

**Rajesh vs State of Kerala**

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**SooperKanoon Citation :** [sooperkanoon.com/1748672](http://sooperkanoon.com/1748672)

**Court :** Kerala

**Decided On :** Sep-17-2020

**Judge :** Honourable Mr. Justice a.Hariprasad,Honourable Mrs. Justice M.R.Anitha

**Appeal No. :** CRL.A/1161/2016

**Appellant :** Rajesh

**Respondent :** State of Kerala

**Judgement :**

C.R.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE A.HARIPRASAD & THE HONOURABLE MRS. JUSTICE M.R.ANITHA THURSDAY, THE 17TH DAY OF SEPTEMBER 2020 / 26TH BHADRA, 1942 CRL.A.No.1161 OF 2016 AGAINST THE JUDGMENT DATED 21-10-2016 IN SC NO.428/2009 OF ADDITIONAL SESSIONS COURT - IV, THIRUVANANTHAPURAM CRIME NO.202/2008 OF Poojappura Police Station , Thiruvananthapuram APPELLANT/ACCUSED NO.2: RAJESH S/O.UNNIKRISHNAN NAIR AGED 33 YEARS, EYYAKUZHI VEEDU V.P.7/274, VATTIYOORKAVU, PEROORKADA

THIRUVANANTHAPURAM DISTRICT. BY ADV. SRI.LATHEESH SEBASTIAN RESPONDENT/STATE & COMPLAINANT: STATE OF KERALA REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM-682031. BY SENIOR PUBLIC PROSECUTOR SHRI S.U.NAZAR THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 19-08-2020, ALONG WITH Death Sentence Ref.NO.1/2017, THE COURT ON 17.09.2020 DELIVERED THE FOLLOWING: & 2

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE A.HARIPRASAD & THE HONOURABLE MRS. JUSTICE M.R.ANITHA THURSDAY, THE 17TH DAY OF SEPTEMBER 2020 / 26TH BHADRA, 1942 Death Sentence Ref..No.1 OF 2017 AGAINST THE JUDGMENT DATED 21-10-2016 IN SC NO.428/2009 OF ADDITIONAL SESSIONS COURT - IV, THIRUVANANTHAPURAM

CP NO.5/2009 OF ADDITIONAL CHIEF JUDICIAL MAGISTRATE'S COURT, THIRUVANANTHAPURAM CRIME NO.202/2008 OF Poojappura Police Station , Thiruvananthapuram COMPLAINANT: STATE OF KERALA REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM-682031. BY SENIOR PUBLIC PROSECUTOR SHRI S.U.NAZAR RESPONDENT: RAJESH, S/O.UNNIKRISHNAN NAIR AGED 33 YEARS, EYYAKUZHI VEEDU V.P.7/274, VATTIYOORKAVU, PEROORKADA THIRUVANANTHAPURAM DISTRICT. THIS DEATH SENTENCE REFERENCE HAVING BEEN FINALLY HEARD ON 19-08-2020, ALONG WITH CRL.A.1161/2016, THE COURT ON 17.09.2020 DELIVERED THE FOLLOWING: & 3 C.R. A.HARIPRASAD & M.R.ANITHA, JJ. ----- & D.S.R. No.1 of 2017 ----- Dated this the 17th day of September, 2020

## **COMMON JUDGMENT**

**Hariprasad, J.**

Factual and legal questions arising in this Criminal appeal and Death Sentence Reference are intrinsically interconnected. Hence we heard them together.

2. Six accused persons were charge sheeted by the Assistant

Commissioner of Police, Cantonment Police Station, Thiruvananthapuram for offences punishable under Sections 143, 147, 148, 149, 323, 324, 302 and 212 of the Indian Penal Code, 1860 (in short, IPC) and Section 27 of the Arms Act, 1959 (in short, Arms Act). The incident which resulted in the registration of crime happened on 11.07.2008. After completing the investigation, a final report under Section 173(2) of the Code of Criminal Procedure, 1973 (in short, Cr.P.C.) was filed on 27.01.2009 before the Magistrate having jurisdiction. Later, the case was committed to the

& 4

Sessions Court. It is an admitted fact that the 1st accused was killed on 01.06.2009. Evidently, on the date of framing a charge by the learned Additional Sessions Judge on 30.05.2016, the 1st accused was no more. Needless to mention, accusations in the final report levelled against him stood abated. After trial, the 2nd accused alone was found guilty of offences punishable under Sections 323, 324 and 302 IPC read with Section 34 IPC and Section 27 of the Arms Act read with Section 34 IPC and others were acquitted. Hence this appeal at his instance.

3. Learned Additional Sessions Judge after hearing both sides framed a charge in the following terms:

That you, along with the deceased first accused, on 11.7.2008 at about 9 p.m., being the members of an unlawful assembly, the common object was to retaliate for the assault made against Aneesh @ Unni (C.W.19) by the son of Choyikkutty (C.W.4) and his friend, chased the autorickshaw in which C.W.4 and C.W.10 was travelling, and at that time

you are possessing deadly weapons like 'sword', 'Rambo knife' etc., and uses criminal force against them and assaulted the autorickshaw driver (C.W.5) and thereby committed offences punishable u/ss 143, 147, 148 r/w 149 of IPC. And in the same transaction, in prosecution of your common object of such assembly, voluntarily caused grievous hurt to Ramachandran (C.W.1) by attacking with a 'sword' and caused simple hurt to C.W.5 and C.W.7 by beating with hands and there by committed offences & 5 punishable u/ss 323, 324, r/w 149 of IPC. And in the same transaction, in prosecution of your common object of such assembly you, 2nd accused along with the 1st accused chased C.W.5 & C.W.7 who took to their heels on seeing the attack on C.W.1, and on doing so, had seen, deceased Santhosh Kumar coming to the house of C.W.1 hearing the commotion, and you the 2 nd accused pointed out the deceased as the person you are searching for and asked the first accused to kill him and then the 1 st accused stabbed him on his abdomen with the sword and you, A-2 cutting on his head twice with the 'Rambo knife' causing fatal injuries and he succumbed to the injuries and you, the 3rd & 4th accused joined them with the knowledge that they are likely to commit murder of the said Santhosh Kumar and thereby committed offences punishable u/s 302 r/w 149 of IPC. That you, the 2nd accused used a sharp edged deadly weapon named 'Rambo knife' which was possessed by you without any license and thereby committed offence punishable u/s 27 of Arms Act. These offences are committed within my cognizance. AND I hereby direct that you be tried by this court on the said charges."

Thereafter, considering the prosecution evidence, consisting of oral testimony of 38 witnesses, 98 documents and 12 material objects, the learned Additional Sessions Judge found the 2nd accused guilty of the offences mentioned above. After hearing him on sentence, the learned trial Judge found that he deserves no mercy and, therefore, he is sentenced,

under Section 302 read with Section 34 IPC, to be hanged by neck till he is dead and imposed a fine of Rs.2,00,000/- too. For other offences, various terms of imprisonment and fine are also imposed. Learned Additional Sessions Judge acquitted all other accused persons. It is interesting to note that guilt of the appellant was pronounced by relying, to a certain extent, on the evidence adduced against deceased 1st accused. Trial court found that the appellant had shared a common intention with deceased 1st accused to commit the crime.

