
(2002) 04 MAD CK 0107

In the Madras High Court

Case No : Criminal Appeal No's. 41, 71, 152, 403, 512 and 603 of 1998

Siluvairajan, Parthiban, Desingu Rajan, Kumaresan,
Rajalingam, Vijayakumar and Murugesan @ Chorimuthu

APPELLANT

Vs

State by Inspector of Police, Suseendram Police Station,
Kanniyakumari District

RESPONDENT

Date of Decision : 22-04-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Penal Code, 1860 (IPC) — Section 147, 149, 302, 304(2), 341

Citation : (2002) 04 MAD CK 0107

Hon'ble Judges : R. Balasubramanian, J; A.S. Venkatachalamoorthy, J

Bench : Division Bench

Advocate : M. Kalyanasundaram, for Md. Fiaz Hussain and K.J. Bharath Mohan, A. Jagadeeswari, C. Thanaseelan, G.R. Edmund and S. Arunachalam and V. Gopinath, for L. Mahendran and C. Christopher, for the Appellant; E. Raja, Additional Public Prosecutor, for the Respondent

Judgement

R. Balasubramanian, J.—The appellants in these batch of appeals, except the appellant in C.A.No.512 of 1998, are the respective accused in S.C.No.123 of 1996 on the file of Court of Sessions, Kanyakumari Division at Nagercoil. At the end of trial, A.1 and A.2 stand convicted for offences under Sections 147 and 302 I.P.C.; A.3 and A.4 for offences under Sections 147 and 302 read with 149 I.P.C.; and A.5 and A.6 for offences under Sections 147, 341 and 302 read with 149 I.P.C. For the offence of murder direct and with the aid of Section 149 I.P.C. each one of the convicted accused stands sentenced to undergo life imprisonment. In view of the maximum sentence having been imposed on the convicted accused, we are not referring to the sentences imposed on them for the other offences. Heard Mr. V. Gopinath, learned Senior Counsel appearing for A.1 and A.2, Mrs. A. Jagadeeswari, learned counsel appearing for A.3, Mr. M. Kalyanasundaram, learned Senior Counsel appearing for A.4, Mr. C. Thanaseelan, learned counsel appearing for A.5 and Mr.S. Arunachalam, learned counsel appearing for A.6,

while the State is defended by the learned Additional Public Prosecutor. Heard Mr. G.R. Edmund, learned counsel appearing for the appellant in C.A.No.512 of 1998 and the learned Additional Public Prosecutor for the State. It would be noticed here that C.A.No.512 of 1998 is directed against the judgment of the Lower Court ordering confiscation of M.O.11.

2. The facts of the prosecution case are as follows:-

(a) Sundaralingam is the deceased in this case. P.W.1 is his younger brother. P.W.1 and the deceased were living as one family in the southern part of South Therivilai. P.Ws.2 and 4 are residing at Uthandan Kudiyruppu. In South Therivilai there are two factions. One belonging to southern part of South Therivilai and the other belonging to the northern part of South Therivilai. The accused belong to the other half. A.1 and A.2 are brothers while A.3 to A.6 are their relatives. The occurrence was on 6.6.1995. Even 1 1/2 years prior to the occurrence the two groups of people were pitted against each other due to various causes. The substantial cause is pendency of litigation between the two groups. Rajkumar is the younger brother of A.1. He died. The accused, suspecting that the deceased in this case is the cause for the death of Rajkumar, want to finish him off. One Shenbagalingam Nadar, a resident of Ariyaperumalvilai died. He died on the date of occurrence. P.W.1 and the deceased attended the condolence at 10.00 a.m. on that day and they were returning home at 12.00 noon. They were travelling in a motor-cycle marked in this case as M.O.4 belonging to P.W.1. The deceased had a coconut Thope with a pump-set. P.W.1 and the deceased went to the pump-set to have their bath. P.Ws.2 and 4 also had their bath in the same pump-set. It was around 1.30 p.m. All of them left the pump-set. The deceased was going ahead of them towards the place where the motor-cycle was parked. A.1 to A.4 were there each armed with fire wood log.

