nearer to his father, he was found lying dead in the pool of blood with cut injuries on all over his body. Thereafter PW1 went to his house and informed the incident to his mother and thereafter, he went to Puthanatham Police Station and lodged a complaint under Ex.P.1. PW1 had identified the cycle which was marked as MO.1. The Aruval which was used by A3 was marked as MO.2, whereas the Aruval which was said to have been used by A4-Balusamy, the appellant herein was marked as MO.3. MO.2 is having iron handle, whereas MO.3 is having wooden handle. The wearing apparels of the deceased were marked under Mos.3 to 8. (iv) On receipt of the complaint at about 6.30 p.m. from PW1, PW8-Sub Inspector of Police attached to Puthanatham Police Station had registered a case in Crime No.123/1992 under Section 302 of IPC and the printed FIR was marked under Ex.P.6. Thereafter he had sent Ex.P.1 Complaint along with Ex.P.6-FIR to the learned Judicial Magistrate, Manapparai and the copies of the same were placed before PW9-Inspector of Police for investigation. While PW9 was investigating the case, PW8 had assisted him. (v) At about 7.30 p.m., on hearing the death of Malayandi Konar, PW4, Bakayaraj had been to the place of occurrence. While so, the police officials were found inspecting the scene of occurrence. PW8-the Sub Inspector of Police had prepared an observation mahazar under Ex.P.2 and besides this, he had also collected some blood stained earth and some unblood stained earth, blood choked stone and a black towel. He had also seized a green colour Hercules Cycle bearing No.MA0-M430 under the cover of a seizure mahazar under Ex.P.3. The black colour towel was marked under MO.9, whereas the blood choked stone was

marked as MO.10. The blood stained earth as well as the unblood stained earth were marked as Mos.11 and 12 respectively. One full hand shirt was marked as MO.13. All the material objects were sent to Court by PW8 under Form 95 which was marked as Ex.P.7. PW9 also had inspected the place of occurrence and prepared a rough sketch under Ex.P.8 and thereafter, he had examined the witnesses and recorded their statements. He had also arranged a private photographer and took photographs on the dead body as well as on the place of occurrence. Then he had conducted inquest on the dead body in the presence of Panchayatdars and completed the same at 12.00 midnight. The inquest report was marked as Ex.P.9. Thereafter, the dead body of Malayandi konar was sent to Government Hospital, Manapparai through PW5-Ravichandran, Head Cosntable along with a requisition for post mortem examination. PW7-Dr. Ram Mohan, Assistant Surgeon attached to Manapparai Government Hospital had conducted the post mortem examination at 11.05 a.m. on 29.9.1992. During the course of his examination, he had found the following external as well as internal injuries on the dead body of the deceased; External Injures:

1. Incised wound over the dorsal aspect of right wrist 6 cm x 3 cm x bone depth exposing the tractal carpal bone.
2. Incised wound 5 cm x 2 cm x bone depth over the anterior aspect of left knee.
3. A curvilinear incised wound of 12 cm x 12 cm x 3 cm over the lateral aspect of left leg. (torn) skin, soft tissue and muscle over the wound area found hanging as a feap being attached to the middle third of left leg with 3 cm torn skin.
4. A curvilinear incised wound of 8 cm x 3 cm x bone depth over the lower 1/3rd left leg.
5. A curvilinear incised wound of 14cm x 4 cm x bone depth running from lateral aspect of lower 1/3rd of left upper arm to the posterior aspect of upper 1/3rd of left fore arm.
6. Incised wound of 5cm x 2 cm x muscle depth over the left upper arm on the anterior aspect.
7. Incised wound of 5 cm x 3 cm x muscle depth over the lateral aspect of left upper arm.
8. A curvilinear incised wound 14 cm x 5 cm x bone depth over the upper 1/3rd of left forearm starting from the aspect running along the medial aspect to the anterior, aspect of left forearm.
9. Incised wound 7cm x 3cm x bone depth over the posterior aspect of lower 1/3rd of left forearm.
10. Incised wound 2 cm x 2 cm x muscle depth over the dorsum of the hand 4 cm (torn)metacarpal phalangial joint of left thumb.
11. A curvilinear incised wound 6 cm x 1 cm x bone depth starting from a point 2 cm

below the metacarpo phalangeal joint of left thumb on the dorsal aspect, to the (NC) on the palmar aspect of left hand running across the space between the left thumb and left Index finger exposing the (NC) end of metacarpal bone. Internal examination: Thorax: symmetrical, all organs intact. Both lungs pale. Heart :