4. Aggrieved by the conviction and consequent sentence on him,

the appellant preferred the criminal appeal under Section 374(2) Cr.P.C. Under Section 366(1) Cr.P.C. a reference was made by the learned Sessions Judge for confirmation of the sentence of death.

5. We heard Shri Latheesh Sebastian, learned counsel for the appellant and Shri S.U.Nazar, learned senior Public Prosecutor.

6. Factual allegations against the appellant, put shortly, are thus: A

skirmish, totally unconnected with the crime in this case, occurred between PW23 Joykutty's son Jyothish and PW29 Aneesh inside a bus eventually resulted in cold blooded murder of PW1 Anumol's first husband, Santhosh Kumar. It is alleged by the prosecution that PW29 is a companion of deceased 1st accused Vineesh, who was a notorious gang leader. Prosecution has a further case that other accused persons are members of his gang. They were involved in various criminal activities in and around

& 7

Thiruvananthapuram City. PW29 deposed that on 10.07.2008, when he was travelling in a bus, his friends picked up a quarrel with some other passengers. According to the prosecution, the accused persons were waiting for an opportunity to retaliate against the assault on one of their gang members. On 11.07.2008, at about 9.00 p.m., the accused saw PW23 and CW10 Murali travelling in an autorickshaw driven by PW24. Accused 1 to 5 formed themselves into an unlawful assembly, having a common object of taking revenge against PW23 and his son

for the incident happened on 10.07.2008. They followed the autorickshaw, in which PW23 was travelling, on two motor bikes. When the autorickshaw reached near the shop of PW19 Ramachandran's brother at Udiyannoor at about 9.10 p.m., the accused 1 and 2 intercepted it. 1st accused caught hold of PW23 and dragged him out. However, PW23 managed to escape from his grip and ran away. Then the accused persons questioned the autorickshaw driver (PW24 Navab Majeed) for not stopping the vehicle when they demanded to do so. There was a scuffle between the accused and PW24. When PW19 intervened, at about 9.15 p.m., the 1st accused took out a sword, concealed inside his shirt, and inflicted cut injuries on PW19's right shoulder and right wrist. CW10 Murali ran away on seeing this incident. PW24 also took to his heels. PW19, on receiving injuries, also ran behind PW24 and the accused 1 and 2 chased them. At that time, deceased Santhosh Kumar came out of his house at about 9.20 p.m. On seeing Santhosh Kumar, the appellant called out that he

& 8

was the person they were looking for. He exhorted to kill Santhosh Kumar. Accordingly, 1st accused inflicted a stab injury on the abdomen of the deceased by using a sword. Appellant (2nd accused) inflicted two fatal blows on his head with a knife. The accused persons committed the offences in furtherance of their common object. Santhosh Kumar succumbed to the grave injuries sustained in the incident. Thereafter, the 6 th accused harboured the accused 1 and 2 in his house for screening them from legal consequences of their acts. Hence prosecution contended that all the accused are liable to be punished. However, only the 2 nd accused remains convicted and sentenced. Acquittal of others has become final as there is no appeal by the State or any victim.

7. Santhosh Kumar died on account of multiple stab and cut

injuries is an undisputed fact. Ext.P29 postmortem certificate proved through PW31 Dr.Sreekumari, then Professor of Forensic Medicine, Medical College Hospital, Thiruvananthapuram will substantiate the prosecution case that Santhosh Kumar was a victim of gruesome murder. Ante-mortem injuries noted on Ext.P29 read as follows:

Injuries (Ante-mortem) : Incised penetrating wound 4 x 1.5 cm, oblique on the abdomen its lower inner end at the right edge of umbilicus and upper outer end 11 cm below costal margin which showed a tailing 3.5 cm long directed upwards and to the right. Underneath the jejunum (4 x 2 cm) and its mesentery (2 x 1.5 cm) were found cut, 33.5 cm below the duodeno- & 9 jejunal junction, greater omentum (5.5 x 2.5 cm), root of mesentery (3.8 x 0.2 cm) were found pierced beneath and the wound terminated in the lumen of the left common iliac artery just below its origin. The wound was directed backwards, slightly downwards and to the left for a depth of 11.5 cm. The abdominal cavity contained 1500 ml of blood and 800 g of blood clot. Both ends of the wound were sharply cut.

2. Incised wound 7 x 0.5 cm, bone deep, oblique, on the

back of left side of head, its lower inner end 5 cm to the left of midline and 5 cm above occiput. The parietal bone underneath showed a cut 4.5 x 0.2 x 0.2 cm involving its outer table and diploe with chipping of the front lower edge. Brain pale and oedematous.

3. Incised wound 4.5 x 0.2 x 0.5 cm, sagittally placed on the left side of head, its back end being 10.5 cm above the top of ear.

4. Superficial incised wound 5.3 x 0.2 cm oblique on the outer aspect of right arm its upper front tapering end situated seen below shoulder tip, showed a tailing 0.5 cm long.

5. Abrasion 3 x 1 cm on the back of right elbow.

PW31 clearly expressed her opinion in the postmortem certificate that the victim died due to the injuries sustained to abdomen and head. According to her testimony, injuries 1 and 2 are sufficient in the ordinary course of nature to cause death. Injuries 3 and 4 are relatively simple in nature. At the time of chief examination, PW31 deposed, on seeing MO1 sword, that injury no.1 could have been caused by using the weapon. Likewise, when MO2 knife

was shown to this witness, she deposed that injury nos. 2 and 3 could have been caused by it. When cross-examined by the learned counsel for appellant, PW31 stated that the investigating officer had shown the weapons to her on 27.10.2008 and 17.11.2008. When asked about the presence of sand on the weapons, she deposed that even if there had been sand on them, it would have been lost by that time. It is pertinent to note that no cross-examination was done on this witness by the counsel for appellant to disprove her version that injury nos.2 and 3 could be inflicted by using MO2 knife. We have no difficulty in finding from the materials available on record that Santhosh Kumar succumbed to a murderous assault.

8. It is relevant to note that material prosecution witnesses refused

to support the prosecution case as the way they wanted it. According to the prosecution, deceased Santhosh Kumar's mother was present at the time of incident and she had witnessed her son receiving injuries at the hands of deceased 1st accused and the appellant. However, without offering any explanation, prosecution did not examine her before the trial court. Even though a statement, purported to be given by her to a Magistrate under Section 164 Cr.P.C., was marked, we have no hesitation to hold that it has no legal effect in advancing the prosecution case as it has no evidentiary value.

9. Law is well settled that statement of a witness recorded under Section 164 Cr.P.C can be used for corroboration and contradiction. & 11

Certainly, both these things can be attempted only when maker of the statement is examined. Indisputably, statement of a person, recorded under Section 164 Cr.P.C., who is alive and available for tendering evidence cannot be used as evidence in relation to the matters stated therein, unless he/she had been examined as a witness at the trial. Then only it can be used for corroboration or contradiction. Mere marking such a statement without examining the maker, if available for adducing evidence, will be of no legal consequence.