(b) A.5 and A.6 prevented the deceased from taking the motor-cycle. A.1 had proclaimed pointing out at the deceased that it is he, who killed his younger brother Rajukumar and therefore he should not be spared. All the accused chased the deceased. The deceased ran towards the field of one Vedamani near the house of Thomas. All the accused chased and surrounded the victim. A.1 with the fire wood log attacked twice on the head of the victim. This was followed by A.3 and A.4 each causing an injury with the fire wood on the right leg knee and left hand wrist. The wrist watch which the victim was wearing on his hand fell down. A.2 with the fire wood in his hand hit on the head of the victim once. The victim fell on his back. P.Ws.1,2,4 and 5 witnessed the occurrence. All the accused throwing the weapon of offence near the fence, ran towards south. Sundaralingam died on the spot. P.Ws1 and 2 reached the police station where P.W.1 gave the complaint. Ex.P.1 is the complaint in which P.W.2 had signed as a witness. M.Os.1,2,3,5 and 6 are the shirt, lungi, towel, wrist watch and the waist cord, which were on the person of the deceased. P.W.14 is the Head Constable on duty in the investigating police station. At 3.00 p.m. on 6.6.1995 P.W.1 appeared before him and gave Ex.P.1, the complaint. P.W.14 registered it in Crime No.305

of 1995 for offences under Sections 147, 341 and 302 I.P.C. Ex.P.13 is the printed First Information Report. He sent the material records to the court as well as to the higher officials through P.W.15, the Police Constable.

(c) P.W.17 is the Investigating Officer in the investigating police station. He took investigation in this case at about 4.00 p.m. on 6.6.1995 and proceeded to the scene of occurrence at 4.30 p.m. In the presence of P.W.10 and another he prepared Ex.P.8, the observation Mahazar and Ex.P.14, the rough sketch. He caused photographs to be taken of the scene of occurrence by P.W.13, the photographer. M.O.14 series and M.O.15 series are the negatives and photographs respectively. Between 5.30 p.m. and 8.00 p.m. he conducted inquest over the dead body and prepared Ex.P.15 the inquest report. He sent the dead body with a requisition Ex.P.2 for post-mortem through P.W.16, the Police Constable to the Government Hospital. P.W.3 is the doctor who did post-mortem on the dead body on receipt of the requisition. During post-mortem, P.W.3 found the following symptoms:

"The following External Injuries noted:-

(1) A lacerated injury 4 cm x 3 cm x 1/2 cm on the superior aspect of the scalp diverted obliquely medial edge 4 cm from the midline.

(2) A lacerated injury 2 cm x 1/2 cm x 1/2 cm on the occipital region of the scalp horizontal in direction.

(3) A lacerated injury 3 1/2 cm x 1 1/2 cm x 3 cm on the inferior aspect of occipital region reaching upto the surface of the brain. On exploration of wound (1) & (2) there was Hematoma underneath the scalp. On exploration of wound No.3 there is hematoma in the scalp and there is multiple fractures of the occipital bone. Meninges and brain matter seen.

(4) Abrasion 2 cm x 1/2 cm on the dorsal aspect of (r) forearm.

(5) Abrasion 1 cm x 1/2 cm on the posterior aspect of (R) elbow joint.

(6) An abrasion 1/2 cm x 1/2 cm on the (L) wrist. On opening of thorax heart weight 250 gm. Chambers empty. Lungs (R) 350 gm. (L) 300 gm. C/s-congested in both. On opening the abdomen stomach 150 gm empty, Liver 1200 gm. C/s - congested. Bladder empty. Opening of the heart multiple fracture of occipital bones with separation of fragments. There is fracture of (Rt) temporal (R) and (l) parietal bones. There is subdural and extradural hematoma in the occipital and (R) temporal region.

Brain Wt: 1000 gm C/s - congested laceration of 2 cm x 1/2 cm of brain in the (R) occipital lobe present.

Opinion as to cause of death:- Death would have occurred 21 - 23 hours prior to post-mortem General appearances totally with police report."

Ex.P.3 is the post-mortem certificate. The doctor is of the opinion that the

deceased would appear to have died of shock and haemorrhage due to injury to the brain, meninges and skull. All the injuries were ante-mortem in nature. P.W.17 continued the investigation. At 8.30 p.m. on the same night in the presence of P.W.19 and another he recovered M.Os.3,5,7 to 10, 12 and 13 under Ex.P.9. At 9.15 p.m. on the same night he recovered M.O.4 under Ex.P.10 attested by P.W.10. He examined P.Ws.1 to 6 and 8 to 11 and recorded their statements. On 8.6.1995 he examined P.Ws.14 to 16 and recorded their statements. He took police custody of the first accused on 23.6.1995 by obtaining permission from the court. At 4.00 p.m. on that day, the accused gave a confession statement, the admissible portion of which is Ex.P.11, which was recorded in the presence of P.W.12 and another. Pursuant to Ex.P.11, M.O.11 came to be recovered under Ex.P.12 attested by P.W.12 and another. P.W.17 examined the other witnesses and recorded their statements. The accused was surrendered before the court after the expiry of police custody. He sent the case properties to the court with a requisition to send the same to the Laboratory. P.W.7 is the Magisterial Clerk, who speaks about the receipt of the case properties along with the requisition given by the investigating agency; sending the same to the laboratory for chemical examination and receipt of Ex.P.6 and P.7, the Chemical Examiner's Report and Serologist's Report. After completing the investigation, P.W.17 filed the final report against the accused in court on 27.9.1995 for offences referred to earlier. When the accused were questioned u/s 313 of the Code of Criminal procedure on the basis of the incriminating materials made available against them, they denied each and every circumstances put up against them as false and contrary to facts. Neither oral nor documentary evidence were brought before court at their instance.

