BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 19.02.2020

Delivered on : 18.02.2020

CORAM:

THE HONOURABLE MR.JUSTICE T.RAJA

and

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

Crl. A. (MD)No.104 of 2018

1.Padhakumar
2.Alex @ Alex Pandiyan
3.Mari ... Appellants/Accused Nos.1 to 3

Vs.

State through
The Inspector of Police,
Kenikarai Police Station,
Ramanathapuram,
Ramanathapuram District.
(in Crime No.299 of 2014) ... Respondent/Complainant

Prayer : Criminal Appeal filed under Section 374 of the Criminal Procedure Code, praying to call for the entire records connected to the judgment in S.C.No.70 of 2018 on the file of the Additional District and Sessions Court, Ramanathapuram dated 19.01.2018 and set aside the conviction and sentence imposed against the appellants.

For Appellant : Mr.C.Arulvadivel @ Sekar
For M/s.R.Alagumani

For Respondent : Mr.R.Anandaraj
Additional Public Prosecutor

J U D G M E N T

(Judgment of the Court was delivered by **B.PUGALENDHI, J.**)

The Criminal Appeal is filed as against the conviction and sentence imposed by the learned Additional District and Sessions Judge, Ramanathapuram in S.C.No.70 of 2016 dated 19.01.2018. The appellants/ Accused Nos.1 to 3 were tried before the trial Court for the commission of offence under Section 302 r/w 34 I.P.C. and the trial Court by order dated 19.01.2018, found the 1st appellant/Accused No.1 guilty for the offence under Section 302 I.P.C. and the appellants 2 and 3/Accused Nos.2 and 3 for the offence under Section 302 r/w 34 I.P.C. and sentenced them as follows:

Rank	Offence	Sentence
A1	302 I.P.C.	Life Imprisonment and fine of Rs.10,000/- in default to undergo simple imprisonment for one year.
A2	302 r/w 34 I.P.C.	Life Imprisonment and fine of Rs.5,000/- in default to undergo simple imprisonment for one year.
A3	302 r/w 34 I.P.C.	Life Imprisonment and fine of Rs.5,000/- in default to undergo simple imprisonment for three months

The sentences were directed to run concurrently. As against the conviction and sentence imposed by the trial Court, the appellants have preferred this Criminal Appeal.

2.The case of the prosecution in nutshell is as follows:

2.1.The accused No.1 - Padhakumar was running a bar attached to a Wine Shop at Poomalai Valasai. The deceased along with his friend P.W.8 - Vasu went to the Wine Shop four month prior to the occurrence and in the Wine Shop a dispute arose between the deceased and the accused No.1. P.W.8 convinced the deceased and take him out of the bar and after some time when they were going in an auto rickshaw near Udaichiar Valasai, they found the first accused on their way and on seeing the first accused, the deceased got down from the auto and caused injury on the face of the first accused. After causing the injury, they left the place in the auto-rickshaw. After this incident, Accused No.1 along with his men went to the house of the deceased to retaliate for this incident. At that time, the deceased was not present in his house and P.W.9 - Muthukumaraselvi, the wife of the deceased, who was also pregnant, pleaded on behalf of her husband, the deceased, to leave her husband. Accused No.1 warned P.W.9 that if her husband come to his area, he would be done to death and left the place. Apprehending danger at the hands of the accused No.1, P.W. 9 sent her husband, the deceased, to Kerala for some job. P.W.9 delivered a child and on knowing that the deceased came to his native place at Ramanathapuram, on 02.07.2014 at about 4.30 p.m., the accused No.1 came to

the village of the deceased in A2's motorcycle (M.O.9) and found the deceased near Munusu Valasai turning road and attacked him with Aruval. The deceased died on the spot.