10. Star witness for the prosecution is PW1 Anumol. As mentioned

earlier, deceased was her first husband. In the chief examination, she deposed that on 11.07.2008 at about 9.15 p.m her husband heard a hullabaloo from the side of PW19 Ramachandran's elder brother Balan's shop. After a short while, PW19, his wife and children came to PW1's house and informed that some people were altercating near the shop. They also told that PW19 sustained a cut injury. Then deceased Santhosh Kumar went to the side of Balan's shop. His mother (PW1's mother-in-law) also accompanied him. Thereafter, PW1 took her small child and went out to know what had happened. When PW1 was passing through the pathway running through backside of PW19's house, she found her husband laterally lying on the pathway. In fact, she had gone there on hearing his cry. When PW1 rushed to the place where her husband had fallen on to the ground, she saw her mother-in-law trying to wake him up. At that time, PW1 found

& 12

two persons standing by his side. A tall man found there was identified as deceased 1st accused and a short one was the appellant. 1 st accused was holding a sword and the appellant was possessing a knife. Both the weapons were bloodstained. PW1's mother-in-law rushed to call her elder son. At that time, 1st accused hit PW1 with a bottle and slapped on her left cheek. Appellant caught hold of PW1's hair lock and pulled. PW1 pleaded not to cause hurt to her husband. Then somebody called out that police party was approaching. Accused fled from the scene. She deposed in chief- examination that when she reached at the place of occurrence, she saw the 1st accused causing hurt to Santhosh Kumar. At that time, the appellant was standing with him.

11. Since PW1 refused to speak out in the manner expected by the

prosecution, with the permission of the court, the prosecutor put questions to her which might be put in cross-examination by the adverse party by invoking the provisions under Section 154 of the Evidence Act, 1872 (in short, Evidence Act) and proviso to Section 162 Cr.P.C. It is the defence case that the incident had happened at a time when there was power cut in the area. On the west of PW19's house, Sri Sri Ravi Shanker Ashramam was located. In the Ashramam, there was electric light at the material time. When a question was put by the prosecutor, PW1

answered that she did not say that the 1st accused inflicted injury on her husband with a sword and the 2nd accused stabbed him with a Rambo knife. But she deposed that she had

& 13

seen a sword in 1st accused's hand and a Rambo knife in 2nd accused's hand. She also deposed that she had occasion to see both the accused 1 and 2 from the place of occurrence. When suggested to PW1 that after the incident, deceased Santhosh Kumar's brother Rajendran (PW27) killed the 1st accused, she feigned ignorance about this incident. PW1 admitted during examination that she married one Shiburaj four years prior to her deposition and she wanted to lead a peaceful life. PW1 further deposed that she knew from police station that the accused persons are hardcore criminals and she was afraid of such people. According to her testimony, even at the time of giving evidence she was fearful of speaking against the gangsters. PW1 candidly agreed to the suggestion by the prosecutor that she saw the accused 1 and 2 inflicting injuries on deceased Santhosh Kumar and she could identify them. Prosecution contention that she deposed in court in favour of the appellant because of terrible fear is also plainly admitted by her. All these suggestions are frankly admitted by PW1. She further admitted that she could identify the assailants and weapons.

12. PW1 identified the dress materials worn by deceased Santhosh Kumar at the time of incident. She identified MO1 sword allegedly used by the 1st accused.

13. PW1 clearly testified during the examination by prosecutor that MO2 knife was in the possession of the appellant. To a specific question by the prosecutor, PW1 deposed that with MO2 knife, the appellant had inflicted & 14

a cut injury on Santhosh Kumar's head. When PW1 identified Rambo knife from court as the one possessed by the appellant and used for causing injury on Santhosh Kumar, it was marked as MO2. This witness too had given a statement under Section 164 Cr.P.C.

14. Learned counsel for the appellant contended that on reading

through the testimony of PW1, no material to infer the alleged role played by the appellant in killing Santhosh Kumar could be seen. According to him, tenor of evidence adduced by PW1 would indicate that deceased 1st accused was solely responsible for the death of her husband. Per contra, learned senior Public Prosecutor would contend that admission elicited from PW1 at the time of examination on behalf of the prosecution would show the real role played by the appellant in the incident. According to him, PW1 plainly admitted that she deviated from the prosecution case out of fear of retaliation by the gangsters. She also deposed that she could identify the aggressors and weapons used by them. Further, during the prosecutor's examination, she had deposed that the appellant inflicted cut injuries on her husband's head by using MO2 knife. All these facts deposed to by PW1 remain unaffected even after the cross-examination done on behalf of the appellant. Interestingly, none of the statements of PW1 accusing the deceased 1st accused was challenged in the cross-examination. It is, therefore, argued by the learned prosecutor that the trial court is justified in placing reliance on the testimony of PW1 to find guilt of the accused. Merely because she was

& 15 found to be deviating from the prosecution case to some extent, her testimony cannot be discarded in its entirety. Moreover, the testimony of PW31 and recitals in Ext.P29 post-mortem certificate also support the versions of PW1.

15. On a careful perusal of the cross-examination done on PW1 at

the behest of the appellant, we find no challenge against any of the above aspects deposed to by this witness. When she was cross-examined by learned counsel for the appellant, she testified that MOs 1 and 2 weapons were identified not because they were found in the court, but she had opportunity to see them at the place of occurrence.

16. PW1 was re-examined by the learned prosecutor. At that time

she admitted that all the accused, except deceased 1st accused, were present in court and she identified each one of them. It also came out in evidence that the place of occurrence was lit up by electric light in the nearby Ashramam and a gas agency, as there was power supply at that time. PW1 emphatically stated that the

accused persons were responsible for her husband's death. None of these aspects was cross-examined by the learned counsel for appellant despite her affirmation in the re-examination. Her deposition needs to be appreciated in the backdrop that she was scared of the aftermath of deposing against the gangsters. Therefore, we are of the view that PW1's testimony clearly implicates the appellant in the crime.

17. Another witness worthy of mention is PW19. He is an injured & 16

witness. As stated above, the 1st accused inflicted an injury on PW19 before killing Santhosh Kumar. PW19 testified only against deceased 1st accused. According to him, 1st accused along with some other persons came on two motor bikes and demanded where the persons travelled in PW24's autorickshaw had gone. There was a wordy duel between PW24 and 1st accused. According to PW19, without any provocation the 1st accused inflicted a cut injury to him with a sword. When he cried out, his wife and children came to the place. All of them ran towards deceased Santhosh Kumar's house. At that time, deceased Santhosh Kumar and his mother came out. 1st accused, who was chasing PW19, stabbed Santhosh Kumar with the same sword. PW19 did not utter a word against the appellant. He failed to identify MO2 Rambo knife. At this juncture, with the permission of the court, learned prosecutor put questions to him which might be put in cross-examination by the adverse party. When his statement under Section 164 Cr.P.C., which is marked as Ext.P19, was read out, he admitted most of the contents therein. In Ext.P19, admittedly he had said that at about 9.15 p.m. on 11.07.2008 while he was present in the shop, the appellant and another person came to his shop. According to his statement, the appellant was previously known to him. He deposed before the Magistrate that the person accompanied the appellant cut his shoulder with MO1 sword. Although this witness pretended ignorance about the identity of the appellant, his admitted versions in Ext.P19 would clearly show that the

& 17

appellant was closely known to him. Learned prosecutor elicited further answers from him indicating that he had previous acquaintance with the appellant. It is

apparent that this witness also refused to depose in terms of his previous statement fearing revenge from the gang members. However, on scanning through PW19's testimony, we find that it supports the version of PW1 to the extent that the appellant was also present at the time of occurrence.