3. Mr. V. Gopinath, learned Senior Counsel appearing for A.1 and A.2 would contend that in view of the admitted enmity between the two groups, this court should examine the evidence of the witnesses with utmost care and caution. In such state of admitted enmity, the learned senior counsel would also submit that examination of independent witnesses is necessary, so that this court would be in a position to accept the case of the prosecution. The learned senior counsel took us through the materials on record to contend that P.W.1 is shown to be inimical and related while P.Ws.2 and 4 are also shown to be interested and related witnesses and therefore no reliance at all can be placed on their evidence. Lastly, it is submitted by the learned senior counsel by taking us through the averments contained in Ex.P.1 and the oral evidence of P.Ws.1,2 and 4, that even assuming that the entire case of the prosecution is true, yet the conviction of the accused either for the offence u/s 302 direct or for the offence of murder with the aid of Section 149 cannot be sustained. The learned senior counsel elaborated this point by stating that the common object of the unlawful assembly was not shown to commit the murder of the victim but it was something less. Therefore the conviction u/s 302 cannot be legally sustained. Mr. M. Kalyanasundaram, learned senior counsel appearing for A.4 would also vehemently contend that on the facts pleaded and established, the conviction u/s 302 either directly or with the

aid of Section 149 I.P.C. cannot be sustained. As far as A.4 is concerned, the learned senior counsel would contend that if the common object to commit the murder of the victim is not established then A.4 can be held guilty for his individual act. In as much as he is shown to have caused only simple injury, his conviction must be brought only for the corresponding offence. Mrs. A. Jagadeeswari, learned counsel appearing for A.3 would contend that her client is also similarly placed as A.4 and therefore whatever arguments that is advanced by the learned senior counsel for A.4 would equally apply to her client as well. She would also add that on the totality of the materials available on record, by no stretch of imagination it could be concluded that the object of the unlawful assembly was to commit the murder of the victim in this case. The learned counsel appearing for A.5 and A.6 would contend that on the materials placed neither their conviction for the offence u/s 341 can be sustained nor their conviction for the offence u/s 302 read with 149 could be sustained. They would elaborate their submissions by stating that the prosecution had not let in any evidence at all to show that they actually participated in the crime by inflicting any injury on the victim. Admittedly they are unarmed. In the background of deep seated enmity between A.1 and A.2 on the one hand and the prosecution party and the deceased on the other hand, the possibility of false implication cannot be totally ruled out. It is further contended by the learned counsels that there is nothing on record to show that A.5 and A.6 have anything adverse against the victim or the witnesses. Learned Additional Public Prosecutor defending the state would contend that if the common object of the unlawful assembly to commit the offence is established, then it does not really matter whether all the members of the unlawful assembly committed any particular act or not. According to the learned Additional Public Prosecutor, on the act of one member of such unlawful assembly all the other members also could be convicted legally. The learned Additional Public Prosecutor would also state that the common object of the unlawful assembly need not be at the inception of the assembly itself and it can develop at any point of time subsequent thereto. The learned Additional Public Prosecutor would state that direct evidence of the common object of the unlawful assembly need not always be there and in a given case it can be inferred from the circumstances placed before court by the prosecution. The learned Additional Public Prosecutor heavily relied upon the sequence of events that are shown to have taken place in this case as spoken to by P.Ws.1,2 and 4 to contend that the common object was only to commit murder.

4. Having regard to the arguments advanced by the learned counsel on either side, we perused the entire materials on record. As already stated there are six appeals filed by six different accused, tried in the same sessions case. For convenience sake, we will refer to the respective appellants in this judgment in the same rank in which they were arrayed before the court of sessions. To substantiate their case the prosecution examined primarily P.Ws.1,2 and 4 as eye witnesses to the occurrence. P.W.14 is the Head Constable in the investigating