2.2.This incident was informed to the mother of the deceased, P.W.1 - Kamala, through P.W.7 - Rajeshwari and P.W.2 - Pandian and P.W.1 lodged a complaint to the Special Sub-Inspector of Police Muniyandi – P.W.13 at about 5.30 p.m. under Ex.P.1. P.W.13, on receipt of the complaint registered a case in Crime No.299 of 2014 for the offence under Section 302 I.P.C. under Ex.P.11 (F.I.R.) as against 3 persons, who came in the motorcycle.

2.3.On the information from the Police Station, the Inspector of Police, P.W.14 – Rajeshkannan, who was incharge of Kenikarai Police Station took up the investigation and went to the place of occurrence on 02.07.2014 at 6.30 p.m. and prepared an observation mahazar Ex.P.2 and Rough Sketch Ex.P.12 at about 6.42 p.m. in the presence of witnesses P.W.5 - Mangaleswaran and another. He also conducted inquest in the presence of Panchayatars from 8.15 p.m. to 10.15 p.m. and the inquest report is marked as Ex.P.13. Thereafter, he made a request through the Head Constable P.W.2 – Selvaraj to conduct the autopsy.

2.4.P.W.11 – Dr.Subha Lakshmi, conducted the autopsy on 03.07.2014

at about 10.35 a.m. The doctor, P.W.11 noted down the following external injuries on the deceased:

"1.A lacerated wound of size 10 x 7 x 4 cm present over ® angle of mandible which extends about 3 cm lateral to midline of back of neck.

2.A lacerated would of size 8 x 3 x 3 cm present over occipital region.

3.A lacerated wound of size 3 x 2 x 1 cm present over ® side of fore head.

4.A lacerated wound of size 13 x 7 x 5 cm size which extends from (LT) angle of mouth to 5 cm lateral to midline of back of neck.

5.Another lacerated wound of size 7 x 2 x 2 cm present over (LT) temporal parietal region.

6.A lacerated wound of size 5 x 1 x 1 cm present over (LT) index finger.

7.A lacerated wound of size 13 x 5 x 5 cm size present over back of neck about 10 cm below the occipital protuberance."

P.W.11 gave her final opinion that the deceased appears to have died of assault with head injury with shock due to blood loss. The postmortem certificate issued by the doctor is marked as Ex.P.10.

2.5.The accused No.1 surrendered before the Judicial Magistrate Court, Muthukulathur on 04.07.2014 and P.W.14 on knowing that, filed

necessary application for taking him on police custody and during police custody the accused No.1 voluntarily gave a confession statement on 13.07.2014 at about 11.45 a.m. in the presence of P.W.6 - Chandiran, Village Administrative Officer and Ramesh, Village Assistant and pursuant to the confession M.O.9 – Passion pro motorcycle bearing registration number TN-69-P-1003 and M.O.8 – bill hook were recovered in the presence of the said witnesses. He also forwarded the recovered article in Form – 95 (Ex.P.16) to the concerned Judicial Magistrate Court. After P.W.15 – Jesu, joined as Inspector of Police, Kenikarai Police Station, P.W.14 handed over the case records to him.

2.6.On 24.07.2014, P.W.15 took up the case for investigation. He came to know that the second accused Alex @ Alex Pandian surrendered before the Judicial Magistrate, Thiruvadanai on 10.07.2014 and the third accused Mari surrendered before the Judicial Magistrate, Rameshwaran on 15.07.2014. Based on the information, he filed applications for taking them on police custody and examined them on police custody in the presence of P.W.6 and one Ramesh. Accused No.2 voluntarily gave his confession and pursuant to his confession statement Bill-hook M.O.10 was recovered on 24.07.2014 at about 10.30 a.m. At about 11.30 a.m. based on the confession of Accused No.3, another bill-hook – M.O.11 was recovered in the presence of the said witnesses. In the meantime,

P.W.15 was also transferred.