18. PW2 Mohanan Nair resided close to Sri Sri Ravi Shanker

Ashramam, Maruthamkuzhi. Deceased Santhosh Kumar was also staying adjacent to the Ashramam. At about 9.30 p.m. on 11.07.2008 PW2 shifted the deceased in his car to S.K.Hospital, Edapazhanji and he was declared dead. PW3 Jabbar is a witness to Ext.P2 mahazar for seizing a motor bike bearing no.KL 01 AQ 365. It is the prosecution case that this is one of the motor bikes used by the accused. PW4 is a Head Constable, Poojappura Police Station, who received the dead body after postmortem examination from Medical College Hospital, Thiruvananthapuram and entrusted to a relative of the deceased. PW5 Assistant Sub Inspector, Poojappura Police Station collected blood samples and prepared Ext.P4 mahazar for that purpose. PW6 is the Village Officer who prepared the site plan Ext.P5. PW7 is the Assistant Executive Engineer, Thirumala Electrical Section, Kerala State Electricity Board. He proved Ext.P6. He was examined to show that at the time of occurrence there was power supply in the locality and power cut

& 18

in the area was between 7.00 - 7.30 p.m. He clearly stated that on 11.08.2008 there was power supply in the area and no power cut was imposed between 9.00 - 9.30 p.m. Further fact that there was sufficient light in the area to clearly see and identify the assailants was also elicited from him. In fact, no serious attempt was made by the learned defence counsel to challenge identification of the appellant. It has come out in evidence that he is a person residing in a nearby place.

19. PW8 is the father of 4th accused. According to him, the appellant

is not his relative. Accused 3 and 4 were classmates and friends. PW9 is a witness to Ext.P8 mahazar. He refused to support the prosecution version that MO2 knife

was recovered at the instance of the appellant while in custody. According to him, he saw MO2 knife for the first time from the court. With court's permission, learned prosecutor put questions to him which might be put in cross-examination by the adverse party. At the material time he was an autorickshaw driver. Learned prosecutor contended that answers given by this witness would go to show that he purposely uttered falsehood fearing the accused. Fact remains that he did not support the prosecution case regarding recovery of MO2 knife said to have been effected under Section 27 of the Evidence Act.

20. PW10 Suresh Kumar is a signatory to Ext.P22 inquest report. He initially deposed in chief-examination that he had signed the inquest report and in the next breath said that he did not sign. Apparently this & 19 prevarication is on account of fear of the accused gang.

21. PW11 is a witness to Ext.P9 mahazar through which a motor bike bearing no.KL-01 R 6148 was seized. He also did not fully support the prosecution case.

22. PW12 Dr.Sumi Mithra is the Scientific Assistant, Forensic Science Laboratory, Thiruvananthapuram. She collected samples from the crime scene. Her evidence may not be of much significance to the prosecution case.

23. PW13 Sunil Kumar was cited to prove recovery of MO1 sword at

the instance of the 1st accused while he was in custody. When he refused to support the prosecution case, learned prosecutor put questions to him, with the permission of the court, which might be put to the adverse party. He came to know that Santhosh Kumar died in an incident in which deceased 1 st accused and the appellant were involved. However, he admitted his signature on Ext.P11 mahazar prepared and proved under Section 27 of the Evidence Act.

24. PW14 Dr.Premlal examined PW19 Ramachandran when he was

taken to Medical College Hospital, Thiruvananthapuram on receiving cut injuries. Ext.P12 wound certificate would show that PW19 had sustained two incised wounds, one on right shoulder and the other on right wrist.

25. Now, we shall consider the testimony of PW20 Prasannan, who was the Sub Inspector. He registered Ext.P20 first information report. & 20

According to him, while he was working as such in Poojappura Police Station on 11.07.2008, he got an intimation at about 9.30 p.m. that the incident had happened. Thereafter, at 12.30 in the night, he came to know that Santhosh Kumar died and PW19 Ramachandran was admitted to a hospital. He recorded (Ext.P18) first information statement (FIS) from Ramachandran. PW20 deposed that PW19 was conscious and he voluntarily gave the statement. In cross-examination, PW20 deposed that PW19 had mentioned names of the assailants when he gave Ext.P18 FIS. It is relevant to note that PW19 has no case that he did not furnish the details in Ext.P18. He clearly admitted that he gave Ext.P18 and signed it. Clear allegations can be seen against the appellant in Ext.P18. However, PW19 did not support the versions against the appellant as seen in Ext.P18.

26. PW23 Joykutty, whose son picked up a quarrel with PW29

which triggered the incident, deviated from the prosecution case. According to him, he gave a statement under Section 164 Cr.P.C. before a Magistrate accusing the accused 1 and 2 because he was fearing that police might take revenge against him if he did not support the prosecution case. On an evaluation of his evidence, it is clear that he deserted the prosecution case apprehending retaliation by the accused.

27. PW24 Navab Majeed, in whose autorickshaw PW23 and CW10 were travelling, also refused to support the prosecution case. Nothing worthwhile could be elicited in his cross-examination. & 21

28. PW26 Latha, who is the wife of PW19 Ramachandran, during

chief-examination itself deposed that she was having a sense of insecurity and fear for testifying in court. She also deposed against the 1 st accused alone. She refused to implicate the appellant in the crime. Prosecution would contend that she was threatened by the accused.

29. PW27 Rajendran is the brother of deceased Santhosh Kumar.

His mother informed him about the incident in which Santhosh Kumar died. When he also showed a disinclination to support the prosecution case, learned prosecutor, with the permission of court, put questions which might be put in cross-examination by the adverse party. During the examination by the learned prosecutor he stated that the appellant along with other accused came on a bike prior to the incident. It was suggested to this witness that he was responsible for killing the 1<sup>st</sup> accused Vineesh and the appellant is a prime witness in that case. Further, as there was a deal between the appellant and PW27 to extricate the latter from prosecution in the other case, he was going soft on the appellant. Although these suggestions are denied by PW27, enough probabilities could be seen to account for his refusal to support the prosecution version despite his brother lost his life in the incident.

30. PW28 Rajesh was examined to show that there was light in the gas agency adjacent to the place of occurrence. He deposed that since there was illumination in Sri Sri Ravi Shankar Ashramam and neighbouring shops, & 22 no light was put on in the gas agency. Fact remains that there was enough light to identify the aggressors.

31. PW32 Hareendran was the Assistant Sub Inspector, Poojappura Police Station, at the material time. He recovered motor bikes involved in the case.