police station. His evidence show that there are cases and counter cases between the two groups of people living in South Therivilai. This place is shown to be divided among the villagers by their place of residence. One group is called as South Therivilai group and the other group is called as North Therivilai group. The evidence on record shows that P.Ws.1, 6 and the deceased belong to the same group by residence while the accused belong to the opposite group. As already noticed, the evidence of P.W.14 establishes beyond doubt that both the groups are having strained relationship. The evidence of P.W.1 also shows beyond doubt that the relationship between the two groups is not definitely cordial. One of the substantial cause for the difference of opinion between the two is the death of one Rajkumar. Rajkumar is the younger brother of A.1. The accused were entertaining a serious doubt that Sundaralingam, since deceased in the present case was responsible for the death of Rajkumar. The prosecution had shown that A.1 and A.2 are brothers while A.3 to A.4 are their relatives. On analysing the materials on record we have no doubt at all in our mind to hold that the prosecution had definitely established that the prosecution group consisting of P.W.1, the deceased and others having residence in the Southern part of South Therivilai and the accused having their residence on the northern part of Souththerivilai are inimically disposed of towards each other on the strongest possible terms. In such state of affairs, the occurrence is shown to have taken place around 1.30 p.m. on 6.6.1995. The case of the prosecution as spoken to by P.W.1 is that one Shenbagalingam Nadar of Ariyaperumalvilai had died and he and the deceased, who is none else than his elder brother attended that condolence and they were returning home around 12.00 noon. M.O.4 is the motor-cycle belonging to P.W.1 and he and the deceased were travelling in that motor-cycle. Enroute the coconut thope of Sundaralingam is there and (as is the practice to have a bath after attending the condolence) P.W.1 and the deceased had gone to the pump-set in the coconut thope of the deceased to take bath. It is evident that P.Ws.2 and 4, who also attended the same condolence, also joined them in their bath. It may be true that P.W.1 had not stated in Ex.P.1 or during investigation that P.Ws.2 and 4 also joined them to take bath. But this is a very trivial omission according to us because the names of P.Ws.2 and 4 are found reflected in Ex.P.1 as eye witnesses to the occurrence. Even during investigation P.W.1 had spoken about the presence of P.Ws.2 and 4 as eye witnesses to the occurrence. Therefore we are not inclined to reject the presence of P.Ws.2 and 4 at the scene of occurrence on the sole ground of P.W.1's omission to mention in Ex.P.1 their presence at the scene of occurrence as one to take bath. Therefore we hold that, besides P.W.1, P.Ws.2 and 4 were also along with him while he was taking bath in the pump-set of the deceased.

5. Thereafter the evidence of P.Ws.1,2 and 4 is uniform on the occurrence proper and it shows the following:

" They finished their bath around 1.30 p.m. and everyone were about to leave; the deceased was going a little ahead of them towards the place where the motor cycle was parked; A.5 and A.6 appeared and prevented the deceased from

taking the motor-cycle;(we are not impressed with the arguments advanced by the learned counsel for the accused that there is no material to show that A.5 and A.6 either held the motor-cycle or physically prevented the deceased from moving around and therefore their evidence cannot be believed.); A.1 and A.4 were there each one having a fire wood in their hand. A.1 proclaims pointing out the deceased that it is he, who murdered his younger brother and therefore he should not be spared; managing to escape from that situation, the deceased ran towards the field of one Vedamani near the house of Thomas; all the accused chased the deceased; in the field of Vedamani all the accused encircled him; A.1 attacks on the head of the deceased twice with the fire wood; A.3 and A.4 each caused an injury on the right leg knee and left hand wrist with fire woods; the wrist watch on the hand of the deceased fell down and then A.2 completed the act by hitting on the rear side head of the deceased with the fire wood."

We have already referred to the manner in which the law was set in motion. Then we have the evidence of P.W.5. He would depose that he was on his way in his cycle towards the medical shop; and at that time he saw a crowd near the field of one Vedamani. He immediately proceeded there where he found all the accused standing in a circle with A.1 to A.4 each having a fire wood in their arm. He also saw P.Ws.1,2 and 4 shouting and noticed Sundaralingam, since deceased, lying on his back profusely bleeding through his mouth and nose and the accused standing in a circle around the victim. He also noticed the accused throwing the weapons of offence there itself and running towards south. Therefore we have the direct oral evidence of P.W.1,2 and 4 about the occurrence proper itself and the oral evidence of P.W.5 as to what he saw on he immediately reaching the scene of occurrence.

6. P.W.3 is the doctor, who did post-mortem on the dead body and his evidence coupled with Ex.P.3 establishes beyond doubt that the deceased died due to homicidal violence. The question is, whether the evidence of P.Ws.1,2 and 4 primarily and the oral evidence of P.W.5 is worth acceptance or not? Before analysing the evidence of the above witnesses, we would like to refer to the oral evidence of P.Ws.6 and 8. The evidence of P.W.6 is to the effect that he attended the court at Nagercoil on 6.6.1995 and he was seated outside the court of Judicial Magistrate No.III. A.1 to A.4 and A.6 were also present in the same court on that day and they were furnished with records. He would also state that they collected the records furnished to them around 11.00 or 11.10 a.m. and they left around 11.30 a.m. He would also state that A.5 was also with them at that time. It is no doubt true that this witness during the course of investigation had not told P.W.17, the investigating officer that A.1 to A.4 and A.6 left the court premises at Nagercoil at 11.30 a.m. This, in our considered opinion, is a trivial omission, which has no bearing on his other evidence that he saw A.1 to A.4 and A.6 in the court at Nagercoil on the morning of 6.6.1995. P.W.8 is the other witness, who saw the accused alighting from the Government Transport bus. He is a resident of Uthandam Kudiyruppy. He would state that he was waiting to board a bus at that bus-stop and at that time he saw all the accused alighting

