

A SHEIKH SINTHA MADHAR @ JAFFER @ SINTHA ETC.

v.

STATE REP. BY INSPECTOR OF POLICE

(Criminal Appeal Nos. 2118-2119 Of 2009)

B APRIL 13, 2016

**[PINAKI CHANDRA GHOSE AND AMITAVA ROY, JJ.]**

*Penal Code, 1860 – ss. 148, 302, 201 and 120B – Conspiracy hatched by 13 accused in two groups (A1 to A6 and A7 to A13) to kill doctor, BJP town secretary – A1 to A7 formed unlawful assembly – A1 to A6 attacked the doctor with weapons resulting in his death, and A7 stood nearby unarmed – Deceased’s daughter-PW 1 witnessed the incident – Conviction and sentence of A1 to A6 for the offences punishable u/ss. 120-B read with s. 302, s. 148 and s. 302 and A7 for the offence punishable u/ss. 147, 109 read with s. 302 – However, A8 to A13 acquitted of all the charges – Order of trial court upheld by High Court – On appeal, held: Cogent and convincing evidence of PW1, corroborated by PW65 – PW1 was not named in the inquest report as also first informant not named PW1 in the complaint, such omission not fatal – PW1’s statement cannot be rejected only on the ground that she is an interested witness – Statement of PW1 corroborated by the medical examination – PW1 saw the assailants at night because there was sufficient light to see them – No inordinate delay in conducting the TIP – Joint TIP would not affect the validity of TIP – Murder of the doctor proved by the aid of the eye-witnesses – Conspiracy proved beyond reasonable doubt between A1 to A6 – Conviction of A1 to A6 based on proper appreciation of evidence, thus, does not call for interference – A7 was charged for the offence u/s. 109/302 along with A8 to A13 on the basis of the conspiracy hatched and A8 to A13 have been acquitted – Offence of s.147 not proved beyond reasonable doubt and A7’s presence doubtful – Thus, A7 not liable for abetment to commit murder by A1 to A6 and his conviction is set aside.*

**Allowing Crl Appeal No. 2117/2009 and dismissing Crl Appeal Nos. 2118-2119/2009, the Court.**

H **HELD: 1.1 The statements of PW1 and PW65 are not**

contradictory to each other, rather they are complementary to each other. Merely because PW65 did not see PW1 until the accused had left, does not mean that she was not present at the place of occurrence and she did not witness the occurrence. She already stated that she was afraid of her own life and so she was hiding to some extent, and thus, PW65 might not have seen her. PW65 made a call to the police but did not mention PW1's presence to the police at that time. This fact is quite natural as in the commotion, he had made a police call only to inform the police about the incident and could not provide details for the same. [Para 12] [943-B-C]

1.2 The fact that PW1 was not named in the inquest report is of no consequence as the inquest report relates to the cause of death and not the witnesses' account of the incident. The first informant though had not named PW1 in the complaint such omission is not fatal in the face of otherwise cogent and convincing evidence of PW1, corroborated by PW65. The other eyewitnesses turned hostile during the trial and did not support the prosecution case at all, but that does not affect the statements of PW1 and PW65. PW1's statement cannot be rejected only on the ground that she is an interested witness as she has been particularly corroborated by PW65's testimony. [Para 13] [943-D-E]

1.3 PW1 could have seen the assailants at night because the area was illuminated by the electric lights all around and there was sufficient light to see them. Also, the fact that she was sitting in an air-conditioned room was not conclusively proved and it is quite natural that at 10 p.m. in the night, when the roads and neighbourhood are quiet, and there is no hustle-bustle like daytime, even a slight noise can be heard. Thus, the screams of the deceased could have been easily heard and identified by his daughter and there was nothing unusual for her to come out and witness the incident, as she was by then already expecting the return of her father from the clinic. The post-mortem report states that most of the wounds are deep cut wounds but the same can be caused by a knife. To this extent, the statement of PW1 is corroborated by the medical examination. [Para 14, 15] [943-G-H; 944-A, C-D]