2.7.P.W.16, Balamurugan, Inspector of Police took up the case for further investigation on 26.12.2015 and he received the Serological reports Exs.P.19 and P.20. He examined P.W.11, the doctor who conducted autopsy and recorded his statement. After completing the investigation, he filed his final report as against the accused on 26.12.2015 for the offence under Section 302 r/w 34 I.P.C. before the Judicial Magistrate No.II, Ramanathapuram, which was taken on file in C.C.No.09 of 2016 and the learned Judicial Magistrate committed the case to the Court of Sessions and the same was tried before the learned Additional District and Sessions Court in S.C.No.70 of 2016.

3.During the trial, 16 witnesses have been examined on the side of the prosecution and 20 documents were marked and 11 material objects were produced in support of the prosecution case. When the incriminating materials were put to the accused under Section 313 CrPC, the accused denied the same. The accused neither examined any witness nor marked any document.

4.The available evidence of the prosecution are as follows:

P.W.1 is the mother of the deceased and the defacto complainant in this case and she speaks about her complaint Ex.P.1. P.Ws.2, 3 and 4 were

examined as eyewitnesses and all the three have turned hostile. But during the cross-examination P.Ws.2 and 3 have stated about the occurrence. P.W.5 – Mangaleshwaran was examined for the observation mahazar and recovery of material objects from the place of occurrence. P.W.6 – Chandiran, Village Administrative Officer was examined for recovery of weapons. P.W.7 – Rajeshwari, who informed P.W.1 about the occurrence, did not support the case of the prosecution and she was treated as hostile. P.W.8 – Vasu, a friend of the deceased and P.W.9, wife of the deceased were examined for the purpose of proving the motive for the occurrence, which took place four months prior to the occurrence. P.W.10 – Balamurugan is the Grade – II Police Constable, who handed over the first information report to the concerned Judicial Magistrate and P.W.11 – Dr.Subalakshmi is the doctor, who conducted the autopsy and P.W. 12 – Selvaraj is the Head Constable, who identified the dead body to P.W.11. P.W.13 – Muniandi, Special Sub-Inspector of Police was examined for the registration of the F.I.R. (Ex.P.11) and P.Ws.14 to 16 are the investigation officers in this case.

5.In conclusion of the trial, the learned Trial Judge, by judgment dated

19.01.2018, found the accused No.1 guilty of the offence under Section 302 I.P.C. and found accused Nos.2 and 3 guilty of the offence under Sections 302 r/w 34 I.P.C. and sentenced them as stated in paragraph No.1. As against the conviction and sentence, the present appeal is filed.

6.Heard Mr.C.Arulvadivel @ Sekar, learned counsel for Mr.R.Alagumani learned counsel appearing for the appellants/accused and Mr.R.Anandaraj, learned Additional Public Prosecutor appearing for the respondent.

7.Mr.Arul Vdivel @ Sekar, learned counsel for the appellants/accused, in support of his case, made the following submissions:

(i) There is no evidence as against the appellants and all the eyewitnesses were treated as hostile and the complaint Ex.P.1 was lodged as against 3 unknown persons and this F.I.R., which was registered on 02.07.2014 at about 5.30 p.m., reached the Court only on 03.07.2014 at 9.00 a.m. Therefore, there is inordinate delay in F.I.R. reaching the Court and even in the F.I.R., the names of the appellants/accused are not mentioned.

(ii) The trial Court has relied upon the evidence of P.Ws.2 and 3, who were treated as hostile, to convict the accused and P.Ws.2 and 3 cannot be

trusted for the reason that P.W.2 is a relative of the deceased and though he is said to have witnessed the occurrence, he has not stated the names of the assailants at the time of registration of the complaint – Ex.P.1. P.W.2 is also attestor of Ex.P.1. P.W.3 in his evidence has categorically admitted that he cannot identify any of the accused, who were present before the trial Court and even then, based on his evidence, the trial Court has found the accused/appellant guilty.

(iii) When the F.I.R. was registered as against the unknown persons, the investigating agency ought to have conducted identification parade in this case. Identification parade was not at all conducted in this case and in the absence of identification parade, the evidence of P.W.2 is doubtful.