30. ml of blood present in left ventricle pale. Hyoid bone: intact no fracture. Abdomen: all organ intact pale. Stomach pale partly digested rice 200 ml gray colour fluid present. Kidney both right and left kidney pale. Spleen pale. Pancreas pale. Bladder empty. Scalp intact. No skull bone fracture. Membrane intact. Brain pale. (vi) After completion of the post mortem examination at 1.30 p.m., he had issued a certificate to that effect saying that the deceased would appear to have died of 17 to 20 hours prior to post mortem due to shock and hemorrhage due to injuries sustained. (vii) That on 11.12.1992 at about 7 a.m. at Manapparai bus stand, PW9- Inspector of Police had arrested Ponnusamy-(A3), son of Andi konar in the presence of PW6-Ponnusamy, son of Mooka konar and one Sokkan. Based on his disclosure statement, Aruval was recovered under the cover of a seizure mahazar Ex.P.4. Subsequently, the accused was sent to court for being remanded to judicial custody. PW9 had also arrested the other accused persons and they were also sent to Court for being remanded to judicial custody. Since PW10 Inspector of Police attached to Thuvankurichi Police Station had joined in his duty, the entire case file was handed over to him and further investigation was taken up by him. After the completion of his investigation, he had laid a final report against the accused 1 to 4 on 18.1.1993 before the learned Judicial Magistrate, Manapparai under Section 302, 341 r/w.34 of IPC.

8. In order to substantiate their case, the prosecution has totally examined 10 witnesses and during the course of their examination Ex.P.1 to Ex.P.14 were marked. With the evidence of PW10, the prosecution has closed its side. 9. When the incriminating circumstances arising out of the testimonials of prosecution witnesses were put to the appellant/A4 during the course of the proceedings under Section 313(1)(b) of Cr.P.C., he had replied that this case was foisted against him and apart from this, he had also submitted a written statement before the learned trial Judge under Section 233 (2) of the Code of Criminal Procedure, wherein, he had set up a plea of Alibi. His statement runs as under: ?. That there was a

previous enmity between the deceased Mookan @ Malayandi konar and the family of the 3rd accused-Ponnusamy, son of Andi konar. In the said dispute, he had assisted the 3rd accused Ponnusamy and also spent money for him. On this score, the deceased Malayandi konar had developed grudge upon him and besides this, due to a land dispute, an enmity was prevailing between him and PW2-Palanisamy. That on 26.11.1992, he had participated in the Executive Committee Members meeting of Hindu Munnani at Puthanatham convened at Pillaiyar Temple. The meeting was commenced at 2 p.m. and lasted till 7 p.m. In the said meeting, it was resolved to conduct a Cycle Rally and after completion of the meeting at 7 p.m., he had been to Manapparai and therefore he has stated in his statement that he had nothing to do with the murder of Mookan @ Malayandi konar and for the purpose of wrecking vengeance, he has been roped into the criminality by PW1 and PW2.?

10. Apart from this, the appellant/A4 has also examined three witnesses on his part and marked two documents under Ex.D1 and D2 respectively. 11.DW1-Solai Gounder is the resident of Poonguzhalipatti. He is the Taluk Leader of Hindu Munnani Organisation. DW2-Thangaraj is the resident of Edayapatti and he is functioning as a representative of Hindu Munnai Organisation, Edayapatti Village. DW1 and DW2 have supported the defense plea of alibi. They have categorically stated that on 26.11.1992, the appellant/A4 had participated in the Hindu Munnani Meeting held at Puthanatham Village at 2 p.m. DW3- Ponnugounder has stated that at the time of occurrence, he along with one Alaga gounder went to Udukkupalli for purchasing cattle, since the cattle was not available for purchase, they had been to Kalathuvizhuthu Village. While so, at about 5 p.m., they happened to hear the noise from Kallukuzhikadu. After hearing the noise, he along with Alaga gounder went nearer to Kannimar Temple. While so, the deceased Malayandi konar was found lying with cut injuries. At that time, Ponnusamy, son of Andi konar (A3) and Kalarpatti Ponnusamy were found running at the distance of 10 or 15 feet. When they saw, Malayandi konar was lying on the ground. Neither his son, nor Adaikka konar were found present near the dead body. Since it was getting late, DW3 along with Alaga gounder went to their village place and disclosed the incident to the villagers.

