

S. Sathyan and Others Vs. State of Kerala represented by, The Public Prosecutor High Court of Kerala

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Court : Kerala

Decided On : Sep-30-2015

Judge : K.T. Sankaran & V. Raja Vijayaraghavan

Appeal No. : Crl. A. No. 2004 of 2009 & Crl. R.P. No. 3475 of 2009

Appellant : S. Sathyan and Others

Respondent : State of Kerala represented by, The Public Prosecutor High Court of Kerala

Judgement :

o.V. Raja Vijayaraghavan, J.

1. The appellants are accused Nos.1 to 4 in S.C. No.617 of 2004 on the files of the Additional Sessions Judge (Ad hoc)-II, Kasaragode. They along with four others were charged for having committed offence punishable u/s 143, 147, 148, 341 and 302 r/w s.149 of the IPC. As per judgment dated 19.8.2009, the learned Additional Sessions Judge found the appellants guilty and they were sentenced to undergo imprisonment for life and to pay a fine of Rs.20,000/- each in default of which, rigorous imprisonment for one year each u/s 302 IPC r/w s.149 IPC. They were also sentenced to undergo rigorous imprisonment for six months u/s 143 r/w s.149 IPC. Accused Nos.1 and 2 were sentenced to undergo rigorous imprisonment for

two years each and to pay a fine of Rs.5000 each and in default to undergo simple imprisonment for six months each for the offence punishable u/s 147 r/w s.149 IPC. Accused Nos.3 and 4 were sentenced to undergo rigorous imprisonment for two years each and to pay a fine of Rs.10,000 each in default to undergo simple imprisonment for six months each for the offence punishable u/s 148 r/w S.149 IPC. The appellants were also sentenced to undergo imprisonment for one month each for the offence punishable u/s 341 r/w s.149 IPC. The accused No 5 to 8 were acquitted of all charges .

2. CrI.R.P.3475 of 2009 has been preferred by the father of deceased Devadasan against the acquittal of accused No 5 to 8 in the above case.

3. The facts giving rise to the instant appeal and also the revision petition are as follows:-

On 27.1.2001, Vinod Kumar, who is the 1st informant along with his friend, deceased Devadasan, were returning back after work in a bus. They alighted at Challingal Panchayat bus stop at 6.45 pm. They saw some persons standing there, huddled together, and on seeing the deceased, they exhorted that he be done away with. The accused Nos. 1 and 2 wrongfully restrained Devadasan by holding the collar of his shirt and the 3rd accused inflicted injuries on him with a billhook on his head and various parts of his body. The 4th accused also inflicted injuries with a billhook on various parts of his body. There were about ten persons, including the accused, who participated in the perpetration of this act. On witnessing the incident, Vinod Kumar, who was examined as PW7, raised a hue and cry. Hearing the scream, the locals gathered. The deceased Devadasan, was made to lie on the lap of one Gopalan and he was given a soda. Devadasan was taken in a jeep driven by PW2 to the Kanjangad hospital. From there, he was shifted to the Mangalore Unity hospital where PW17, examined him and pronounced him dead. PW7 returned back and gave Ext.P4, FI statement before PW18, the Additional Sub Inspector of police, Hosdurg. In Ext.P4, the names of eight persons and two others who could be identified by sight were stated. Investigation was taken over by PW14, the Circle Inspector of police, Hosdurg, who arrested all the accused except the 5th accused, on 30.1.2001. The 5th

accused was arrested on 1.2.2001. He also visited the place of occurrence and prepared Ext.P1 scene mahazar. Based on the disclosure statement given by accused Nos.3, 4 and 7, weapons allegedly used by the accused were recovered. Thereafter, investigation was taken over by PW15, the Circle Inspector of police, Kanjangad. PW16, the Circle Inspector of police, Hosdurg, verified and laid the charge sheet before the Judicial Magistrate of First Class, Hosdurg.

4. The learned Magistrate initiated the committal proceedings as C.P.No.175 of 2003 and after complying with the prescribed procedure under the Code, committed the case to the Court of Sessions.

5. The accused appeared before the Sessions Court on summons and the learned Sessions Judge after hearing the prosecution and the defence, framed a charge u/s 143, 147, 148, 341 and 302 of the IPC r/w S.149 IPC.

6. On the accused pleading not guilty to the charge framed against them by the Court below for the aforementioned offence, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 18 witnesses as PWs.1 to 18 and got marked 12 documents as Exts.P1 to P12 and 6 material objects as MOs.1 to 6.

7. After the close of the prosecution evidence, the accused were examined u/s 313 (1)(b) Cr.P.C with regard to the incriminating circumstances appearing against them in the evidence for the prosecution. They denied the incriminating circumstances put to them and asserted that they were innocent.

8. After the conclusion of the trial, the learned Sessions Judge, after careful scrutiny of the oral as well as documentary evidence, found the appellants guilty and convicted accused Nos.1 to 4 u/s 143, 341 and 302 r/w S.149 IPC and sentenced them accordingly. A1 and A2 were convicted u/s 147 of the IPC and A3 and A4 u/s 148 of the IPC. All the other accused were acquitted u/s 235 of the Cr.P.C. Challenging the order of conviction, the instant appeal is preferred.

9. The father of the deceased has preferred a Revision Petition numbered as Crl.R.P.3475 of 2009 against the acquittal of accused Nos. 5 to 8. The said

revision is also placed along with the appeal and the same are considered together .

10. We have heard Sri.M.K.Damodaran, the learned Senior counsel appearing for the appellants and also Smt.Bindu Gopinath, the learned Public Prosecutor. We have heard Sri.T.G.Rajendran, the learned counsel appearing for the revision petitioner as well.

11. The learned Senior counsel submitted that the conviction of the appellants is vitiated due to grave error in the Court charge. Taking us through the Court charge framed in this case, it is pointed out that there is no reference to the role played by the 4th accused in the offence. Though the prosecution had let in evidence attributing overt acts on the 4th accused, the omission in the charge with regard to the role played by the 4th accused, is a vital defect. It is pointed out that the learned Sessions Judge, pursuant to the trial, had acquitted the 7th accused against whom specific overt acts were alleged in the charge. On the other hand, the 4th accused, against whom no overt act was alleged in the charge, has been convicted. It is argued that the 1st and 2nd accused stood on the same footing as accused Nos.5 to 8. No overt acts were attributed against any of these accused. After trial, the learned Sessions Judge has extended the benefit of doubt to accused Nos.5 to 8 and convicted A1 and A2. This, according to the learned counsel, shows the perverse appreciation of evidence by the learned Sessions Judge. It was assiduously argued that the learned Sessions Judge did not place reliance on the recovery of weapons alleged to have been recovered on the basis of the disclosure statement given by the accused. After having done that, the learned Sessions Judge ought not to have convicted the accused, is the next contention. It was pointed out that the eye witnesses who were examined as PW7 and 8 had not given a truthful version of the incident. PW8 was examined as an eye witness to the occurrence and in his evidence, he claimed that he had witnessed the incident. On the other hand, PW8 was present during the inquest and there is no conceivable reason why he did not mention the fact that he was an eye witness before the Circle Inspector who had prepared the inquest. Ext.P5 inquest report prepared on 28.1.2001 between 8.00 am and 10.00 am, does not mention the names of the accused, the weapons used or the exact mode in which