32. PW33 Satheeshkumar was the Judicial First Class Magistrate-I, Thiruvananthapuram, who recorded statements under Section 164 Cr.P.C. of PWs 1, 19, 23 and 24 and CW8. There was no cross-examination on this witness.

33. PW34 Thomas Alexander was the Assistant Director Serology,

Forensic Science Laboratory, Thiruvananthapuram. He examined the bloodstained cloths worn by the deceased and other material objects collected from the crime scene. Dress materials were smeared with human blood.

34. PW35 Sandhya Kumar was a police constable attached to the

Assistant Commissioner of Police, Cantonment Police Station. This witness went along with the Assistant Commissioner of Police Ramachandran (PW38) to arrest

the appellant. They reached at about 7.00 p.m. near Central Railway Station. Appellant (2nd accused) was arrested from a place adjacent to platform no.1. Ext.P38 is the arrest memo. Ext.P61 is the arrest intimation given to his father. Ext.P62 is the inspection memo pertaining to the appellant. Ext.P63 is the remand report relating to this accused.

& 23

35. PW35 was also a witness to the recovery of MO2 knife said to

have been made at the instance of the appellant. On 27.10.2008 at about 9.00 a.m., as per the confession statement of the accused while in custody, PW38 Ramachandran along with PW35 and other officers went to Vikram Sarabhai Space Centre (VSSC) compound. Appellant, after removing dry leaves and sand, took out MO2 knife kept in its sheath. Sheath is marked as MO10. Mahazar prepared for the recovery of MOs 2 and 10 under Section 27 of the Evidence Act is marked as Ext.P8. Both PWs 35 and 38 identified MO2 knife at the time of trial. Appellant's confession statement is marked as Ext.P8(a). PW35 identified the appellant from the dock. Despite cross-examination by the learned defence counsel, no dent or discredit could be made in the credibility of this witness. Although PW9 Radhakrishnan refused to support recovery of MO2 knife at the instance of the appellant and Ext.P8 document, this witness clearly supported the prosecution case, especially recovery of MO2 knife at the instance of the appellant while in custody. Testimony of this witness gets corroboration from that of PW38, the investigating officer as well. He also deposed to the fact of recovery of MO2 in crystal clear terms. In spite of cross-examination, no serious challenge could be made on the credibility of the factum of recovery of MO2 as disclosed by the appellant while in custody.

36. PW37 Baiju conducted initial part of the investigation. He prepared Ext.P28 scene mahazar. Bloodstained material objects were & 24

recovered from the crime scene. He prepared the inquest report Ext.P22 on the dead body of Santhosh Kumar. He questioned material witnesses. 1st accused and other accused, except the appellant, were arrested. According to him, motive

for the incident was a fight between gang members in a bus on the previous day of occurrence. This witness deposed that 1 st accused was killed subsequent to this incident and PW27 Rajendran is the accused in that case. Appellant's father is the 26th witness in that murder case. Prosecution, therefore, would contend that many of the relatives and friends of deceased Santhosh Kumar showed a visible disinclination to support the prosecution case in order to disentangle PW27 Rajendran from the murder case. Even though PW37 was cross-examined at length, we find nothing worthwhile elicited at the instance of the appellant.

37. PW38 Ramachandran took over investigation from PW37 and

arrested the appellant as stated above. He effected recovery of MO2 knife and its sheath from VSSC compound. Learned counsel for the appellant strenuously argued that VSSC compound is a high security zone and it could not have been possible to enter the compound without obtaining permission from the security personnel. No document is produced to show that police had approached the VSSC authorities seeking permission. In answer to this submission, learned prosecutor, relying on the testimony of PW38, would contend that recovery of MO2 was effected from an area where officers' quarters are located and there is no tight security in the area as the residents

& 25 and other visitors are allowed to have a free ingress and egress. Hence, we cannot discard the evidence given by witnesses to substantiate the recovery of MO2 knife under Section 27 of the Evidence Act.

38. Another contention raised by the learned counsel is that no sand

particle was detected on MO2 despite the recovery mahazar and testimony of PW35 would go to show that the knife was buried in sand. Prosecution witnesses, including PW31 Dr.Sreekumari, have given an explanation that sand particles must have been found missing by efflux of time. Further, the knife was inside a sheath. Hence, we find no merit in this contention. Even though PW38 deposed that so many criminal cases have been registered against the accused 1 and 2, except his deposition, no document is produced to substantiate this prosecution case. On a perusal of the testimony of PWs 37 and 38, we find that the

investigation was proper and the officers have gone into every aspect of the crime. Allegations levelled by PW38 against the appellant have been validated by his undented testimony.

39. Learned counsel contended that the testimony of PWs 1 and 19

cannot be relied on to enter a conviction on the appellant. According to him, these witnesses failed to support the prosecution case as borne out from the final report. In short, it is contended that they deserted the prosecution case. Referring to various decisions, Hon'ble Mr. Justice U.L. Bhat, in his work *Relevancy, Proof and Evaluation of Evidence in Criminal Cases*, at page 147, has stated thus:

& 26 The word hostile is not appropriate and could be avoided. That is because; the word does not find a place in the Evidence Act. The discretion conferred by section 154 on the court is unqualified and untrammelled, and is apart from any question of hostility. The grant of such permission does not amount to adjudication by the court as to the veracity of the witness. The court can permit cross-examination of a hostile witness. Leading questions and confrontation with Case Diary statements (by prosecutor of a prosecution witness) are permitted. Discretion to permit cross-examination must be judiciously and properly exercised. There must be some material to show that the witness is not speaking the truth or has exhibited an element of hostility to the side, which called him. Speaking the truth even if it is against prosecution is not a ground to treat him hostile. Evidence is not washed off the record. It is for the Judge to consider in each case whether the witness stands thoroughly discredited or can still be believed in regard to a part of his evidence. If the evidence is not completely shaken, the court may, after considering his evidence as a whole with due care and caution, accept in the light of other evidence on the record, that part of his evidence which is found creditworthy and act upon it. The testimony of such a witness may not be rejected outright. ...

Above propositions in law are amply supported in Anil Rai v. State of Bihar (AIR 2001 SC 3173) and Radha Mohan Singh v. State of Uttar Pradesh (AIR 2006 SC 951). & 27

40. Learned Prosecutor relied on the following observations in Devraj v. State of Chhattisgarh (AIR 2016 SC 3498):

The evidence of a witness who has been declared hostile can be relied if there are some other material on the basis of which said evidence can be corroborated. Moreso, that part of evidence of a witness as contained in examination-in-chief, which remains unshaken even after cross-examination, is fully reliable even though the witness has been declared hostile.

We have mentioned earlier that no cross-examination was ever attempted on PWs 1 and 19 in respect of their emphatic testimony against deceased 1 st accused that he stabbed on the deceased's belly with MO1 sword resulting in the first injury noted on Ext.P29 postmortem certificate. Similarly, the answers elicited from PW1 by the prosecutor regarding the role played by the appellant and causation of injury no.2 on the deceased's head with MO2 knife also was not touched in cross-examination done on behalf of the appellant.