from the bus and going towards the village. P.W.8 is a resident of South Therivilai. Therefore, on a reading of the evidence of P.W.8 we have no doubt at all in our mind that all the accused were present in the scene of occurrence Village on 6.6.1995. We also want to make it very clear that we are not relying on the only circumstance of the accused alighting from the bus and heading towards their village as the incriminating material against them to hold them guilty. We do not find anything surprising in the accused alighting from the bus and going towards their village. But what all we want to make it clear is that the evidence of P.W.8 definitely establishes the presence of the accused on the date of occurrence near the village. Now we advert our mind to the oral evidence of P.W.1,2 and 4. It may be true that P.W.1 is the younger brother of the deceased and we have already found that there exists a deep seated enmity between his group on the one hand and the accused on the other hand. It is needless to state that there are umpteen number of judgments not only by the Apex Court but also by this Court to show that since the witnesses and the accused are inimically disposed of towards each other, their evidence cannot be discarded on that sole ground. To quote, the latest judgment on this point is the one reported in ANIL RAI v. STATE OF BIHAR 2001 S.C.C. (Cri.) 1009, wherein it has been stated as follows:-

"The existence of animosity between the accused and the witnesses may, in some cases, give rise to the possibility of the witnesses exaggerating the role of some of the accused or trying to rope in more persons as accused persons for the commission of the crime. Such a possibility is required to be ascertained on the facts of each case. However, the mere existence of enmity in this case, particularly when it is alleged as a motive for the commission of the crime, cannot be made a basis for discarding or rejecting the testimony of the eyewitnesses, the deposition of whom is otherwise consistent and convincing."

Therefore what all is expected from us is to scrutinise this evidence of P.W.1 with utmost care and caution. A suggestion has been put to P.Ws.2 and 4 that they are related to the witnesses and the deceased, which they denied. We have already noticed that P.Ws.2 and 4 are not residents of any part of South Therivilai. Even assuming they are related, yet it could not be a ground to reject their evidence, is again the subject matter of a number of judgments. The recent one being reported in MUNSHI PRASAD v. STATE OF BIHAR 2002 S.C.C. (Cri.)175, wherein it has been held as follows:-

"The witnesses may be related but that does not mean and imply total rejection of the evidence: interested they may be but in the event they are so - it is the predominant duty of the court to be more careful in the matter of scrutiny of the evidence of these interested witnesses and if on such a scrutiny it is found that the evidence on record is otherwise trustworthy, question of rejection of the same on the ground of being interested witnesses would not arise. It is the totality of the evidence which matters and if the same creates a confidence of acceptability of such an evidence, question of rejection on being ascribed as

"interested witness" would not be justifiable."

Therefore, the position in law is, that where the witnesses are thickly related to each other or has got some common interest would not by itself be a ground to reject their evidence in to if their evidence is found to be trustworthy and satisfactory otherwise. Having these principles in our mind, we perused the evidence of P.Ws.1,2 and 4. On a perusal of their evidence, we find no material worth mentioning had been elicited as to why this court should disbelieve their evidence. In other words, no circumstance, much less no compelling circumstance is brought out before this court, which would enable us to reject either the whole or part of the evidence of these witnesses. P.Ws.2 and 4, being independent witnesses have stood the test of cross examination well and not even one answer in favour of any of the accused had been elicited to disbelieve the substratum of their evidence. The substratum of their evidence had been already extracted by us in the earlier portion of this judgment, which definitely establishes not only the direct physical overt act attributed to A.1 to A.4 but also the presence of A.5 and A.6 at the scene of occurrence in a conjoint effort of the unlawful assembly in accomplishing the common object to kill. P.W.5's evidence show that he saw all the accused standing in a circle around the place where the victim was lying on his back profusely bleeding through his mouth and nose. He has also spoken about the presence of P.Ws.1,2 and 4. This evidence of P.W.5 is in the nature of corroboration to the oral evidence of P.Ws.1,2 and 4 about the occurrence proper. One more aspect which has to be noticed in the evidence of P.W.5 is that he saw all the accused standing in a circle even after the victim had fallen on his back profusely bleeding through his mouth and nose. In the light of our discussion, we conclude that the evidence of P.Ws.1,2,4 and 5 definitely deserves acceptance at our hands also as accepted by the learned Sessions Judge. This means the involvement of the accused in perpetrating the crime on the victim fully stands established.