12. On evaluating the evidence both oral and documentary and on hearing the submissions made on behalf of both sides, the learned First Additional Sessions Judge, Tiruchirapalli had found the appellant/A4 guilty under Section 302 r/w.34 of IPC and convicted and sentenced thereunder as afore stated.

13. Heard Mr. R. Sankarasubbu, the learned counsel for the appellant and Mr. T. Mohan, learned Additional Public Prosecutor appearing for the State.

14. As discussed in the opening paragraphs, Mr. R. Sankarasubbu, the learned counsel appearing for the appellant has adverted to that when the trial court had suspected the presence of PW1 in the place of occurrence, and discarded his evidence in toto, Ex.P.1 complaint ought to have been construed as left unproved. During the course of his argument, he has invited the attention of this Court to the evidence adduced by PW2. PW2 in his chief examination has stated that on 26.11.1992, the deceased Malayandi konar and his son PW1 came to Marungapuri, when he had been there for taking Tea. Thereafter they were proceeding to their house in their Cycle and they were followed by him in his cycle behind their back. While so, Palanisamy, son of Rama konar ?. A1 and one Munusamy, son of Madha konar had waylaid Malayandi Konar. On seeing them, the deceased Malayandi konar had stopped the Cycle resting his left hand on the ground. At that time, Ponnusamy, son of Andi Konar-A3 had suddenly emerged from the bushes lying on the left side and Balusamy (A4) appellant herein had emerged from the bushes lying on the right side. When Balusamy/A4 (appellant herein) was trying to cut Malayandi Konar with Aruval, he had dropped his Cycle there itself and started running. Whileso, he had received cut injury over his left ankle. When he was running, Ponnusamy-A3 and Balusamy-A4 had cut Malayandi konar indiscriminately. When they were inflicting cut injuries, Malayandi konar had begged them with his folded hands not to cut him, however, they were going on cutting him indiscriminately. While so, one Adaikka konar who was coming by walk had shouted ?.don't cut, don't cut?.. Due to the cut injuries, Malayandi konar had slid down and thereafter all the four persons took to their heels from the scene of occurrence. When PW2 went nearer to the deceased, PW1 had emerged from the bushes and come there. Thereafter PW2 went to Marungapuri and brought the villagers. In so far as the testimony of PW2 is concerned, he never stated that at

the time of occurrence i.e., when the accused 3 and 4 (appellant herein) were inflicting cut injuries on the person of Malayandi konar, PW1 was present there, but he has stated that when he was returning from Marungapuri, the deceased Malayandi konar and his son were proceeding in a Cycle in front of him.

15. The evidence given by PW2 alone is available with reference to the occurrence. He has stated that he had seen the occurrence directly. He has also admitted in his cross examination that the single feet pathway (Othaiyadi pathai) has been running through the thickest thorny bushes on either side. He has asserted in his cross examination that PW1 was not found in the place of occurrence and that he came there only after hearing their noise.

16. Though PW2 claims to be the eye witness, he did not inform the incident to the police. The learned trial Judge, while tending to believe the evidence of PW2 has found that PW1 being the son of the deceased would not have been present at the time of occurrence. He has also found that the testimonials of PW1 and PW2 are conflicting with each other as a lot of discrepancies are found in their testimonies. As per the case of prosecution, two witnesses are said to be the eye witnesses, viz., PW1 and PW2. According to the learned trial Judge, the evidence of PW1 lost its credit worthiness. Therefore, the only available evidence is PW2. In this circumstances, a crucial question is arisen as to whether conviction could be maintained based on the evidence of a solitary eye witness?. 17. In this connection, we would like to place it on record that, conviction could be based on the testimony of a single eye witness and there is no rule of law which says to the contrary, provided the sole witness passes the test of reliability. So long as the single eye witness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eye witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eye witness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect.