41. Law is well settled that court should be slow to act on the

testimony of a witness who do not fully support the prosecution case and normally it should look for corroboration (see - Karuppanna Thevar v. State of Tamil Nadu - AIR 1976 SC 980 and State of Rajasthan v. Bhawani - AIR 2003 SC 4230). It is axiomatic, corroboration is a rule of prudence for satisfying the test of reliability. That part of the witness's evidence found believable can be used for the purpose of corroborating the evidence of

& 28 other witnesses. Legal proposition that evidence which is not shaken by cross-examination cannot be brushed aside has been declared in many binding precedents.

42. Viewing in this background, we are of the view that PW1, though

did not speak exactly in terms with her previous statements in the manner the prosecution wanted, has deposed supporting the core of the prosecution case and clearly implicated the appellant for using MO2 knife to inflict cut injury on the head of the deceased. Testimony of PW19, albeit not established any overtact on the part of the appellant, establishes his presence at the time of occurrence along with deceased 1st accused. Apart from this, testimony of PW31 based on Ext.P29 postmortem certificate also probabilises the versions spoken to by PW1 against the appellant. Hence, we are unable to accept the arguments raised on behalf of the appellant, that evidence tendered by PW1 cannot be relied upon, because the attending circumstances borne out from the testimony of the aforementioned witnesses, clearly corroborate her versions.

43. Indisputable is the proposition that it is open to the court to

convict an accused on the basis of the evidence of a single witness, though it is always advisable to look for corroboration. No doubt, whether the court should seek corroboration or not depends on the facts and circumstances in each case. Section 134 of the Evidence Act unequivocally states that no particular number of witnesses shall in any case be required for the proof of

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any fact. Conviction can be recorded on the basis of the evidence of a single eye witness provided his credibility is not shaken by any adverse circumstance appearing in the record against him and the court, at the same time, is convinced that he is a truthful witness. The court will not then insist on corroboration by any other eye witness. Indeed, the court insists on the quality, and, not on the quantity of evidence (see - Kartik Malhar v. State of Bihar ((1996) 1 SCC 614).

44. In this case, it has come out in evidence that the appellant and

deceased 1st accused were members of a dreaded gang. They were allegedly involved in various criminal cases in and around that locality. PWs 1 and 19 explicitly admitted that they were afraid of the gang. Other witnesses also testified

in the same manner. In the peculiar facts and circumstances of this case, it may be idle to expect corroboration regarding the incident from multiple witnesses. True, there is no material brought out by the prosecution as to why the mother of the deceased was not examined. That by itself cannot be a reason to discard the testimony of PW1, especially when she spoke about the role of the appellant in spite of her fear for life. Pertinently, the appellant has no case that PW1 testified against him on account of any previous enmity.

45. As mentioned above, the witnesses were terribly petrified even at the time of examination, apprehending retaliation from the gang members if they did speak against them. It is held in *Rana Partap v. State of Haryana* & 30

(AIR 1983 SC 680) that evidence of a witness cannot be rejected on the ground that he did not behave in a particular manner. Every person who witnesses a murder reacts in his own way. Some are stunned and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves safe. Yet others rush to rescue the victim. Each person reacts in a special way. There are no set of rules of natural reactions. People react differently in similar situations. It is difficult to probe into the minds of people as to how they act in a particular way.

46. Prosecution case is that the material witnesses were afraid of

speaking against the appellant and other accused persons since they were members of a notorious gang. This contention is strongly opposed by the learned counsel for the appellant. He argued that the appellant, though was released on bail initially, was again taken into custody for violating the bail conditions on 14.01.2015 and he, therefore, was in judicial custody at the time of recording evidence in this case. As per the calendar appended to the impugned judgment, trial of the case commenced on 25.07.2016 and closed on 06.10.2016. During that period, the appellant was in custody. It was, therefore, argued on behalf of the appellant that the prosecution witnesses had no occasion to worry about any retaliation. Learned prosecutor, in answer to this contention, submitted that only the appellant was inside the prison, but other accused were on bail. Further, other members of the gang

& 31 were looming large at that time. Hence, the witnesses' apprehension is justified, contended the learned prosecutor. We are of the view that the appellant's judicial custody may not alleviate fear from the minds of material witnesses and that fact is evident from the manner in which they testified before the court.

47. Another contention raised by the learned counsel for the

appellant, relying on *Sukhram v. State of M.P.* (AIR 1989 SC 772), that when the versions given by prosecution witnesses conflict with each other, conviction of an accused should not be resorted to. On a perusal of the evidence tendered by PWs 1 and 19, we find no conflict, though PW19 did not fully support the versions of PW1. When we notice the clear distinctions in the facts in this case and in *Sukhram's* case, we find the principles laid down therein will have no application to this case.

48. PW1 should be regarded as an interested witness since her

relationship with the deceased was husband and wife at the material time. The expression interested witness postulates that the person concerned must have some direct interest in seeing that the accused person is convicted or in otherwords, he/she has an interest in the result of the prosecution. Merely because of the interestedness of a witness, his/her testimony cannot be discarded, if it is natural and credible. Evidence tendered by such a person becomes tainted only if he or she has a reason or motive for falsely implicating the accused (see - *Dalip Singh v. State of*

& 32 Punjab - AIR 1953 SC 364 and *Kartik Malhar* (supra)).

49. On an assessment of PW1's testimony, we find no reason

brought out in the cross-examination to think that she had any special reason to speak against the appellant or to implicate him falsely in the crime. Material evidence adduced by the prosecution clearly establish the fact that the appellant had inflicted an incised injury on the back of left side of the deceased's head (injury no.2 in Ext.P29) which according to PW31 was sufficient in the ordinary course of nature to cause death. Therefore, the appellant should be held liable for

his independent act. In this perspective, we are of the view that the trial court is justified in convicting the appellant for an offence of murder along with other offences.

50. After having found as above, we shall examine the applicability

of Section 34 IPC in this case to rope the appellant with a constructive criminality. Learned counsel for the appellant vehemently argued that court below committed a serious error in finding that the appellant is guilty of the offences with the aid of Section 34 IPC. According to him, when PW1 testified mainly against deceased 1st accused and PW19 solely against him, the appellant should not have been held liable for the offences by invoking the joint criminal liability enshrined in Section 34 IPC. It is contended that the allegations made by PWs 1 and 19 against deceased 1st accused cannot be regarded as evidence against the appellant and such allegations can have no impact on him. Since the 1st accused died much before commencement

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of the trial, deposition by the witnesses speaking against him cannot be regarded as evidence adduced in a trial, when he did not participate in it. Learned counsel, on this premise, contended that whatever said by the witnesses against deceased 1st accused cannot be used against the appellant. It is also contended that there is no material on record to implicate the appellant for his independent criminal action. We straight away reject the last contention of the learned counsel because we have already found that there are enough materials to hold that the appellant too had inflicted an injury on the deceased, which was independently sufficient to cause his death.