7. The question then addressed to us is, whether on the facts established, could the conviction of the accused either for the offence u/s 302 I.P.C. direct or for the offence u/s 302 with the aid of 149 I.P.C. can be sustained. We now apply our mind to this argument with reference to the materials available on record. The sequence of events as to what happened at the time of occurrence as extracted above is consistent throughout. But we find one difference as to what were the words uttered by A.1 at the time when the accused came to notice the victim in this case. In Ex.P.1, we find that on seeing the victim, A.1 openly shouted to kill the victim in this case, as he (the deceased) is the person responsible for killing his (A.1's) brother Rajkumar. This specific averment in Ex.P.1 that A.1 induced the other persons to kill the victim in this case is not spoken to by P.W.1 himself in his oral evidence. P.W.2 in his evidence would state that on seeing the victim A.1 only declared pointing out at him that it is he, who killed his brother. P.W.4 would also give evidence on the same lines as that of P.W.2. Therefore we do agree, as submitted by the learned senior counsel, that there is a conspicuous omission in the oral evidence placed of A.1 inducing the other accused to kill.

P.Ws.1,2 and 4 in their oral evidence had not stated that A.1 at any point of time induced others to kill the victim. From the mere absence of that evidence alone, we are not inclined to agree with the other submissions made by the learned senior counsel and other counsel that the accused did not have the common object to kill the deceased in this case. The reasons are as follows. "It is a well settled position in law that an assembly which is lawful at its inception may turn into an unlawful assembly. Explanation to Section 141 of the Indian Penal Code says so." The facts remains established that there was an unlawful assembly of six persons at the scene of occurrence. The question is whether such an unlawful assembly has any common object to commit the offence namely, to commit the murder of the victim in this case. We once again note herein the sequence of events. To start with, A.5 and A.6 on seeing the victim proceeding towards his motor-cycle to take it, prevented him from taking it. It should be noticed here even at this stage that when A.5 and A.6 wanted to prevent the victim from taking his motor-cycle, A.1 had not induced any body to commit the crime. Therefore we tried to find out as to why A.5 and A.6 all of a sudden wanted to prevent the deceased from taking his motor-cycle. Was it with the idea of committing any crime at all or was it an act of simple show down. We have already noticed that all the six accused were moving as a body right from that morning till the actual occurrence had come to have taken place. Therefore the act of A.5 and A.6 even before A.1 could utter any word pointing out at the deceased, would only show that at that point of time there was no common object to commit murder. There is nothing to show that, at that time the accused had any common object to kill the victim. Only as a next step to A.5 and A.6 moving towards the victim A.1 pointing out the victim as the person who is responsible for the death of his younger brother said that he should not be spared.

8. What happened thereafter will give a clear clue as to whether any common object to kill the deceased developed or not. The consistent evidence of P.Ws.1,2 and 4 show that Sundaralingam started running and he was chased by all the accused. When Sundaralingam reached the field of Vedamani near the house of Thomas, all the accused encircled him. At that stage A.1 caused two injuries on the head of Sundaralingam with the fire wood and A.3 and A.4 caused two simple injuries respectively on the right leg knee and the wrist followed by A.2 causing once again an injury on the head of the victim with the fire wood. If really the common object to kill the deceased have not developed and if really A.3 to A.6 had no common object at all to kill the victim, then one would expect A.3 to A.6 to withdraw from the scene of occurrence, once they saw A.1 hitting twice with the fire wood on the head of Sundaralingam. It is not as though A.1 had chosen a non-vital part of the body of Sundaralingam to cause the injury and the part he has chosen is "head" and he hit twice. Therefore there is no difficulty at all in concluding that at that point of time when A.1 attacked twice on the head of the victim what was in his mind was only to kill the victim. After A.1 hitting A.3 and A.4 each using the fire wood in their hand, attacked on the leg and hand of the

victim. The hitting on the leg must be only with a view to prevent him taking any movement towards safety. Then A.2 completed the attack by hitting on the rear side head of the victim. When the accused were attacking the deceased was found encircled by all of them and it is a strong circumstance available in this case to hold without any hesitation that the common object of the unlawful assembly was only to murder the victim and nothing short of that. It is a settled position in law that the common object can develop eo instanti. P.W.5's evidence establishes beyond doubt that the unfortunate victim had fallen on his back profusely bleeding through his nose and mouth and even at that helpless stage of the victim, all the six accused were standing around him in a circle. Therefore the common object of the unlawful assembly to murder the victim is apparent on the face of it. It is not as though on A.1 hitting on the head of the deceased twice, A.3 to A.6 wanted to go away from the scene of occurrence as they did not want to participate in the occurrence. But they continued to be present at the scene of occurrence till the final act was performed by A.2. The evidence of the doctor is that the death would have been instantaneous. Why we emphasis on this medical evidence is to conclude that the presence of all the accused around the dead body on the scene of occurrence even after he fell on his back profusely bleeding, can only be when the common object to kill the deceased was running through their mind. Simply because A.5 and A.6 have not caused any injury at all and A.3 and A.4 had caused only simple injuries does not necessarily mean that they cannot be held guilty for the act of the other members of the unlawful assembly, whose common object was to commit the murder.