18. This view has been supported by Anil Phukan Vs. State of Assam (1993 Supreme Court Cases (Cri) 810). On coming to the instant case on hand, as herein before stated, the only available evidence is the testimony given by PW2. The trial Court has also found that there were a lot of discrepancies between the testimonials of PW1 and PW2 and therefore on appreciation of the evidence of PW2, this Court finds that PW2 being a single eye witness is wholly unreliable witness and therefore, his evidence, as argued by Mr. R. Sankarasubbu deserves to be discarded in toto, as it is tainted with ambiguity. Because it is left uncorroborated and it also lost its sanctity and evidentiary value. 19. In so far as this case is concerned, Ex.D.2 written statement filed by the 3rd accused Ponnusamy, son of Andi konar under section 233 (2) of Cr.P.C, in the previous trial assumes importance. It is in the nature of inculpatory and creates a twist in the prosecution story. A3 in Ex.D2 has stated that the evidence given by PW1 to PW3 are false and that they were not at all present at the time of occurrence. Even he has gone one step further and stated that A1, A2 and A4 (appellant herein) were also not present at the time of occurrence and that the occurrence was not taken place as spoken to by Pws.1 to 3. In paragraph 2 of his statement, he has stated that he had animosity with the deceased Malayandi konar. One week prior to the occurrence, he had received a notice in respect of a suit filed by the deceased in respect of a pathway and in this connection, he had asked Masa konar -PW3 herein, who is none other than the brother in law of the deceased Malayandi konar to tell the deceased that he had been picking up quarrel on extraneous matters and therefore he had requested PW3 to convey his brother in law to keep quiet. In paragraph No.4 of his statement, he has stated that on the fateful day, at about 6 p.m., after cutting the bushes, he had been returning to his house with Aruval. While so, the deceased Malayandi konar was found passing urine after parking his Cycle. Thereafter he had turned towards him and asked what he was telling to his brother in law?. For which, A3 had asked him to behave properly . While saying so, the deceased Malayandi konar had removed his chappal and assaulted him. On account of heat of the moment, he had cut him with Aruval, but his act was not with an intention of committing murder. He has also stated in paragraph 3 that on the same night , he had surrendered before the concerned Police Station and disclosed the incident. Further he would state that

when he was proceeding to Police Station, he had jettisoned the Aruval on the bushes. It is also disclosed from his statement that out of confusion he was kept in the Police Station for about 10 days and thereafter, he was remanded. 20.Mr. R. Sankarasubbu, learned counsel for the appellant, with reference to Ex.D2 has argued that the learned trial Judge ought to have taken into account that the statement of Ponnusamy, Son of Adaikka konar - (3rd accused in the previous trial) filed under Section 233(2) of Cr.P.C is inculpatory in nature. He would argue further that as it is revealed from his written statement (Ex.D2) on the material time, there had been a verbal altercation between A3 and the deceased and when the deceased had assaulted him with chappal, out of sudden provocation, he had reacted and attacked the deceased with Aruval at his hands, but he did not act with the intention of committing murder. Mr. R. Sankarasubbu, learned counsel for the appellant has also submitted that Ex.D.2 appears to be a material document wherein, the 3rd accused himself had admitted that the appellant/A4 including other two accused viz., A1 and A2 were not present at the time of occurrence, but the learned trial Judge had miserably failed to consider and appreciate the averments of Ex.D.2. 21.With regard to Ex.D2, it is imperative on our part to have, the reference of the evidence given by PW3 Masakkonar. As already stated, he is none other than the brother in law of the deceased Malayandi konar. He has admitted that previous enmity was prevailing between the deceased Malayandi konar and A3-Ponnusamy, Son of Andikonar in respect of a ridge lying between their land. 10 days prior to the occurrence, as per the evidence of PW3, A3-Ponnusamy , son of Andi konar, (in the previous trial) came to him and requested him to tell the deceased Malayandi konar to waive claiming of right over a tree, otherwise, he would kill him. 22.On a harmonious reading of the evidence given by PW3 with the written submissions made by A3-Ponnusamy, son of Andi konar (in the previous trial) under Section 233(2) of Cr.P.C., we find that what A3-Ponnusamy, has stated in his statement is true and corroborated by PW3. Therefore the presence of the appellant in the place of occurrence as well as his participation attributed against him are found to be false. 23.Without offering any explanation to Ex.D2, the investigating officer PW9 has deposed as if he had arrested all the accused persons including A3 at Manapparai Bus Stand at 7 a.m. on 11.12.1992. The learned Additional Public Prosecutor also has not argued on

this aspect.