(iv) There is discrepancy in the inquest report and there is delay in sending the statements recorded under Section 161(3) Cr.P.C. and Form 95 to the concerned trial Court.

8.Per contra, Mr.R.Anandaraj, the learned Additional Public Prosecutor appearing for the respondent/State has submitted that there was a strong motive against these accused/appellants as against the deceased and the earlier incident which has taken place four months prior to the occurrence was clearly stated by P.Ws.8 and 9. It is only pursuant to that incident, the deceased was

sent away from the village and only just prior to the occurrence he had turned from Kerala on account of his child's birth and immediately the accused have done away with him. Though P.Ws.2 and 3 were treated as hostile they have clearly stated that these accused have left the place of occurrence in the motorcycle and also about the commission of offence. P.W.2 was not aware of the names of the accused and he came to know about the names of the accused through P.Ws.3 and 5 and therefore, in the complaint Ex.P.1, the names of the accused are not available. He also referred to the evidence of P.W.2 that they were afraid of the accused in deposing against them. Though there is delay in F.I.R. reaching the Court, P.W.10, the constable, who took the F.I.R. to the Court has explained the reasons for the delay that when he went to the Judicial Magistrate Court, the Magistrate was not available and therefore, the F.I.R. was handed over on the next day morning at 9.00 a.m. Since the delay has been explained, it cannot be treated as a material defect as against the prosecution and more over the F.I.R. has been registered as against three persons, who came in a motorcycle. Therefore, there is no scope for any manipulation in the F.I.R. and hence, there is no reason to interfere with the well considered judgment of the trial Court.

9.This Court paid its anxious consideration to the rival submissions

and also perused the available records.

10.The occurrence was taken place on 02.07.2014 at 4.30 p.m. The complaint was lodged at about 5.30 p.m. Though P.Ws.2 and 3 were present in the occurrence place at the time of occurrence, none has come forward to lodge the complaint and the complaint was lodged through the mother of the deceased P.W.1. In the complaint Ex.P.1, the names of the assailants were not mentioned and it is mentioned that three persons, who came in a motorcycle, assaulted her son and committed the murder. P.W.1 in her complaint Ex.P.1 has referred about P.Ws.2 to 4's presence in the place of occurrence. She visited the dead body. All these three eyewitnesses did not support the case of the prosecution and they were treated as hostile. But during their cross-examination, they admitted that these accused have left the place of occurrence in the motorcycle. P.W.2 in his evidence admitted that these accused were present in the place of occurrence and also assaulted the deceased with bill-hook. As rightly pointed out by the learned counsel for the appellant, P.W.2, who is also an attestor to the complaint Ex.P.1, though he is said to have been present in the place of occurrence and witnessed the occurrence, the names of the accused are not mentioned in the complaint Ex.P.1. But in the complaint

Ex.P.1, it is specifically mentioned that three persons, who came in a motorcycle have committed the occurrence.

11.The learned counsel for the appellants has also pointed out that when P.Ws.2 and 4 were not aware of the names of the accused, the investigation agency ought to have conducted identification parade, but, in this case, no identification parade was conducted and therefore, the evidence of P.Ws.2 to 4 identifying the accused in the Court cannot be accepted as material evidence as against these accused to arrive at the conclusion that these accused are assailants. The learned counsel for the appellants in support of his contention has also relied upon the judgment of the Hon'ble Apex Court in ***Dana Yadav v. State of Bihar [(2002) 7 SCC 295]***, wherein the Hon'ble Apex Court held as follows:

> "7. Apart from the ordinary rule down in the aforesaid decisions, certain exceptions to the same have been carved out where identification of an accused for the first time in court without there being any corroboration whatsoever can form the sole basis for his conviction. In the case of ***Budhsen v. State of U.P. [(1970) 2 SCC 128]*** it was observed:
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> "There may, however, be exceptions to this general rule, when for example, the court is impressed by a

particular witness, on whose testimony it can safely rely, without such or other corroboration."