9. We now refer to the case law brought to our notice by Mr.V. Gopinath, learned Senior Counsel for A.1 and A.2. The learned Senior Counsel relied upon the judgment of the Supreme court reported in CAMILO VAZ v. STATE OF GOA (2000 (2) C L J 1816 to contend that on the established facts in this case, the conviction of A.1 and A.2 can be brought u/s 304(2) I.P.C. According to him the facts collected in this case do not disclose the common object of the unlawful assembly to kill the deceased. In the decided case of the Supreme Court it is seen that boys of two different Villages namely "K" and "C" were not on best of terms between them; during the festival time they were quarrelling with each other; Victor, one of the boys hailing from "C" attended the festival and left for his house around 12.00 in the night; Simon and Irinue are the brothers of Victor; the accused (all boys) went to Village "C" ; banged the door of the house where Victor and his brothers were sleeping; the boys were armed with sticks, cycle chains and bottles; Victor and his brothers came out and Simon was beaten to death. On the materials available, the Apex Court held that the boys from "K" did not go to the house of Simon and his brothers with the intention to kill anyone and that they were not armed with any particular weapon to commit the murder. It was also held by the Apex Court that visit of the boys from "K" was not to commit murder but to thrash the opposite group. It was also firmly found that in such circumstances, it cann't be said that one of the accused hit Simon on the head with a view to commit his murder. In our respectful opinion, the facts

available in the judgment of the Apex Court referred to supra are not the facts available in the case on hand and our judgment reflects the facts which are totally different. Therefore this judgment, in our respectful opinion, is not in favour of the accused. Mr. M. Kalyanasundaram, learned Senior Counsel relied upon the following judgments, namely, THAKORE DOLJI VANVIRJI v. STATE OF GUJARAT 1992 Cri.L J 3953 and Shivalingappa Kallayanappa and others Vs. State of Karnataka, for the same purpose. Placing reliance on these two judgments, the learned Senior Counsel would contend that the unlawful assembly, assuming it existed, did not have the common object to kill any body and therefore A.3 having caused only simple injury on the right leg knee has to be held guilty only for his individual act. The facts available in the judgment reported in Thakore Dolji Vanvirji and others Vs. State of Gujarat, are as follows:-

"A.1 instigated A.4 to kill "D"; A.4 dealt a blow with a stick on the hand of "D"; "D" started running apprehending that he would be killed; he ran to the house of "A" and took shelter therein; the accused followed "D" with weapons in their hands; "A" was sitting near the door of his house; on the accused following "D", "A" intervened; A.1 asked "A" to bring "D" and "A" refused saying that he had taken shelter under him and that he would not bring him out; thereupon A.1 gave a blow with a sword on the head of "A" which made him fell down; this was followed by A.2 to A.5 causing various blows and then all the accused ran away."

On the above noted facts, the Supreme Court held as follows:

"No doubt Section 149 I.P.C. is wide in its sweep but in fixing the membership of the unlawful assembly and in inferring the common object, various circumstances also have to be taken into consideration. Having regard to the omnibus allegation, we think it is not safe to convict every one of them for the offence of murder by applying Section 149 I.P.C. On a careful examination of the entire prosecution case and the surrounding circumstances, we think the common object of the unlawful assembly was only to cause grievous hurt. But A.1 acted in his own individual manner and proved fatal. No doubt he inflicted only one blow but having regard to the nature of the weapon and the vital organ on which the blow was inflicted and the medical evidence regarding the result of injury proving fatal, he must be held responsible for offence of murder. In differentiating the case of A.2 to A.3 to that of Section 149 I.P.C. every one of them should participate and inflict serious injuries but having regard to the special circumstances of this case particularly the sudden manner in which the occurrence took place in the village itself, we think it would be unsafe to make every one of the accused liable for offence of murder by application of Section 149 I.P.C."

In the other case referred to by Mr. M. Kalyanasundaram, learned Senior counsel, the facts are as follows:

"There were two deceased; there was dispute regarding the family properties; in the disputed land there was a standing crop; the two deceased, their brothers in

the company of some more went to the hut on the land in occupation of A.1 and threatened him not to cut the sugarcane crop or make any changes in the said land; A.1 gave a complaint at the police station; in the evening the police took action; in the evening one of the deceased and P.Ws.2 and 4 remained in the field; in the mid-night A.1 to A.4 accompanied with A.5 came there with axes and sticks; A.1 and A.2 were armed with axes while the others were armed with sticks. A.1 assaulted one of the deceased with the butt end of the axe; A.4 and A.5 assaulted P.Ws.2 and 4 with sticks in their hands; A.1 and A.2 also assaulted the other deceased and P.W.3 with the butt end of the axes in their hands."