the incident had taken place. It is contended that if PW8 was actually an eye witness to the occurrence, he would definitely have disclosed to PW14, the C.I of Police, Hosdurg, the above facts at the time of inquest. According to the learned counsel, conspicuous absence of the names of the accused and the omission to describe the weapons used in the various columns assigned in Ext.P5 would show that the FIR, which was allegedly registered on 27.1.2001, was brought into existence at a later time. The learned Senior counsel has further argued that when the accused are specifically identified, named and tried, it was not open for the Court to convict accused Nos.1 to 4 alone u/s 302 r/w s.149 as s.149 contemplates participation of five or more persons. It was also argued that the Court below has convicted accused Nos.1 and 2 u/s 147 r/w S.149 and accused Nos.3 and 4 u/s 148 r/w S.149 IPC. According to the learned Senior counsel, it was not for the Court to pick and chose amongst the accused when all the accused were roped in u/s 149 IPC. According to the learned Senior counsel, when complicity of the names of accused Nos. 5 to 8 were found against and acquitted, the Court was not justified in invoking S.149 to convict accused 1 to 4. It was argued that the evidence let in by the prosecution was inconsistent and contradictory and this fact was not appreciated in the proper perspective by the learned Sessions Judge. It was pointed out that at the time of preparation of Ext.P1 scene mahazar, several clothing items were seized by the Investigating Officer. None of these items were produced before Court and there is also no explanation from the Investigating Officer. The items which were seized at the time of inquest as well as at the time of preparation of scene mahazar were sent over to the Forensic Science Laboratory as is evident from Ext.P11; but the analysis report is not before Court. According to the learned counsel, if the analysis report was produced before Court, it would have falsified the case of the prosecution.

12. Per contra, the learned Public Prosecutor has submitted that the evidence let in by the prosecution through PW7 and 8 would unmistakably and unerringly prove the complicity of the accused. According to the learned Public Prosecutor, PW7 and 8 have given a truthful version before the Court and in spite of searching cross examination, the defence was not able to shake their testimony. According to the learned Public Prosecutor, the conviction and sentence passed against the 4th accused will not be deemed to be invalid merely on the ground that no charge was

framed or on the ground of some minor error, omission or irregularity in the charge. The learned Public Prosecutor further submitted that failure on the part of the prosecution to prove the recovery evidence will not prove vital as the evidence of the eye witnesses was convincing. According to the learned public prosecutor, none of the contentions raised by the appellants were sufficient enough to unsettle the considered findings of the learned Sessions Judge.

13. Sri.T.G.Rajendran, the learned counsel appearing for the revision petitioner in Crl.R.P.3475 of 2009 supported the trial Court judgment insofar as the appellants in Crl.A.2004 of 2009 are concerned. At the same time, the learned counsel contended that reasons stated by the learned Sessions Judge for acquitting accused Nos.5 to 8 were not correct. According to the learned counsel, the evidence let in by the prosecution by examining PW7 and 8 brought home the guilt of respondents 1 to 4 in the Criminal Revision preferred by him. Finally, it was contended that the learned Sessions Judge ought to have convicted respondent Nos. 1 to 4 in the revision petition also by bringing them within the ambit of S.149 of the IPC as they also nursed a common object to commit the crime. According to the learned counsel, there was ample evidence to show that the acts committed by the accused were done in prosecution of common object. On these grounds, the learned counsel sought to support the judgment of the learned Sessions Judge insofar as the conviction of appellants 1 to 4 is concerned and prayed that this Court may interfere with the acquittal of accused Nos.5 to 8 who are respondent Nos. 1 to 4 in Crl.R.P.3475 of 2009.

14. In order to prove the homicidal death of Devadasan, the prosecution has examined PW3, the Assistant Surgeon, who conducted and issued Ext.P2 post mortem certificate over the dead body of the deceased. Ext.P2 would reveal that deceased Devadasan had sustained 29 external injuries on various parts of his body of which 18 injuries were incised. Injury No.2 is an incised wound 15.5 X 3.5 x 6 cm exposing the brain on the right temporal region. It is also noted by PW3 that the incised injury sustained to the head extended from the left eye brow cutting through brain and exposing left eye ball with intra cerebral hemorrhage. He has also noted another injury on the right temporo occipital region incising the brain with intra cerebral hemorrhage. His opinion as to cause of death was head injury

and hemorrhagic shock.

15. The learned Senior counsel however, raised a contention that when PW3 was examined, it was not brought out through him that the injuries sustained by the deceased were sufficient in the ordinary course of nature to cause death. The evidence of PW3 would reveal callous indifference on the part of the prosecutor to put relevant questions to the Forensic Surgeon when he was examined. It was elementary to bring out the nature of injuries while examining the doctor and to elicit through him that the injuries sustained were sufficient in the ordinary course of nature to cause death. But at the same time, one cannot fail to notice that Ext.P2 reveals the extremely fatal nature of the injuries sustained by Devadasan. PW3 in his report and evidence has emphatically stated that the death was due to head injury and hemorrhagic shock. There is absolutely no dispute with regard to the cause of death of Devadasan from any quarters. When the cause of death is certain and when the doctor himself has opined in his evidence about the fatal nature of the injuries, failure on his part to specifically depose that the injury was sufficient in the ordinary course of nature to cause death cannot be held to be fatal. It has been held by the Apex Court in a string of judgments that when the injuries intentionally inflicted were visibly fatal and not requiring any expert opinion with regard to the inevitable consequence of death, the failure of the doctor to state that the injuries were sufficient in the ordinary course of nature to cause death is immaterial.

16. In this context, the Hon'ble Supreme Court in Sannappa Rayappa Jadge v. State of Karnataka (1994 SCC (Cr) 1167), had occasion to observe as follows :

"According to the learned Counsel since the accused inflicted only one stab injury and since the doctor has not specifically stated that the injury was sufficient in the ordinary course of nature to cause death, Clause 3rdly of Section 300, I.P.C. is not attracted. We are unable to agree. The medical evidence shows that the stab wound was on the left side of the chest and it had cut the lung and heart. It does not require an expert's opinion to say further that this injury is sufficient in the ordinary course of nature to cause death. That apart the evidence is to the effect that the accused went towards the deceased who was sitting under the tree and

stabbed him with a knife on the chest and caused the injury. Therefore, he intended to cause that particular injury and Clause 3rdly of Section 300, I.P.C. is fully attracted."

17. Faced with an identical situation, in *State of West Bengal v. Mir Mohammed and Ors*, (2000 (8) SCC 382) the Apex Court has held as follows:-

"No doubt it would have been of advantage to the Court if the Public Prosecutor had put the said question to the doctor when he was examined. But mere omission to put that question is not enough for the Court to reach a wrong conclusion. Though not an expert as P.W3, the Sessions Judge himself would have been an experienced judicial officer. Looking at the injuries he himself could have deduced whether those injuries were sufficient in the ordinary course of nature to cause death. No sensible man with some idea regarding the features of homicidal cases would come to a different conclusion from the injuries indicated above, the details of which have been stated by the doctor (PW-30) in his evidence." So the omission on the part of the Public Prosecutor to elicit from P.W3, the injuries sustained by the deceased in the incident is immaterial.