...

38. In view of the law analysed above, we conclude thus:

(a) If an accused is well known to the prosecution witnesses from before, no test identification parade is called for and it would be meaningless and sheer waste of public time to hold the same.

(b) In cases where according to the prosecution the accused is known to the prosecution witnesses from before, but the said fact is denied by him and he challenges his identity by the prosecution witnesses by filing a petition for holding test identification parade, a court while dealing with such a prayer, should consider without holding a mini-inquiry as to whether the denial is bona fide or a mere pretence and/or made with an ulterior motive to delay the investigation. In case the court comes to the conclusion that the denial is bona fide, it may accede to the prayer, but if, however, it is of the view that the same is a mere pretence and/or made with an ulterior motive to delay the investigation, question for grant of such a prayer would not arise. Unjustified grant or refusal of such a prayer would not necessarily enure to the benefit of either party nor the same would be detrimental to their interest. In case prayer is granted and test identification parade is held in which a witness fails to identify the accused, his so-called claim that the accused was known to him from before and the evidence of identification in court should not be accepted. But in case either prayer is not granted or granted but no test identification parade held, the same *ipso facto* cannot be

a ground for throwing out evidence of identification of an accused in court when evidence of the witness, on the question of identity of the accused from before, is found to be credible. The main thrust should be on answer to the question as to whether evidence of a witness in court to the identity of the accused from before is trustworthy or not. In case the answer is in the affirmative, the fact that prayer for holding test identification parade was rejected or although granted, but no such parade was held, would not in any manner affect the evidence adduced in court in relation to identity of the accused. But if, however, such an evidence is not free from doubt, the same may be a relevant material while appreciating the evidence of identification adduced in court.

(c) Evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification in test identification parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate identification of the accused by a witness in court.

(d) Identification parades are held during the course of investigation ordinarily at the instance of investigating agencies and should be held with reasonable dispatch for the purpose of enabling the witnesses to identify either the properties which are the subject-matter of alleged offence or the accused persons involved in the offence so as to provide it with materials to assure itself if the investigation is proceeding on right lines and the persons whom it suspects to have committed the offence were the real culprits.

(e) Failure to hold test identification parade does not make

the evidence of identification in court inadmissible, rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form the basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check valve to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

(f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction.

(g) Ordinarily, if an accused is not named in the first information report, his identification by witnesses in court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general rule there may be exceptions as enumerated above."

12.It is true that the investigation agency failed to conduct identification parade. P.W.2 in his evidence has admitted that he know the accused through P.Ws.3 and 5, who were also present in the occurrence place and when he was cross-examined on behalf of the accused. During cross-examination by the public prosecutor after he was treated as hostile, he

admitted that out of fear on the accused he has not stated about the occurrence in the chief examination. P.W.2 was a palm tree merchant and P.W.3 is a grocery merchant in a small village and it is obvious for ordinary persons to come forward to give evidence against the persons like the accused, among them the first accused is running a bar in a wine shop.

13.Since there is no protection in the present system for the witnesses, most of the trials ended in acquittal as the witnesses did not come forward to give evidence. Hence, as per the directions of the Hon'ble Apex Court, the Witness Protection Scheme, 2018 is evolved to give confidence to the witnesses to come forward to assist law enforcement and judicial authorities with full assurance of safety and aiming to identify series of measures that may be adopted to safeguard witnesses and their family members from intimidation and threats against their lives, reputation and property and Section 7 of the Scheme provides the following protection measures:

"7. Types of Protection Measures:

The witness protection measures ordered shall be proportionate to the threat and shall be for a specific duration not exceeding three months at a time. They may include:

a) Ensuring that witness and accused do not come face to face during investigation or trial;

b) Monitoring of mail and telephone calls;

c) Arrangement with the telephone company to change the witness's telephone number or assign him or her an unlisted telephone number;

d) Installation of security devices in the witness's home such as security doors, CCTV, alarms, fencing etc;

e) Concealment of identity of the witness by referring to him/her with the changed name or alphabet;

f) Emergency contact persons for the witness;

g) Close protection, regular patrolling around the witness's house;

h) Temporary change of residence to a relative's house or a nearby town;

i) Escort to and from the court and provision of Government vehicle or a State funded conveyance for the date of hearing;

j) Holding of in-camera trials;

k) Allowing a support person to remain present during recording of statement and deposition;

l) Usage of specially designed vulnerable witness court rooms which have special arrangements like live video links, one way mirrors and screens apart from separate passages for witnesses and accused, with option to modify the image of face of the witness and to modify the audio feed of the witness' voice, so that he/she is not identifiable;

m) Ensuring expeditious recording of deposition during trial on day to day basis without adjournments;

n) Awarding time to time periodical financial aids/grants to the witness from Witness Protection Fund for the purpose of re-location, sustenance or starting a new vocation/profession, if desired;

o) Any other form of protection measures considered necessary."

Though the Witness Protection Scheme, 2018 has been evolved in the year 2018, still the system is not providing confidence to the witnesses to come out with the truth as against the hard-core criminals.

14.In *State of Gujarat v. Anirudhsing, (1997) 6 SCC 514 : 1997 SCC (Cri) 946*, the Hon'ble Apex Court in paragraph 29 held as follows:

"29. In view of the above settled legal position, merely because some of the witnesses have turned hostile, their ocular evidence recorded by the court cannot be held to have been washed off or unavailable to the prosecution. It is the duty of the court to carefully analyse the evidence and reach a conclusion whether that part of the evidence consistent with the prosecution case, is acceptable or not. It is the salutary duty of every witness who has the knowledge of the commission of crime, to assist the State in giving evidence; unfortunately for various reasons, in particular deterioration in law and order situation and the principle of self-preservation, many a witness turn hostile and in some instances even direct witnesses are being liquidated before they are examined by the Court. In such

circumstances, it is high time that the Law Commission looks into the matter. We are informed that the Law Commission has recommended to the Central Government to make necessary amendments to the CrPC and this aspect of the matter should also be looked into and proper principles evolved in this behalf. Suffice it to state that responsible persons like Sub-Divisional Magistrate turned hostile to the prosecution and most of the responsible persons who were present at the time of flag-hoisting ceremony on the Independence Day and in whose presence a ghastly crime of murdering a sitting MLA was committed, have derelicted their duty in assisting the prosecution and to speak the truth relating to the commission of the crime. However, we cannot shut our eyes to the realities like the present ghastly crime and would endeavour to evaluate the evidence on record. **Therefore, it is the duty of the trial Judge or the appellate Judge to scan the evidence, test it on the anvil of human conduct and reach a conclusion whether the evidence brought on record even of the witnesses turning hostile would be sufficient to bring home the commission of the crime.** Accordingly, we undertake to examine the evidence in this case."

Therefore, keeping in mind the law laid down by the Hon'ble Apex Court, we have to analyse the evidence in a very careful manner.

15.P.W.2 in his chief examination has stated that on hearing the noise

they went to the place of occurrence and at that time these accused left the place of occurrence in a motorcycle. Therefore, he was treated as hostile by the prosecution and he was also cross-examined on the same day. In the cross-examination, he admitted that all these accused with bill-hooks indiscriminately cut the deceased Karthi on his head and neck and he witnessed the same. He admitted during the cross-examination that during the examination by the police he stated about the occurrence and he also admitted the statement recorded by the police. He also stated that when he was examined by the police he was not aware of the names of the accused. But he was later informed by P.Ws.3 and 5. P.W.2 has also expressed his fear in his cross-examination and admitted that only out of fear he turned hostile.