On the above noted facts, the Honourable Supreme Court of India held that A.1 and A.2 though armed with axes, did not use the sharp side but only gave one or two blows on the heads, with the butt ends. It cannot be said that the common object of the unlawful assembly was to cause murders and at any rate it cannot be said that all the accused shared the same and that they had knowledge that the two deceased persons would be killed and with that knowledge continued to be the members of the unlawful assembly. With great respect we state that the facts available in the judgment of the Supreme Court referred to supra are not similar to the facts available in this case and therefore it does not enure to the benefit of the accused. But however there are materials in that decided case which are squarely against the accused in the case on hand. The relevant reflection of mind of the Apex Court in this regard are extracted hereunder once again.

"These circumstances show that the common object of the unlawful assembly cannot be said to be to cause murders and at any rate it cannot be said that all the accused shared the same and that they had knowledge that the two deceased persons would be killed and with that knowledge continued to be the members of the unlawful assembly"

10. The post-mortem report Ex.P.3 shows multiple fractures of occipital bones with separation of fragments; fracture of right temporal and right and left parietal bones. The fire woods recovered from the accused are shown to be of a length of 101 cm, 84 cm, 72 cm and 73 cm respectively. The presence of internal fractures on the head of the victim shows the force with which the deceased would have been assaulted by A.1 to start with and to be completed by A.2. It is common knowledge that head is the vital part of the human anatomy and therefore no one normally hits the other on the head. After A.1 hit twice on the head of the victim in this case, A.3 and A.4 participated in hitting the deceased, though resulting in simple injuries on non vital parts of the body. The act was completed by A.2 by hitting once again on the head with force. Therefore when A.1 hit on the head of the deceased twice, it should have been within the knowledge of A.3 to A.6 that A.1 had targeted the most vital part of the human anatomy of the deceased and therefore this act of A.1 should have put them on caution that something is seriously going wrong. If they or any one of them had realised the grim situation, then the normal conduct requires that they should

withdraw from the scene of occurrence and move away. But on the other hand, in between the acts of A.1 and A.2, A.3 and A.4 had caused injuries and A.5 and A.6 were present body and sole. We have already noted the oral evidence of P.W.5, who would state that when the victim was lying down on his back profusely bleeding through his mouth and nose, he saw all the accused standing around the body of the victim. This only shows the firmness in the mind of all the accused. Therefore on facts, we hold that the common object of the unlawful assembly to kill the victim is explicit from their conduct. It may be true that when Sundaralingam ran hotly chased by the accused, probably the common object would not have fructified into one of killing the victim. But once the victim was attacked twice on the head by A.1 with fire wood, the common object had surfaced eo instanti . Under these circumstances, we have no doubt at all that the prosecution had definitely established that there was an unlawful assembly of all the six accused with the common object to kill the deceased. Accordingly finding no merits in C.A.No.152/1998 (A.1 & A.2), C.A.No.41 of 1998 (A.4), C.A.No.71/1998 (A.3), C.A.No.403 of 1998 (A.5) and C.A.No.603 of 1998 (A.6) we dismiss all those appeals confirming the judgment under challenge.

11. As far as C.A.No.512 of 1998 is concerned, the appellant is not an accused in the sessions case. He claims to be the owner of M.O.11, which had been directed to be confiscated. Before ordering confiscation no notice had been given to him by the court of sessions. The only evidence available on record about the vehicle having been used is the evidence of P.W.9. His evidence shows that at 2.00 p.m. on 6.6.1995 he saw A.1 driving M.O.11 (Tempo van) and A.2 and A.3 sitting by his side in the vehicle. There is no evidence to show that the accused travelled in this vehicle to the scene of occurrence to commit the crime. There is no evidence to show that this vehicle was used in any manner in the commission of crime. In other words, the only material available as spoken to by P.W.9 is, after the occurrence, A.1 to A.3 were found travelling in this vehicle which was driven by A.1. This would not be a substantive material in the eye of law to order confiscation of the said vehicle. Accordingly, we set aside the judgment under challenge so far as it relates to ordering confiscation of M.O.11. Accordingly, C.A.No.512 of 1998 is allowed setting aside that portion of the judgment of the Court of Sessions in S.C.No.123 of 1996 ordering confiscation of M.O.11. The court of sessions is directed to return the vehicle to the appellant in C.A.No.512 of 1998 on his furnishing the necessary proof of his ownership to the said vehicle.