18. In view of the above, the contention raised by the learned Senior counsel cannot be accepted. We hold that the prosecution has successfully established that Devadasan was inflicted with fatal injuries by a group of assailants on 27.1.2001 at 6.45 pm and his death was the direct result of the fatal injuries sustained.

19. PW7 is the 1st informant and Ext.P4, FI statement was marked through him. The incident as per the FI Statement had occurred at 6.45 pm on 27.1.2001. PW7 had taken the injured initially to the Kanjangad Government hospital and after providing first aid, the injured was referred to the Unity hospital, Mangalore, where he was pronounced dead by PW17, Dr.Alam Navas, the then Causality Medical Officer of Unity hospital, Mangalore. PW7 returned back in the same ambulance and it was thereafter that he had gone to the Hosdurg police station at 24.00 hours on 27.1.2001 and had given the FI statement in respect of the incident which according to the prosecution had occurred at 6.45 p.m on 27.1.2001. The FIR has reached the magistrate at 5.25 a.m on 28.1.2001 as is evident from the initials of

the Magistrate on the record. In other words, within about 5.00 hours and 25 minutes of lodging the FI statement by PW7, the same has reached the learned Magistrate. In Ext.P4, PW7 has given the time and nature of the incident, the fact that he was an eye witness and was travelling together with Devadasan, the names of all the accused persons involved and a description of the weapon wielded by the assailants and the manner of assault. The prompt lodging of the FIR by an eye witness, according to us, substantially eliminates any chance of embellishment and concoction creeping into the prosecution version. PW18 was the Additional Sub Inspector of the Hosdurg police station and it is the said Officer who had registered Ext.P4(a) FIR. We have perused the evidence of PW18 and we do not see any challenge from the side of the defence with regard to the prompt lodging of Ext.P4 (a). We give much sanctity to the prompt lodging of the FIR and hold that the truthfulness of the evidence let in by PW7 is evident from the same.

20. The prosecution case substantially rested on the eye witness account of PW 7 and PW 8. PW7 testified that the incident had occurred at 6.45 pm on 27.1.2001 near the Challingal Panchayat bus stop. He along with the deceased Devadasan were returning back from work and had alighted from the bus at the bus stop. Several persons were seen huddled together outside. At that time, they exhorted kill him and forcefully restrained Devadasan. A1-Sathyan and A2-Shaji restrained Devadasan by holding on to the collar of his shirt. A3 Unni and A4 -Rajesh were armed with billhooks (Kathival). A3-Unni cut deceased Devadasan on his head and on his body. A4-Rajesh also inflicted cut injuries on his leg and body using the billhook. A total of ten persons were present there. PW7 cried out and people gathered. Devadasan was made to lie on the lap of CW3 - Gopalan. Soda was given to Devadasan. Later, he was taken to the hospital in a jeep. When they reached Kanjangad hospital they were directed to take the deceased to Mangalore hospital. They took him to the Mangalore Unity hospital where Devadasan was pronounced dead by the doctor. He identified MO1 as the larger of the two billhooks and MO2 as the other billhook. He also identified MO3 as the axe used by the accused. He Identified all the accused standing in the dock as the persons who were standing outside huddled together when they alighted from the bus. He deposed that he knows each of the accused by name. In cross examination, PW7

deposed that he owed allegiance to the congress party and the accused are workers of the Marxist party. All the accused are residents of the same area and he used to interact with them. He also admitted that he was accused in a case in which he was acquitted after trial and Devadasan was a co-accused in that case. He also deposed that PW8 and 9 had come to the place of occurrence on hearing the hue and cry. Immediately a jeep was summoned and PW7 along with CW3 - Gopalan and PW9 Aravindakshan had accompanied the injured to the District hospital which was about 10 - 11 kms away. As Devadasan had died when they reached the Unity hospital, Mangalore, they did not admit the deceased and immediately PW7 and others returned back to the District hospital. It was thereafter that PW7 had gone to the police station and had lodged the FIR. He stated that on 28.1.2001 at 10.00 a.m, the C.I of police had questioned him. He also deposed that there was sufficient light in the area to properly identify the accused with whom, he is having acquaintance.

21. The learned Senior counsel attacked the evidence of PW7 on all fronts and attempted to show that the said witness was not speaking the whole truth. It was pointed out by the learned Senior counsel that the FI statement could not have been lodged at 24.00 hours on 27.1.2001. It was contended that the endorsement on the FIR that the same had reached the Magistrate at 5.25 am on 28.1.2001 can only be a mistake. It was also pointed out that the lack of reference of the name of the accused and the details of the weapons used in Ext.P5 inquest report would reveal the falsity of the prosecution version. We cannot agree. PW7 was aged 19 years on the date of incident. His version before Court is in tune with Ext.P4 FI statement lodged by him immediately after returning back from the Unity hospital, Mangalore. The evidence of the prosecution witnesses will reveal that there is no error in the sequence of events deposed by PW7. His evidence appears to be truthful to us. Further the prompt lodging of the FIR and the initialing by the learned Magistrate within 5 hours of the lodging of the FIR certifies its authenticity. According to the learned Senior counsel, it was inconceivable that the learned Magistrate would have initialed the FIR at such early hours but after having perused the endorsement, we reject the said argument, particularly when no challenge was raised when PW18, the Additional Sub Inspector of Hosdurg police station, who registered the FIR, was in the box. It is, of course, true that the

prosecution has not attempted to bring out the names of all the accused when PW7 was questioned. He only mentioned about the overt acts of accused Nos.1 to 4. As far as others are concerned, he only mentions about their presence but does not disclose in detail their individual names and the specific role that they had played. It has also to be noted that in the FI statement, PW7 does not attribute any overt acts on the part of accused Nos. 5 to 8 but only say that the others were exhorting accused 3 and 4 to do away with Devadasan. After going through the evidence of PW7, we do not find any reason whatsoever to disbelieve him.

22. PW8 also testified that he is an eye witness to the incident and corroborates the version of PW 7. He deposed that the incident had occurred at 6.45 PM on 27.01.2001 in front of the Challingal Bus Stop. He was standing in front of the shop of Mohanan. About 8-10 persons were seen huddled together towards the western side. He knew only accused No 1 Satyan, A2 - Shaji , A3- Unni and A4 Rajesh and duly identified the said accused who stood in the dock. The other accused are not known to him. According to him, the bus by name Hakkim had stopped there. After sometime he heard a loud cry. He saw accused Nos. 1 and 2 holding the collar of the shirt of the deceased. Accused numbers 3 and 4 were seen inflicting cut injuries on the body of the deceased with billhooks. He also saw some others beating Devadasan with sticks. He was not able to identify the said persons. He rushed towards the injured and saw that he was lying in a pool of blood. The injured was made to lie on the lap of Gopalan and he was given a soda. The injured was taken to the hospital in a jeep but he did not accompany the injured. According to him, Devadasan was murdered due to political rivalry. The accused are members of the CPM party and the deceased was a congress party worker. He identified MO1 and MO.2. He was not able to identify MO 3. He also stated that he had signed as witness in the inquest report. When he was cross-examined he stated that he owed allegiance to the Congress party. His statement was recorded by the police at 8.00 a.m on the next day of the incident. He was present when inquest was prepared. According to him, PW7 was present in the hospital. He further stated that he had given all the details when the police had questioned him. He stated that he is having acquaintance with all the accused. PW8 also stated that there was ample light to identify the accused persons. The accused had escaped from the scene with the weapons. PW8 further stated that

there were nearby shops and houses and the panchayat office was about 150 m away from the scene of occurrence. Other than PW7- Vinod Kumar, PW9- Aravindan, CW3- Gopalan and himself nobody had come near to the scene of occurrence. He also spoke of the presence of PW7 with the deceased when the incident was taking place. He denied that he was stating falsehood at the instance of his party men.