16.P.W.3, who is also an eyewitness did not support the case of the prosecution and therefore, he was also treated as hostile. In the chief-examination he admits that he went to the place of occurrence along with P.W. 2. at that time P.W.2 on seeing the occurrence raised alarm and all the accused, who were present in the Court left the place of occurrence in a motorcycle and he also found the deceased lying down with injuries. When he was cross-examined by the Public Prosecutor, he admitted that he stated about the

occurrence before the police as recorded in the 161 statement and reiterated that the accused have left the place of occurrence in a motorcycle and when he was cross-examined by the accused he again reiterated that he know the assailants who caused injuries to the deceased Karthi.

17.P.W.4. though stated in the chief examination that he went along with P.Ws.2 and 3 to the place of occurrence, he stated that 3 persons were standing with a bike, but refused to identify the accused and in the cross-examination he also stated that those three persons left the place of occurrence in a motorcycle.

18.The Hon'ble Apex Court in *Rizan v. State of Chhatisgarh [(2003) 2 SCC 661]*, has clearly held that it is the duty of the Court to separate the chaff from the grain. Where the chaff can be separated from grain, it would be open to the Court to convict the accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of accused persons. In paragraph No.12 of the said decision the Hon'ble Apex Court has held as under:

> "12. Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out the entire prosecution case. In essence,

prayer is to apply the principle of *falsus in uno falsus* in omnibus (false in one thing, false in everything). This plea is clearly untenable. Even if a major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where the chaff can be separated from the grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of a particular material witness or material particular would not ruin it from the beginning to end. The maxim *falsus in uno falsus* in omnibus has no application in India and the witnesses cannot be branded as liars. The maxim *falsus in uno falsus in omnibus* has not received general acceptance nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence". (See *Nisar Ali v. State of U.P. [AIR 1957 SC 366 : 1957 Cri LJ 550]*) Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate accused who had been

acquitted from those who were convicted. (See *Gurcharan Singh v. State of Punjab [AIR 1956 SC 460 : 1956 Cri LJ 827]* .) The doctrine is a dangerous one, specially in India for if a whole body of the testimony were to be rejected, because a witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See *Sohrab v. State of M.P. [(1972) 3 SCC 751 : 1972 SCC (Cri) 819]* and *Ugar Ahir v. State of Bihar [AIR 1965 SC 277 : (1965) 1 Cri LJ 256]* .) An attempt has to be made to, as noted above, in terms of the felicitous metaphor, separate the grain from the chaff, truth from falsehood. Where it is not feasible to separate truth from falsehood, because the grain and the chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available

course to be made is to discard the evidence in toto. (See *Zwinglee Ariel v. State of M.P. [AIR 1954 SC 15 : 1954 Cri LJ 230]* and *Balaka Singh v. State of Punjab [(1975) 4 SCC 511 : 1975 SCC (Cri) 601 : AIR 1975 SC 1962]* .) As observed by this Court in *State of Rajasthan v. Kalki [(1981) 2 SCC 752 : 1981 SCC (Cri) 593 : AIR 1981 SC 1390]* normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there, however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category into which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in *Krishna Mochi v. State of Bihar [(2002) 6 SCC 81 : 2002 SCC (Cri) 1220 : JT (2002) 4 SC 186]* and *Gangadhar Behera v. State of Orissa [(2002) 8 SCC 381 : 2003 SCC (Cri) 32 : (2002) 7 Supreme 276]* . Accusations have been clearly established against the accused-appellants in the case at hand. The courts below have categorically indicated the distinguishing features in evidence so far as the acquitted and convicted accused are concerned."

19.When we have carefully analysed the evidence of P.Ws.2 and 3, we could find the presence of P.Ws.2 and 3 in the place of occurrence and the

accused have also present in the place of occurrence and having left the place of occurrence and after the commission of offence. P.W.2 in his cross-examination by the Public Prosecutor has admitted that these accused have indiscriminately cut the deceased on the head and neck. The doctor who conducted the postmortem has also noted down the corresponding injuries on the deceased.