24. In the circumstances narrated above, we find that it may be expedient to quote the decision of a three Judge Bench of the Apex Court reported in *Hate Singh Bhagat Singh Vs. State of Madhya Bharat* (AIR1953 Supreme Court 468). In this case, while speaking on behalf of a three Judges Bench, Honourable Mr. Justice Vivian Bose has observed that usually the Supreme Court in a criminal appeal before it, will not depart from its practice of declining to re-assess the evidence but where there has been a departure from the rule that when an accused person puts forward a reasonable defence which is likely to be true, and in addition is supported by two prosecution witnesses, then the burden on the other side becomes all the heavier because a reasonable and probable story likely to be true when pitted against a weak and vacillating case is bound to raise reasonable doubts of which the accused must get the benefit, the Supreme Court would examine the evidence at length. It has also been held that where the facts which the prosecution themselves do not controvert in the witness-box are found to accord with the accused's story, the Court should not overlook it, by drawing presumptions against it. But it is far worse when the Sessions Judge leads the accused to believe that their version on this point is the and then turns round in the judgment and puts the evidence just the other way round.

25. On coming to the instant case on hand, as discussed in the foregoing paragraphs, the statement under Ex.D2, submitted by the 3rd accused Ponnusamy, Son of Andi konar (in the earlier trial), implicating himself in the occurrence and excluding the other accused including the appellant from the bounds of the occurrence, should have been controverted by the prosecution, but this has not been done by them. The learned trial Judge has also failed to take judicial notice on Ex.D2 which is filed on behalf of the appellant by way of defence. Therefore the benefit of doubt should have been given to the appellant/4th accused and the presumption ought to have been drawn as against the case of prosecution with reference to the involvement of appellant in the alleged crime.

26. On the other hand, Mr. T. Mohan, learned Additional Public Prosecutor appearing for the respondent State has vehemently objected to the argument advanced by Mr. R. Sankarasubbu, learned counsel appearing for the appellant and he has also contended that as it appear from the evidence of PW2, the participation of the appellant/A4 in the occurrence has been

fully substantiated and since PW1 has spoken to about the occurrence clearly, the trial court also should have placed reliance upon his evidence. He has also submitted that the learned trial Judge has rightly found the appellant/A4 guilty under Section 302 r/w.34 of IPC, which did not require the interference of this court and therefore he has urged to dismiss the Criminal Appeal. 27. We have given our careful consideration to the grounds of Memorandum of Appeal as well as to the submissions made on behalf of both sides. We have also analysed the testimonials of prosecution witnesses and having been given our due consideration, we find that the evidence given by investigating officer viz., PW9 is tainted with several infirmities and contradictions. He did not speak about the arrest of the appellant/A4 including the other accused persons. His evidence does not inspire confidence. In so far as this case is concerned, PW8-Sub Inspector of Police has deposed as if he had assisted PW9 during the time of his investigation. But in fact, on deep analysis of his evidence, we find that he himself had taken up the investigation on his hand which is in total negation of the principle of investigation as contemplated under Sections 156 and 157 of Cr.P.C. The reason why is that he himself had received the complaint and registered the FIR., when he being the officer who had registered the case, he should not have taken up the investigation as he is not attached with the competency. Apart from this, on an analytical approach, we find that the preponderance of probabilities are available in favour of the appellant/A4 in respect of his defence plea of Alibi, rather than his involvement in the occurrence. Since the evidence of PW3 as well as Ex.D2 and Ex.D3 are fully in favour of the appellant/A4 ratifying his presence in the Hindu Munnani Meeting which was held at Puthanatham Village on 26.11.1992, we find that the prosecution has miserably failed to overwhelm the testimonies of DW2 to DW3 as well as Ex.D1 and Ex.D2. In view of the above fact, we are of firm view that the appeal deserves to be allowed and the order of conviction and sentence recorded by the learned trial Judge viz., First Additional District and Sessions Judge (PCR), Tiruchirapalli are liable to be set aside. 28. Accordingly, the Criminal Appeal is allowed. The judgment of conviction and sentence dated 2.12.2006 and made in S.C.No.89 of 1994 on the file of the I Additional District and Sessions Judge, (PCR), Trichy are set aside and the appellant/A4 is acquitted of all the charges. The fine amount paid, if any, is ordered to be refunded. The bail bond, if

any, executed by/on behalf of the appellant/A4 stands discharged. Consequently, the connected MP (MD)No.1 of 2013 is closed. To 1.The First Additional District and Sessions Judge (PCR), Trichy 2.The Addl. Public Prosecutor, High Court, Madurai.

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