23. In order to corroborate the evidence of PW7 and 8, the prosecution has examined PW9 as well. PW9 is a parallel college teacher who was present during the preparation of Ext.P5 inquest. He deposed before Court that he had gone to the hospital and he identified MO4 shirt, MO5 series of footwear and MO6 dhoti worn by Devadasan at the time of incident. He deposed before Court that at about 6.45 p.m on 27.1.2001, he had seen the deceased lying injured on the western side of the road near the Challingal Panchayat bus stop. He identified his signature in the inquest. In cross examination, he stated that PW7 and 8 and CW3 were present when he had seen Devadasan lying on the road. Others had also come to the scene of occurrence.

24. The learned Senior counsel, earmarked the evidence of PW8 to contend that the prosecution case is not worthy to be believed. By inviting our attention to Ext.P5 inquest report, it was argued that the inquest was prepared by PW14, the Investigating Officer between 8 a.m and 10 a.m on 28.1.2001. It was pointed out that in column No. XII(a) of Ext.P5, which is the column meant for stating the name of the suspected persons, it has only been mentioned that they have been identified. According to the learned Senior counsel, omission to state the names of the accused in the said column would show that the Investigating agency was unaware as to the identity of the accused even at the time of preparation of Ext.P5 inquest. In column No. XVII of inquest, PW8 has signed as one of the panchayatdars and he had concurred with the opinion with regard to the cause and manner of death of the deceased. The opinion of the panchayatdars as to the cause and manner of death stated in column number XVI, though states that members of the CPM were instrumental in doing away with Devadasan, the names of the accused, or the weapons used are not mentioned. Reference was also made to the evidence of PW8 wherein it was deposed by him that PW7 was

also present in the hospital during the time of inquest. According to the learned senior counsel, if as contended by the prosecution, FIR was lodged earlier in the day, the details of accused, manner in which the incident had taken place and also the weapons used would have found a place in Ext.P5 inquest. Absence of the above details, according to the learned counsel, would falsify the prosecution case and reveal in unmistakable terms that the FIR is ante timed. The learned Senior counsel also cited the *L/NK Meharaj Singh v. State of Uttar Pradesh* (JT 1994 (3) SC 440), *M.C.Ali and Another v. State of Kerala* (2010 (4) SCC 573) and *Vijayakumar and Others v. State* (1994 (2) KLJ 903) to support his contentions. We have to disagree with the contentions raised and have to state that the above judgements were rendered in the facts of those cases.

25. In a catena of judgments, the Apex Court as well as this court has held that the scope of inquest is limited and is confined to ascertainment of apparent cause of death. The conduct of inquest is concerned with discovering whether in a given case, death was accidental, suicidal or homicidal and in what manner or by what weapon or instrument, the injuries on the body appear to have been inflicted. It is now settled that the details of overt acts need not be recorded in the inquest report. (See *Guiram Mondal V State of West Bengal* - 2013 (15) SCC 284)

26. In *Brahm Swaroop v. State of U.P* (2011 (6) SCC 288), the Apex Court had occasion to consider in detail the scope of inquest and whether any omission or discrepancy in the inquest is fatal to the prosecution case and whether such omission would lead to the inference that FIR is ante timed. Para 7 of the said judgment, being relevant, is extracted hereunder:

The whole purpose of preparing an inquest report under S.174 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C') is to investigate into and draw up a report of the apparent cause of death, describing such wounds as may be found on the body of the deceased and stating as in what manner, or by what weapon or instrument such wounds appear to have been inflicted. For the purpose of holding the inquest it is neither necessary nor obligatory on the part of the Investigating Officer to investigate into or ascertain who were the persons responsible for the death. The object of the proceedings under S.174 Cr.PC is

merely to ascertain whether a person died under suspicious circumstances or met with an unnatural death and, if so, what was its apparent cause. The question regarding the details of how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of such proceedings i.e. the inquest report is not the statement of any person wherein all the names of the persons accused must be mentioned. Omissions in the inquest report are not sufficient to put the prosecution out of court. The basic purpose of holding an inquest is to report regarding the apparent cause of death, namely, whether it is suicidal, homicidal, accidental or by some machinery etc. It is, therefore, not necessary to enter all the details of the overt acts in the inquest report. Evidence of eyewitnesses can not be discarded if their names do not figure in the inquest report prepared at the earliest point of time. The inquest report cannot be treated as substantive evidence but may be utilised for contradicting the witnesses of inquest. (See *Podda Narayana and Others v. State of Andhra Pradesh*, AIR 1975 SC 1252; *Khujji v. State of Madhya Pradesh*, AIR 1991 SC 1853; *George and Others v. State of Kerala and Another*, 1998 (4) SCC 605; *Shaikh Ayub v. State of Maharashtra*, 1998 (9) SCC 521; *Suresh Rai v. State of Bihar*, 2000 (4) SCC 84; *Amar Singh v. Balwinder Singh and Others*, 2003 (2) SCC 518; *Radha Mohan Singh alias Lal Sahab and Others v. State of Uttar Pradesh*, 2006 (2) SCC 450; and *Aqeel Ahmad v. State of Uttar Pradesh*, AIR 2009 SC 1271).

27. In *Meharaj Singh* (supra) relied on by the learned Senior counsel, there was absolutely no reference to the FIR in the inquest report. The FIR was also not sent to the Medical Officer along with the inquest report and the dead body for the post mortem. There was no evidence to show as to when the FIR was received by the learned Magistrate. It was in such circumstances that the Apex Court had held that there was element of fabrication in the prosecution case. In the instant case, the FIR has reached the learned Magistrate within 5 hours of its lodging. The inquest report contains the requisite details and its contents did not militate with that of the FIR. Merely because of the fact that the officers who prepared the inquest report, failed in noting the names of the accused or the details of the weapons in the inquest cannot lead to the conclusion that the eye witness testimony is suspect and the FIR is ante timed. The omission to state the name of the accused or the

details of the weapon in the inquest report cannot be held to be fatal in all cases unmindful of the other aspects which include prompt registration of the FIR. We are of the considered view that the question whether the FIR is ante timed or not and whether there are falsities in the prosecution version has to be evaluated based on the facts of each case and a general view cannot be taken. When confronted with a situation wherein the genesis of the incident is attacked as suspect on account of lack of details in the inquest report prepared subsequently, the Courts are to carefully scrutinize the materials on record and if it is found that such minor omission is nothing but a bona fide error or the result of a casual approach on the part of the investigating officer which does not affect the substratum of the prosecution story the same can be ignored (See Shiv Ram and Another V State of U.P. (1998 (1) SCC 149). After scrutinizing the materials on record and also the sequence of events, we are not inclined to accept the contention of the learned Senior Counsel that the FIR is ante timed.