51. Now we shall examine the applicability of Section 34 in this

case. We may recapitulate, in brief, the evidence adduced by PWs 1 and 19 for appreciating this contention. PW1 deposed that when she rushed to the place, where her husband lay with bleeding injuries, she found deceased 1 st accused and the appellant standing by his side. At that time, 1 st accused was holding a

sword and the appellant was wielding MO2 knife. It is further deposed to by PW1 that both the sword and knife were bloodstained. It is her version that when she pleaded to the accused 1 and 2 not to cause hurt to her husband, they physically assaulted her. As mentioned earlier, to a specific question put by the learned prosecutor, PW1 admitted that MO2 knife was used by the appellant to inflict injury no.2, noted in Ext.P29, on the deceased.

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52. It is pertinent to note that the matters spoken to by PW1 against

deceased 1st accused were not touched in the cross-examination done at the behest of the appellant. Despite PW1 admitting to a suggestion put by the learned prosecutor that she deviated from her previous statement, that she saw accused 1 and 2 participating in the crime, out of fear of suffering harm at the hands of the criminal gang, this aspect also was not challenged in the cross-examination.

53. PW19, an injured witness, clearly deposed that the 1st accused

came chasing the passenger in PW24's autorickshaw and in the course of an altercation happened in front of his brother's shop, the 1st accused inflicted a cut injury on his shoulder. True, he did not level any allegation against the appellant. This witness affirmed in chief-examination that while he ran to the house of deceased Santhosh Kumar, he and his mother came out. And at that time, the 1st accused Vineesh inflicted a stab injury on the abdomen of the deceased. This deposition is not at all disputed in the cross-examination on behalf of the appellant probably thinking that the entire allegations in PW19's deposition would affect only deceased 1st accused. On a perusal of PW19's evidence, it will be clear that he has directly implicated the 1st accused for causing one of the fatal injuries, viz., one on the abdomen of the deceased. Still, this was not challenged in the cross-examination.

54. If the allegations against deceased 1st accused were not challenged in the cross-examination at the behest of the appellant, certainly & 35

they will bind him in the peculiar nature of the charge that he was called upon to answer. In other words, prosecution allegation that the appellant, as a member of an unlawful assembly, formed with the common object of committing the alleged offences, has committed the crime would take in the criminal liability for his individual action, if established, and also a joint liability for the actions of other members of the unlawful assembly. In that view of the matter, the appellant owes a legal duty to discredit the prosecution evidence given against deceased 1st accused as well. Otherwise, from the very nature of the charges framed against the accused, including the appellant, they could be held liable for the actions of other members in the assembly.

55. Section 149 IPC is wider than Section 34 IPC. Both these

Sections deal with liability for constructive criminality, i.e., liability for an offence not committed by the person charged. It is an axiomatic legal proposition that in a case under Section 149, if the accused is a member of an unlawful assembly, the common object of which is to commit a certain crime, and that crime has been committed by one or more of the members of that assembly, every person who happened to be a member of that assembly would be liable for the criminal act by virtue of his membership in the assembly, irrespective of the fact whether he actually committed the criminal act or not. Indeed, the appellant is put to notice about the nature of offences alleged against him and others when the charges, including one

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under Section 149 IPC, were framed by the trial court. When law declares that the appellant, if proved to be a member of an unlawful assembly formed with the common object of committing offences, could be held liable for the criminal actions of other members of the assembly, it becomes obligatory on his part to challenge the evidence adduced against any member of the assembly, whether dead or alive. Fact that the 1st accused died before commencement of trial and he cannot, therefore, be convicted on the basis of the allegations made against him could never be a factor favouring the appellant in the light of the principles underlying charge under Section 149 IPC. Further fact, that the trial court ultimately acquitted

other accused persons, will also not absolve the appellant from his legal obligation to challenge the prosecution evidence because the acquittal happens only at the end of trial. Statements given by witnesses on oath at the trial will certainly be evidence in the case, even if it be against a deceased accused.

56. Legally speaking, merely because the 1st accused died before

commencement of the trial, the allegations made by the prosecution witnesses against him will not lose its character as evidence as defined under Section 3 of the Evidence Act. Definition of evidence therein reads thus: Evidence means and includes-

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; & 37 such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence.

It takes in all statements which the court permits or requires to be made before it by witnesses. Certainly, it must be in relation to matters of fact under inquiry. Testimony of PW19 regarding the overtact played by deceased 1st accused squarely falls within the definition of evidence under Section 3 of the Evidence Act. It has come out in evidence through the testimony of PW1 that the appellant was also present at the time when the 1st accused inflicted a stab injury. She goes a bit further and says in the examination by the learned prosecutor that the appellant had inflicted an injury on the deceased's head with MO2. In the absence of any challenge against these versions, they remain acceptable. It appears that the

insinuations against the 1st accused was left untouched on the misunderstanding of law that it may not bind the appellant.

57. True, there is no material to convict the appellant under Section

143, 147, 148 and 149 IPC. It is a well settled legal proposition that even if the accused had not been charged with the aid of Section 34 IPC, instead, they were

charged under Section 149 IPC and on evidence if it was found that five or more persons were not involved in the offence, the court could convict remaining accused with the aid of Section 34 IPC, if it could be seen

& 38 that they had a common intention to commit the crime. Common intention implies a pre-arranged plan and acting in concert pursuant to the plan. Law laid down in *Krishna Govind Patil v. State of Maharashtra* (AIR 1963 SC 1413) is thus:

It is well settled that common intention within the meaning of S.34 implied a prearranged plan and the criminal act was done pursuant to the pre-arranged plan. The said plan may also develop on the spot during the course of 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 under S.302, read with S.34 it should come to a definite conclusion that the said person had a prior concert with one or more other persons, named or unnamed, for committing the said offence.

Unless it is established from evidence that the accused suffered any prejudice by invoking the principle of joint criminal liability under Section 34 IPC, they cannot have any complaint. Long line of decisions are available to support this proposition starting from *Karan Singh v. State of M.P* (AIR 1965 SC 1037). In *Dhaneswar Mahakud and others v. State of Orissa* (AIR 2006 SC 1727) it is held thus:

It is apparent from the decisions rendered by this Court that there is no bar on conviction of the accused appellants with the aid of Section 34 IPC in place of Section 149 IPC if there is evidence on record to show that such accused shared a common intention to commit & 39 the crime and no apparent injustice or prejudice is shown to have been caused by application of Section 34 IPC in place of Section 149.

58. So, there cannot be any valid objection that the court below

went wrong in finding the appellant guilty by invoking Section 34 IPC in the place of Section 149 IPC when the trial court found that there is no evidence to suggest the formation of an unlawful assembly.

59. On an analysis of the testimony of PWs 1 and 19, it can be

clearly seen that the 1st accused inflicted a stab injury by using MO1 on the abdomen of the deceased. That is evident from Ext.P29. PW1 deposed that the appellant was present at that time and he too inflicted injury no.2 in Ext.P29 with MO2 knife. Since his presence with deceased 1st accused and overtact are established by reliable evidence, we have no hesitation to hold that both the accused 1 and 2 had shared a common intention to commit the offences alleged against them.