20.P.W.8, the friend of the deceased in his evidence has stated about the previous occurrence, which has taken place in the bar run by the accused, wherein a glass was broken out by the deceased and accused No.1 and consequent to that the deceased has also caused injury on the face of the accused No.1. P.W.9, the wife of the deceased has also corroborated the evidence of P.W.8 that there was such an incident took place in the bar run by the accused No.1 and after the deceased caused injury, the accused No.1 came to her house and intimidated her even though she was pregnant during the relevant time. She also stated that apprehending danger, she has sent her husband to Kerala and her husband returned back only on the date of their child's birth. The evidence of P.Ws.8 and 9 established the case of the prosecution on the previous motive as against the accused No.1 with the deceased and on the arrival of the deceased the occurrence was taken place on

02.07.2014 and the available evidence of P.W.2 and 3 established that these accused have committed the occurrence on that day.

21.As rightly pointed out by the learned Additional Public Prosecutor appearing for the State there is no scope for any manipulation in the F.I.R. since it has been registered against unnamed three persons only. Further, P.W.10, the constable, who took the F.I.R. to the Court has explained the reasons for the delay that when he went to the Judicial Magistrate Court, the Magistrate was not available and therefore, the F.I.R. was handed over on the next day morning at 9.00 a.m. Hence, the delay in sending the F.I.R. to the Court having been sufficiently by explaining the said delay as argued by the learned counsel for the appellant cannot be fatal to the prosecution. Besides, the other minor discrepancies pointed out by the learned counsel for the appellants are also not fatal to the prosecution case since they are minor discrepancies. As stated in ***Rizan's*** case it is the duty of the Court to separate the chaff from the grain. While doing so, we could separate the truth from the falsehood of the appellant's case.

22.As a matter of fact, in the complaint, Ex.P.1, the names of the assailants are not mentioned, but it is mentioned as three persons who came in a motorcycle committed the offence. But in Ex.P.1, the presence of P.Ws.2, 3 and

4 is mentioned and P.Ws.2 and 3 have deposed during the cross examination that those accused were present in the place of occurrence and left the place of occurrence after commission of offence in motorcycle and P.W.2 has specifically stated that these accused have indiscriminately cut the deceased with bill-hooks. These accused have surrendered before the Court on various dates and were taken on police custody by the investigation officer and the weapon M.Os.8, 10 and 11 were also recovered pursuant to their confession statements recorded in the presence of P.W.6, the Village Administrative Officer and the evidence of the Village Administrative Officer has established the recoveries from the accused. The Doctor – P.W.11, who conducted the autopsy has also pointed out that injuries found on the deceased are possible through the weapons M.Os.8, 10 and 11, therefore, this Court finds that the prosecution has sufficiently established their case as against the appellants/accused beyond any reasonable doubt and the defence has not demolished the prosecution theory, hence there is no reason for this Court to interfere with the judgment of the trial Court.

23.In the result, Criminal Appeal is dismissed confirming the judgment dated 19.01.2018, made in S.C.No.70 of 2016 by the Additional District and Sessions Judge, Ramanathapuram convicting and sentencing the first appellant/first accused for the offence under Section 302 I.P.C. and the

appellants 2 and 3/accused 2 and 3 for the offence under Section 302 r/w 34 I.P.C.. The bail bonds executed by the accused shall stand cancelled. The period of imprisonment already undergone by the appellants/accused shall be given set off. The respondent is directed to take steps to procure the accused for undergoing the remaining period of sentence.

[T.R., J.] [B.P., J.]
18.09.2019

Index : Yes / No
Internet : Yes / No
sj

To

1.The Additional District and Sessions Judge,
Ramanathapuram.

2.The Judicial Magistrate No.2,
Ramanathapuram.

3.The Inspector of Police,
Kenikarai Police Station,
Ramanathapuram District.

4.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

T.RAJA, J.

and

B.PUGALENDHI, J.

sj

Copy to

The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

Pre-delivery judgment in
Crl. A. (MD)No.104 of 2018

Delivered on
18.09.2020