28. After carefully evaluating the evidence of PW7 to 9 and after having given our anxious thoughts to the objections as to their reliability, we are of the view that the appearance of PW7 and PW8 at the scene of occurrence was quite natural and normal. We find that there is a ring of truth in the oral testimonies of the eye witnesses which cannot be discarded for the reason that they owe allegiance to a particular political party. The minor discrepancies in their evidence are all but natural and merely because the witnesses failed to specifically speak about the overt acts of accused No 5 to 8 in Court cannot be regarded as sufficient enough reason to doubt their otherwise convincing testimony. It is well settled that the evidence of witnesses cannot be discarded only on the ground that they are friends or relatives of the deceased person. All that is required in such a situation is for the court to carefully scrutinize the evidence of such witnesses with utmost care and caution. The attendant circumstances and the nature and gravity of the crime has put us on guard and we have evaluated the evidence of these two eye witnesses with utmost care and caution. The persuasive arguments of the learned Senior Counsel notwithstanding, we do not think that the defence was able to make any dent in the evidence of these two witnesses and we are not persuaded to discard their evidence on the reasons argued. The evidence of both these witnesses in our considered view is absolutely credible, unblemished and bereft of

any infirmity. The First Information Report which was lodged within 6 hours, naming all the accused, and which has reached the court within a few hours also lends assurance to our firm conviction that the evidence of these two witnesses are trustworthy and cannot be discarded.

29. The next contention of the learned Senior counsel is that the prosecution has not placed the actual facts before Court and the eye witnesses were not deposing the truth. In order to buttress his argument, the learned Senior counsel invited our attention to Ext.P1, the scene mahazar. It is noted in Ext.P1 that PW14, the Investigating Officer has seized some sand stained with blood and a pair of lunar foot wear which was sent to the chemical analysis lab as is seen from Ext.P11 forwarding note. The learned Senior counsel contended that thirteen other items were seized by the investigating officer but those items have not seen the light of day. Further, it was contended that the prosecution has not proved before Court the chemical analysis certificate issued after analyzing the items seized. The learned Senior counsel is right in contenting that the chemical analysis certificate has not been produced or proved by the prosecution despite the fact that Exhibit P11 forwarding note is produced before court. As regards 13 items which were seized by PW14 when Ext.P1 scene mahazar was prepared, no question was put when PW14 was in the box. It is evident from the prosecution version that the incident had happened near a bus stop at about 6.45 p.m and the shop owners and passers by would have been terror stricken at the melee that had happened there. We note that the items seized are footwear and clothes which could have belonged to anyone. In the light of the cogent eye witness testimony, lapses on the part of the Investigating officer cannot be taken as sufficient enough material to suspect the prosecution version. As held by this Court in Jaison Vs. State of Kerala [2013 (4) KLJ 451] , the flaws in the investigation and the flaws in the conduct of the prosecution case before the Sessions Court are not grounds for holding that the appellants are not guilty, when the Court is of the opinion that the guilt has been established by other acceptable evidence.

30. The next contention raised by the learned Senior counsel concerns the weapons of offence which are marked as MOs 1 to 3. MO1 and MO2 are billhooks (Kathival) allegedly used by accused Nos. 3 and 4 and MO3 is an axe allegedly

used by one of the acquitted accused. MOs 1 to 3 were recovered in consequence to the disclosure statements of the accused. At the stage of trial through PW 7 had identified the weapons, he has not stated the name of the person who had wielded the respective weapons. The learned Sessions Judge on appreciation of evidence did not place reliance on the evidence of recovery effected u/s 27 of the Indian Evidence Act holding that the items were not sealed and the chemical analysis certificates were not produced. According to the learned Senior counsel, omission on the part of the eye witnesses to speak about the usage of weapons by the accused would be fatal. We are unable to agree. In the case on hand, the eye witness account of PW7 and 8 is reliable and convincing and alleged lapses of the investigating officer cannot deter us from placing reliance on the same. Non recovery of the murder weapon or the failure of the investigating agency to produce credible material to prove the recovery cannot be a ground to exonerate the accused of all charges when the participation of the accused in the crime is unfolded in the ocular account of the occurrence given by the witnesses, whose evidence is found unimpeachable. (See Krishna Mochi V State of Bihar 2002 (6) SCC 81)

31. The next contention raised by the learned counsel is that the charge framed by the learned Sessions Judge is defective and that the same has vitiated the trial. According to the learned Senior Counsel, the charge is silent as regards the overt act committed by the 4th accused or the weapon used by him. Accused Nos. 3 and 7 are alleged to have used a sword and axe respectively in the charge and the other accused except accused No.4 are charged for having beaten the deceased with sticks. All the accused have been generally charged u/s 143, 147, 148, 341 and 302 of the IPC read with S. 149 of the IPC. According to the learned Senior counsel, at the stage of evidence, the prosecution witnesses have not spoken about the overt acts committed by accused Nos.5 to 8, but have spoken about the roles played by accused Nos.1 to 4 alone. Though no specific charge was framed against the 4th accused detailing the overt act committed by him and the weapon used, he has been found guilty u/s 302 r/w s. 149 of the IPC, which is illegal according to the learned senior counsel. Further, it was submitted that the learned Sessions Judge has convicted the appellants 1 and 2 u/s 147 of the IPC r/w S.149 and the accused Nos.3 and 4 have been convicted u/s 148 read with S.149. The

failure on the part of the learned Sessions Judge to convict the appellants 1 and 2 u/s 148 with the aid of S.149 of the IPC was contended to be another flaw in the judgment rendered. It was argued that the omissions are material which vitiated the entire trial.

32. We have considered the arguments of the learned senior counsel and have perused the court charge. The court charge commences with the words

I,.....(name omitted), Additional District and Sessions Judge (Ad hoc) II, Kasaragod do hereby charge you, A1 - A9 (names and addresses omitted) as follows:

That on 27.01.2001 at 6.45 p.m., you have found (sic) yourselves into an unlawful assembly armed with deadly weapons and committed rioting and in prosecution of your common object the first and second amongst you wrongfully restrained Devadasan while he was alighting from the bus at Chalingal by catching hold of his shirt, the third amongst you cut him with a sword, the 7th amongst you cut him with an axe and the 1st, 2nd, 5th, 6th and 8th amongst you had beaten him with sticks causing his death. Your aforementioned acts constitute offences punishable under S.143, 147, 148, 341 and 302 read with S.149 thereof and within the cognizance of this court. I hereby direct that you be tried before this court for the said offences .

33.As contented by the learned Senior counsel, there is no reference to the overt act committed by Accused No 4 as spoken to by the eye witnesses though his name finds a place in the charge. Question is whether the said error is fatal and whether the trial is vitiated in view of the purported error in charge as contended by the learned Senior counsel. The purpose of framing charge is to tell the accused as precisely and concisely as possible of the matter with which he is charged. The charge must convey to the accused what the prosecution intends to prove against him and what he is required to defend. Chapter XVII of the Code deals with charge. S.211 postulates what the contents of the charge should be. S.212 mandates that the particulars as to the time, place and person be mentioned. S.213 enumerates the circumstances wherein the manner of committing offence must be stated.

34. S.215 of the Code deals with the effect of errors in a charge. Section 215 Cr.P.C. reads as under:

"Effect of errors:- No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice".