60. Specific contention raised by the learned counsel for appellant

that evidence tendered against deceased 1st accused cannot be taken into account for mulcting a criminal liability on the appellant is legally unsustainable. As mentioned earlier, the allegations made by the witnesses against deceased 1st accused and the appellant are to be taken together as they are integral parts of the prosecution case. Since the appellant failed to challenge the evidence adduced in the case, including the allegations against him and deceased 1st accused, the entire evidence will have to be

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comprehensively appreciated. When we do so, it is seen that the accusations made against the appellant remain firm and his sharing a common intention with deceased 1st accused to commit the crime is clearly revealed. Hence we have no hesitation to hold that the trial court is justified in invoking Section 34 IPC to find that the appellant shared a common intention with deceased 1st accused to commit the crime.

61. To buttress this legal principle, we may refer to Rajan Rai v.

State of Bihar (AIR 2006 SC 433). Facts would show that the appellant therein was convicted by the trial court under Section 302 read with Section 34 IPC and Sections 3 and 5 of the Explosive Substances Act, 1908. Trial court and appellate court acquitted all the accused, except the appellant. In that case the appellant raised a contention before the Supreme Court that without any evidence he could not have been convicted with the aid of Section 34 IPC when all other accused were acquitted. Apex Court answered this question in paragraph 12 as follows:

12. The last submission to be examined is whether the appellant could have been convicted under Section 302 read with Section 34, IPC for sharing the common intention with accused-Tileshwar Rai for causing the death of the deceased. So far as accused- Tileshwar Rai is concerned, he died before the commencement of trial, as such his prosecution stood dropped which cannot, in any manner, tantamount to acquittal. Shri Mishra submitted that the effect of & 41 dropping the prosecution of Tileshwar Rai would tantamount to his acquittal and relied upon a decision of this Court rendered in the case of Krishna Govind Patil v. State of Maharashtra, 1964 (1) SCR 678, to show that if all other persons were acquitted, one person alone could not be convicted under Section 302 read with Section 34, IPC. In the said decision, a four Judges' Bench of this Court was considering a case in which there were in all four accused persons and all of them were acquitted by the trial court of the charge under Section 302 read with Section 34 IPC. The High Court upheld acquittal of the three accused persons, but convicted the fourth accused under Section 302 read with Section 34, IPC. When the matter was brought to this Court, the conviction was set aside as apart from these four accused persons, there was no other fifth accused and in view of the acquittal of three accused persons, the conviction of the appellant before this Court under Section 302 read with section 34, IPC could not be maintained as there was none else with whom he could have shared the common intention to cause death of the deceased. While acquitting, this Court observed that neither it was the prosecution case that there was any fifth accused person nor was there any evidence to that effect,

meaning thereby that if there could have been any other accused person - known or unknown - other than the four persons tried, the conviction of the appellant before this Court could have been upheld as it could have been said that he shared the common & 42 intention with the fifth unknown accused person to commit the offence. To illustrate the point, if in a case First Information Report is lodged against four persons, known as well as unknown, and tried, out of whom three acquitted, one person can be convicted under Section 302, IPC simpliciter in case it is found that injury inflicted by him was fatal one, but he cannot be convicted under Section 302 with the aid of Section 34, IPC as in view of acquittal of the other accused persons, he cannot be said to have shared the common intention with anybody. On the other hand, if there are three persons, two named and one unknown, whose identity could not be ascertained even during the course of investigation, and upon being put on trial, out of the two named one gets acquitted, the other can be convicted under Section 302 with the aid of Section 34 IPC as it can be said that the convicted accused shared the common intention with the unknown person if there is evidence to that effect. In the present case, all the four eye-witnesses, namely, PWs 2,3,5 and 9, upon whom reliance has been placed by the two courts below, have candidly and consistently stated that the appellant and accused Tileshwar Rai along with other accused persons came to the house of the deceased and threw bomb upon him as a result of which he received injuries and succumbed to the same. We have already found that the evidence of these witnesses has been rightly found to be reliable by the trial court as well as the High Court so far as the appellant is concerned. We do not find any reason & 43 whatsoever to discard their evidence so far as participation of accused Tileshwar Rai in the crime is concerned. From the prosecution evidence it becomes clear that appellant shared common intention with accused Tileshwar Rai to cause death of the deceased. Thus, we have no difficulty in holding that if accused Tileshwar Rai would not have died, on the basis of evidence adduced by the prosecution, which is unimpeachable, he was liable to be convicted under Section 302 with the

aid of Section 34 IPC, but merely because he died before the commencement of his trial and could not be tried, the appellant cannot take any advantage therefrom. For the foregoing reasons, we are of the view that the High Court has not committed any error in upholding convictions of the sole appellant under Section 302 read with Section 34 IPC as well as Sections 3 and 5 of the Act.

In the light of the above declaration of law, we find no merit in the contention raised by the appellant that the court below erred in finding guilt of the appellant by invoking Section 34 IPC.

62. Learned counsel for the appellant strongly contended that if at

all the entire prosecution case is accepted and the appellant is found guilty of murder and other offences, he is not liable for capital punishment. Learned trial Judge has considered many decisions relating to the imposition of capital punishment. Legal principle in *Bachan Singh v. State of Punjab* (AIR 1980 SC 898) and *Machhi Singh and others v. State of Punjab*

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((1983) 3 SCC 470) that when the collective conscience of the society is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, same can be awarded was also considered by the court below. Some other decisions on the same subject, justifying death penalty, were also referred to by the learned Additional Sessions Judge. It is true that the appellant and deceased 1<sup>st</sup> accused were allegedly members of a notorious gang indulging in criminal activities. Even though the investigating officer deposed about some of the crimes in which the appellant was said to have been involved, no material was produced before the court below to substantiate his deposition. Merely because the appellant was a gang member, it cannot be assumed without evidence that his continuance in the society will be a menace to mankind. We are unable to subscribe to the view taken by the learned trial Judge that the appellant should be eliminated from the society by executing him, taking recourse to the

most severe punishment provided in the Penal Code. However, considering nature of the allegations proved against the appellant through material witnesses, we find that he should be appropriately dealt with in the matter of sentence.

In the result, the appeal is partly allowed. Convictions of the appellant under Section 323, 324 and 302 read with Section 34 IPC and Section 27(1) of the Arms Act read with Section 34 IPC are confirmed. & 45

Except the death penalty and period of default sentence imposed on the appellant, all other sentences and fine are confirmed. His death penalty is commuted. For the offence under Section 302 IPC, he shall undergo imprisonment for life and pay a fine of `2,00,000/- (Rupees two lakhs only). In default of payment of fine, he shall undergo imprisonment for a further period of three years. Based on the principles laid down in Union of India v. V.Sriharan ((2016) 7 SCC 1) we hereby direct that the appellant shall not be released from prison before he undergoes actual imprisonment for 25 years. He shall not be entitled to claim parole or any remission of sentence, as provided in the Code of Criminal Procedure, 1973. If fine amount is realised, it shall be paid as compensation under Section 357(1) of the Code of Criminal Procedure, 1973 as directed by the court below. Rest of the directions in the lower court judgment are hereby confirmed.

A.HARIPRASAD, JUDGE. M.R.ANITHA, JUDGE. cks

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