35. At this juncture, reference to S. 464 Cr.P.C. will also be apposite. S. 464 of the Code reads as under:

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

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

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

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

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

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction".

36. S.465 of the Code reads as under:

"Finding or sentence when reversible by reason of error, omission or irregularity:-

(1) Subject to the provisions herein above contained, no finding sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby".

37. The question therefore, is whether the failure to mention in the charge the overt act of accused No. 4 or the weapon used by him, would result in failure of justice or prejudice .

38. Illustration (e) to S. 213 is relevant for the purpose which reads as follows :-

Illustration (e) :- A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B.

39. Illustration (e) to S 213, Secs.215, 464 and 465 of the Code would cover every conceivable type of error and irregularity referable to a charge that can possibly arise ranging from cases in which there is a conviction with no charge at all to cases in which there is a charge but with errors, irregularities and omissions in it.

40. In Willie (William) Slaney Vs. State of M.P. (AIR 1956 SC 116), the Hon'ble Supreme Court speaking through Vivian Bose, J. has explained this aspect as follows:

[58]. Now what is an accused person entitled to know from the charge and in what way does the charge in this case fall short of that? All he is entitled to get from the charge is --

(1) the offence, with which he is charged, S.221

(1), Criminal Procedure Code,

(2) the law and section of the law against which the offence is said to have been committed, S.221 (4),

(3) particulars of the time, S.222(1), and

(4) if the place, S.222(1), and

(5) of the person against whom the offence is said to have been committed, S.222(1), and

(6) when the nature of the case is such that those particulars do not give him sufficient notice of the matter with which he is charged, such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose, S.223. He is not entitled to any further information in the charge; see Illustration (e) to S.223 of the Code:

"A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B".

[59]. It is clear from this that when the case is one of murder, the accused is not entitled to be told in the charge how it was committed, whether with a pistol or a lathi or a sword. He is not entitled to know from the charge simpliciter any further circumstance. How then is he expected to defend himself? He has the police challan, he has the evidence recorded in the Committal Court, he hears the prosecution witnesses and he is examined under S.342 of the Code. It is these proceedings that furnish him with all the necessary, and indeed vital, information, and it is his duty to look into them and defend himself. It will be seen that if the logic of the appellant's contention is carried to its fullest extent to accused could complain of prejudice because he was not told in the charge whether a pistol was used for the crime or a sword and if a pistol, its caliber and bore and the type of cartridge.

41. Judging by the above principles, we are of the considered view that the appellant No.4 was given proper notice of the accusation against him of which he was going to be tried and there was substantial compliance with the spirit and requirements of the Code of Criminal Procedure. The mere omission to mention the weapon used by the appellant No.4 and the manner in which it was used cannot be said to have caused any prejudice. The charge extracted above gives

exact details about the offence with which he is charged, the law and section of the law against which the offence is said to have been committed, particulars of time and place and the person against whom the offence was committed. As held in Willie Slaney (supra), the mere omission to state the weapon used or the mode of use cannot be said to have caused prejudice when the appellant No.4 has been unmistakably told that he has participated in the crime along with the co-accused. Like all procedural laws, the Code of Criminal Procedure is devised to subserve the ends of justice and not to frustrate them by mere technicalities. It regards some of the provisions as vital but others not, and a breach of the latter is a curable irregularity unless the accused is prejudiced thereby. It places errors in the charge, or even a total absence of a charge in the curable class. (See Chandra Prakash V State of Rajasthan 2014 (8) SCC 340)

42. While judging the question of prejudice, Court must act with a broad vision and look to the substance and not to technicalities, and its main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself. If the court ultimately comes to the conclusion that in spite of defect in framing of charge, no prejudice had been caused to the accused, no interference would be required.

43. It has to be borne in mind that the appellant No.4 was represented by a lawyer before the trial Court, and no objection was raised as regards the non-mention of the specific overt act committed by the appellant No.4 or with regard to the alleged irregularities. The police charge clearly speaks about the above overt act on the part of appellant No. 4 and the direct ocular evidence of PW7 and 8 clearly established the role played by the appellant. Nothing could be brought out to doubt the veracity of the evidence let in by them. We are of the considered view that no prejudice has been caused to the appellant No.4 owing to the minor omission in the charge as contended by the learned Senior counsel. Procedural laws are designed to further the ends of justice and not to frustrate them by technicalities. The object of the Code is to ensure that the accused is granted an opportunity for a fair trial in accordance with the principles of natural justice. In the case on hand,

materials reveal that the accused was made aware of the nature of offence committed by him and he was granted a full and fair opportunity to defend the case. Minor mistakes in procedure cannot be projected as major violations to contend that trial is vitiated unless the appellant is able to show substantial prejudice. No such prejudice is shown to have been made out in the instant case. But at the same time, it should not be taken that we have encouraged any laxity of procedure in the matter of framing of charge. These observations are made in the facts and circumstances made out in the instant case.

44. The next contention raised by the learned Senior counsel is with regard to the application of S.149. It is vehemently argued by the learned senior counsel that the specific charge was that 8 named persons had assaulted the deceased Devadasan and murdered him. The learned Sessions Judge after elaborate appraisal of the evidence have acquitted accused Nos.5 to 8 holding that the prosecution has failed to establish their identity. His contention is that in view of the finding of the trial Court which resulted in the number of convicted persons falling below the required number of five, it was not open to the trial Court to make out a case of a new unlawful assembly consisting of the four convicted persons and certain unspecified persons; nor could any of the acquitted persons be held, in spite of the acquittal, to be members of an unlawful assembly. According to the learned counsel, their acquittal has become final for all purposes and the legal effect of the acquittal is that they were not members of any unlawful assembly. Thus, learned counsel has contended that the conviction of the appellants for the offence of murder with the aid of S.149, Indian Penal Code, is bad in law. The learned Senior counsel relied on Nagamalleswara Rao (K) Vs. State of Andhra Pradesh (1991 (2) SCC 532) to substantiate his contention.

45. In the case on hand, the Court charge specifically names accused Nos.1 to 8 as participis criminis and it is the specific charge that they had formed themselves into an unlawful assembly and perpetrated the heinous murder of Devadasan. The prosecution does not have a case that apart from the 8 accused persons, there were others who were involved in the crime. When the 4 named accused were acquitted as the prosecution had not been able to establish their identity, it means that their involvement in the offence has not been proved. As held in

K.Nagamalleswara Rao (supra) by the Apex Court, it would not be permissible to assume or conclude that others named or unnamed acted conjointly with the charged accused in the case unless the charge itself specifically said so and there was evidence to conclude that some others were also involved in the commission of the offence conjointly with the charged accused in furtherance of their common object to commit the crime.

46. The true legal position in respect of the several categories of cases which may fall to be tried when a charge under S.149 is framed was considered by a constitution bench of the Apex Court in Mohan Singh Vs. State of Punjab [AIR 1963 SC, 174] and it was laid down as follows:-

In dealing with the question as to the applicability of S.149 in such cases, it is necessary to bear in mind the several categories of cases which come before the Criminal Courts for their decision. If five or more persons are named in the charge as composing an unlawful assembly and evidence adduced by the prosecution proves that charge against all of them, that is a very clear case where S.149 can be invoked. It is, however, not necessary that five or more persons must be convicted before a charge under S.149 can be successfully brought home to any members of the unlawful assembly. It may be that less than five persons may be charged and convicted under S 302/149 if the charge is that the persons before the Court along with others named constituted an unlawful assembly; the other persons so named may not be available for trial along with their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the Court does not make S.149 inapplicable for the simple reason that both the charge and the evidence seek to prove that the persons before the Court and others number more than five in all and as such, they together constitute an unlawful assembly. Therefore, in order to bring home a charge under S.149 it is not necessary that five or more persons must necessarily be brought before the Court and convicted. Similarly, less than five persons may be charged under S.149 if the prosecution case is that the persons before the Court and others numbering in all more than five composed an unlawful assembly, these others being persons not identified and so not named. In such a case, if evidence shows that the persons before the Court along with unidentified an un

named assailants or members composed an unlawful assembly, those before the Court can be convicted under S.149 though the un named and un identified persons are not traced and charged. Cases may also arise where in the charge, the prosecution names five or more persons and alleges that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving before the court less than five persons to be tried then S.149 cannot be invoked. Even in such cases; it is possible that though the charge names five or more persons as composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the Trial Court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge under S.149 because along with the two or three persons convicted were others who composed the unlawful assembly but who have not been identified and so have not been named. In such cases, the acquittal of one or more persons named in the charge does not affect the validity of the charge under S.149 because on the evidence the court of facts is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five. It is true that in the last category of cases, the court will have to be very careful in reaching the said conclusion. But there is no legal bar which prevents the court from reaching such a conclusion. The failure to refer in the charge to other members of the unlawful assembly un named and un identified may conceivably raise the point as to whether prejudice would be caused to the persons before the court by reason of the fact that the charge did not indicate that un named persons also were members of the unlawful assembly. But apart from the question of such prejudice which may have to be carefully considered, there is not legal bar preventing the court of facts from holding that though the charge specified only five or more persons, the unlawful assembly in fact consisted of other persons who were not named and identified. That appears to be the true legal position in respect of the several categories of cases which may fall to be tried when a charge under S.149 is framed.

47. In *Amar Singh Vs State of Punjab* (AIR 1987 SC 826) , seven accused were charged for murder under S.302 read with S.149 of the IPC. Two out of the seven accused were acquitted by the trial court and on appeal the High Court acquitted one more accused. In spite of that, the High Court convicted four of the remaining accused under S.302 read with S.149 of the IPC and sentenced them to life imprisonment. The four convicted accused appealed before the Hon'ble Supreme Court and contended that conviction u/s 149 was not maintainable. This contention was accepted and the Apex Court observed as follows:

.....as the appellants were only four in number, there was no question of them forming an unlawful assembly within the meaning of S.141 of the IPC. It is not the prosecution case that apart from the said seven accused persons, there were other persons who were involved in the crime. Therefore, on the acquittal of three accused persons, the remaining four accused, that is, the appellants, cannot be convicted under S.148 or 149 IPC for any offence, for the first condition to be fulfilled in designating an assembly as an unlawful assembly is that such assembly must be a five or more persons as required under S.141 of the IPC. In our opinion, the conviction of the appellants under S.148 and 149 of the IPC cannot be sustained.

48. Similar views were taken by the Apex Court in *Maina Singh V State of Rajasthan* (AIR 1976 SC 1084) and in *Nagamalleswara Rao* (supra), wherein it was held that in a given case if the charge disclosed only named persons as accused and the prosecution witnesses confined their testimony to them, it would be permissible to conclude that others, named or unnamed, acted conjointly with one of the charged accused, if there was other evidence to lead to that conclusion but not otherwise.

49. The position in law is, therefore, clear and it appears to us that in so far as the conviction and sentence of the appellants u/s 143 r/w S. 149, 147 r/w 149 , 148 r/w S 149 , 341 r/w S 149 and 302 r/w S 149 is concerned, the same cannot be sustained on the charge as framed against them which definitely named the 4 appellants as also the 4 acquitted accused as being members of an unlawful assembly, who had in the prosecution of the common object of such assembly,

wrongfully restrained the deceased, committed rioting and rioting armed with deadly weapons and the murder of Devadasan.

50. It has now to be considered whether a conviction of the accused u/s 302 read with S.34 of the I. P. C will be justified or not.

51. In Mohan Singh v. state of Punjab (AIR 1963 SC 174) , the Constitution Bench of the Hon'ble Supreme Court considered the question as to whether accused could be convicted u/s 302 read with S.34 of the IPC when S.149 of the IPC could not be invoked as against them for reason of acquittal of the named co-accused. The Apex Court held as follows in Para.13 of the judgment.

That inevitably takes us to the question as to whether the appellants can be convicted under S.302/34. Like S.149, S.34 also deals with cases of constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The essential constituent of the vicarious criminal liability prescribed by S.34 is the existence of common intention. If the common intention in question animates the accused persons and if the said common intention leads to the commission of the criminal offence charged, each of the persons sharing the common intention is constructively liable for the criminal act done by one of them. Just as the combination of persons sharing the same common object is one of the features of an unlawful assembly, so the existence of combination of persons sharing the same common intention is one of the features of S.34. In some ways the two sections are similar and in some cases they may overlap. But, nevertheless, the common intention which is the basis of S.34 is different from the common object which is the basis of the composition of an unlawful assembly. Common intention denotes action in concert and necessarily postulates the existence of a prearranged plan and that must mean a prior meeting of minds. It would be noticed that cases to which S.34 can be applied disclose an element of participation in action on the part of all the accused persons. The acts may be different; may vary in their character, but they are all actuated by the same common intention. It is now well settled that the common intention required by S.34 is different from the same intention or similar

intention. As has been observed by the Privy Council in *Mahbub Shah v. Emperor*, 72 Ind App 148 : (AIR 1945 PC 118), common intention within the meaning of S.34 implies a pre arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre arranged plan and that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case.

52. The same principle was laid down by the Apex Court in *Babu and Another Vs. State rep. by Inspector of Police, Chennai and Another* (2013 (4) SCC 448), wherein relying on *Dhanna and Others Vs. State of M.P.* [1996 (10) SCC 79], the Apex Court held that, where the Court finds that the strength of the assembly was insufficient to constitute into unlawful assembly , but the remaining persons who participated in the crime had shared common intention in the main perpetrators of the crime, the Court can take the aid of S.34 of the IPC even if the said section was not specifically mentioned in the charge.

53. In *Pal Singh v State of Punjab* (2014 (3)SCALE 36), this aspect of the matter was considered in extenso by the Apex Court and it was held as follows :-

11. In *Dhari and Ors. v. State of Uttar Pradesh*: AIR 2013 SC 308, this Court re-considered the issue whether the Appellants therein could be convicted under Sections 302 r/w 149 Indian Penal Code, in the event that the High Court had convicted three persons among the accused and the number of convicts has thus remained less than 5 which is in fact necessary to form an unlawful assembly as described under Section 141 Indian Penal Code. This Court considered the earlier judgments in *Amar Singh v. State of Punjab* AIR 1987 SC 826; *Nagamalleswara Rao (K) v. State of A.P.*: AIR 1991 SC 1075, *Nethala Pothuraju v. State of A.P* : AIR 1991 SC 2214; and *Mohd. Ankoos v. Pubic Prosecutor* : AIR 2010 SC 566, and came to the conclusion that in a case where the prosecution fails to prove that the number of members of an unlawful assembly are 5 or more, the court can simply convict the guilty person with the aid of Section 34 Indian Penal Code, provided that there is adequate evidence on record to show that such accused shared a common intention to commit the crime in question. (See also: *Jivan Lal v.*

State of M.P. : (1997) 9 SCC 119; Hamlet v. State of Kerala : AIR 2003 SC 3682; Fakhruddin v. State of M.P.: AIR 1967 SC 1326; Gurpreet Singh v. State of Punjab : AIR 2006 SC 191; and S. Ganesan v. Rama Raghuraman and Ors. AIR 2013 SC 840).

54. It is well settled that common intention within the meaning of the section implies a pre-arranged plan and postulates that the criminal act was done pursuant to a pre-arranged plan. The said plan may also develop on the spot during the commission of the offence; but the crucial circumstance is that the said plan must precede the act constituting the offence. If that be so, before a Court can convict a person u/s 302 read with S.34 of the IPC it should come to a definite conclusion that the said person had prior concert with one or more other persons, named or un-named, for committing the said offence.

55. In the case on hand, there is concrete evidence about the participation of accused Nos.1 to 4 and though four named persons were also charged for having had the common object, they were acquitted as their identity could not be proved beyond the shadow of doubt. It will not be possible to enter a finding of guilt as against accused Nos.5 to 8 as there is total lack of evidence. We are not inclined to interfere with the said finding of the learned Sessions Judge. At the same time, facts of the instant case reveal that the appellant Nos.1 and 2 shared common intention with appellants 3 and 4 who inflicted fatal injuries on vital parts of the body of the deceased Devadasan. The eye witness accounts of PWs 7 and 8 leaves no room for doubt that appellants who are accused Nos.1 to 4 had shared the same motive. The appellants waited in anticipation for the arrival of deceased Devadasan in a bus near the Challingal bus stop and it was the appellants 1 and 2, who, according to the eye witnesses, restrained Devadasan so as to enable appellants No.3 and 4 to inflict fatal injuries to the head and other parts of the body. The brutal nature of the injuries inflicted are evident from Ext.P2 postmortem certificate. The conduct of the appellants as revealed from the eye witness account clearly show that they had shared the common intention to murder Devadasan. On these facts, the conclusion appears to be inevitable that the appellants were actuated by common intent to kill Devadasan and in furtherance of the common intention had inflicted brutal injuries on the deceased at 6.45 p.m

on 27.01.2001.

56. In *Dhaneswar Mahakud and Ors. v. State of Orissa* (AIR [2006] SC 1727) , the Apex Court had held that even if the accused has not been charged with the aid of S. 34 Indian Penal Code and instead charged with the aid of S. 149 Indian Penal Code, they can be convicted with the aid of S. 34 Indian Penal Code when evidence shows that there was common intention to commit the crime and no prejudice or injustice has been caused to the accused therein. Even the conviction of the accused u/s 302 Indian Penal Code simpliciter is permissible if the court reaches the conclusion on the basis of material placed before it that injuries caused by the accused were sufficient in the ordinary course of nature to cause death and nature of the injuries was homicidal.

57. Now the question is whether the conviction of the accused with the aid of S. 34 of the IPC is likely to cause prejudice.

58. In *Darbara Singh v. State of Punjab* (AIR 2013 SC 840), the Hon'ble Supreme Court considered a similar issue and came to the conclusion that the accused has to satisfy the court that if there is any defect in framing the charge it has prejudiced the cause of the accused resulting in failure of justice. It is only in that eventuality the Court may interfere.

The Court elaborated the law as under:

Failure of justice" is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth. There would be "failure of justice"; not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be over emphasised to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under the Indian criminal jurisprudence. "Prejudice" is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope.

Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under criminal jurisprudence, then the accused can seek benefit under the orders of the court. (Vide: Rafiq Ahmed @ Rafi v. State of U.P. (AIR 2011 SC 3114) ; Rattiram v. State of M.P. (AIR 2012 SC 1485); and Bhimanna v. State of Karnataka (AIR 2012 SC 3026).

59. The learned Senior counsel contended that the fact that the accused has been convicted and sentenced to undergo imprisonment for life by itself is prejudice. We cannot agree. The evidence reveal the grotesque nature of the murder of Devadasan and it was perpetrated in a brutal manner. Evidence reveal the active participation of the accused. We are not impressed with the contentions raised.

60. On the basis of the materials discussed above, the prosecution case as against the appellants stood established by the legal evidence tendered before the Court below and their conviction has to be sustained.

61. In so far as the revision against the acquittal of accused Nos. 5 to 8 is concerned, we are of the considered view that the learned Sessions Judge on due appreciation of the evidence of PW 7 and 8 and on the materials on record have found that their identity has not been established beyond reasonable doubt. Though PW7 has casually mentioned about the presence of the accused the same was not supported by PW8 and he has gone to the extent of deposing before Court that some other persons, other than accused No 5 to 8, were involved in the beating of the deceased with the aid of sticks. This piece of contradictory evidence let in by the prosecution witnesses created doubt on the mind of the trial court and it was in the said circumstances that the benefit of doubt was extended to the accused 5 to 8. The said finding of the learned Sessions Judge was arrived at based on appreciation of evidence and we do not find any reason to interfere with the same. After having gone through the evidence in extenso we do not find any materials to conclusively connect the respondents 1 to 4 in the criminal revision with the commission of the crime. The findings arrived at by the learned Sessions Judge cannot be said to be perverse or illegal in any manner warranting interference in revision. There is no jurisdictional error, illegality or impropriety in the acquittal of the accused Nos. 5 to 8, respondent Nos. 1 to 4 in the revision

petition. Furthermore the State has not preferred any appeal against the acquittal and having regard to the scope and limits of the revisional jurisdiction u/s 397 Cr.P.C, we do not find any ground to interfere with the acquittal of the respondents 1 to 4 in the Criminal Revision Petition.

62. In so far as the conviction entered against the appellants u/s 143 r/w S. 149 , S. 147 r/w S 149 and S. 148 r/w S. 149 is concerned , the same cannot be sustained in view of the above findings .

63. In the result, we are not able to justify the conviction of the appellants with the aid of S 149 of the IPC. The same is set aside. Instead the appellants are convicted u/s 302 r/w S. 34 of the IPC and S. 341 r/w S.34 of the IPC . The conviction arrived at by the trial court under S 147 and 148 of the IPC are hereby set aside .

64. Accordingly, the Criminal Appeal is disposed as follows :

The appellants are found not guilty of the offence punishable u/s 302 r/w S. 149 , 147 , 148 and 341 r/w S.149 but instead they are found guilty and are convicted u/s 302 r/w S. 34 and are sentenced to undergo imprisonment for life and to pay a fine of Rs.20,000 each and in default to undergo Rigorous Imprisonment for one year. Appellants Nos. 1 to 4 are also convicted u/s 341 r/w S. 34 of the IPC and they are sentenced to undergo rigorous imprisonment for one month each.

65. The appellants shall be entitled to set off for the period they have been in custody in this case as provided u/s 428 of Code of Criminal Procedure, subject to the orders passed by appropriate authority u/s 432/433 of Code of Criminal Procedure.

66. Crl.R.P.3475 of 2009 shall stand dismissed.

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