A           1.4 It is clear from the evidence that there is no inordinate  
delay in conducting the TIP. As and when the accused were  
arrested, within reasonable time they were produced for the TIP.  
Also, there is no invariable rule that two accused persons cannot  
be made part of the same TIP. Joint TIP would thus, in no manner,  
B           affect the validity of the TIP. The purpose of a TIP is to ensure  
that the investigation is going on the right track and it is merely  
a corroborative evidence. The actual identification must be done  
in the court and that is the substantive evidence. If the accused  
is already known to the witness, the TIP does not hold much  
value and it is the identification in the court which is of utmost  
C           importance. PW1 identified all the seven accused appellants in  
the court as well as in the TIP. [Para 16] [944-E-F]

D           1.5 The fact that the deceased had a few strands of hair in  
his hand which did not match with any of the accused except A13,  
who had been acquitted by the Trial Court as well as the High  
Court, does not hold much ground as it, by itself cannot exonerate  
the accused only because the samples do not match. [Para 17]  
[944-G-H]

E           1.6 A conspiracy is always hatched in secrecy and it is very  
difficult to gather direct evidence for the proof of the same. The  
conspiracy before the incident is proved by the statements of  
PW23, PW36 and PW37. Thus, the conspiracy was proved beyond  
reasonable doubt between A1 to A6 and the courts below were  
correct in convicting them for the offence of conspiracy. Also,  
the murder of the doctor was proved by the aid of the eye-  
witnesses. The conviction of A1 to A6 is based on proper  
F           appreciation of evidence and requires no interference. [Paras 20-  
21] [945-G-H; 946-A-B]

G           1.7 PW1 though identified A7 as well in the court, but she  
did not state that he was the one standing unarmed, as is the  
case of the prosecution. A7 was already acquitted of the charges  
of conspiracy with the second group i.e. A8 to A13. Thus, he  
cannot be linked at all with the common object of A1 to A6 who  
had hatched a separate conspiracy. Also, PW65 did not identify  
A7 or any other accused in the court. [Para 22] [946-D-E]

H           1.8 A8 to A13 had been acquitted of the charge for the

offences under Section 109 read with Section 302 IPC and the same reason would apply for the acquittal of A7 as well, as this charge relates to the second group. A7 had been charged for the offence u/s. 109 read with Section 302 along with A8 to A13 on the basis of the conspiracy hatched but when A8 to A13 have been acquitted, A7 must also be acquitted as the abetment is with reference to the conspiracy. Also, when the offence of Section 147 IPC is not proved beyond reasonable doubt, A7's presence becomes doubtful and as such he cannot be made liable for abetment to commit murder by A1 to A6. Thus, the conviction of A7 is set aside. [Paras 23, 24] [946-F-H]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 2118-2119 of 2009.

WITH

Crl. A. No. 2117 of 2009

From the Judgment and Order dated 22.02.2008 of the Madurai Bench of Madras High Court in Criminal Appeal Nos. 1736 of 2003 and 1807 of 2003.

Sidharth Luthra, Ratnakar Das, M. Karpaga Vinayagam, Sr. Advs., Anis Mohd., Ms. Shardha Karol, Joel, L. K. Pandey, Ms. K. V. Bharathi Upadhyaya, S. I. Abdul Kalam, Mrs. V. S. Lakshmi, Ganesh D. Gurnule, A. Venayagam Balan, Mehboob, Advs. for the Appellants.

Subramonium Prasad, Sr. Adv., M. Yogesh Kanna, Jayant Patel, Utkarsh Srivastava, Ashmeet Singh, Advs. for the Respondents.

The Judgment of the Court was delivered by

**PINAKI CHANDRA GHOSE, J.** 1. These appeals, by special leave, have been directed against the judgment and order dated 22.02.2008 passed by the Madras High Court, Madurai Bench, in Criminal Appeal No. 1736 of 2003 and Criminal Appeal No. 1807 of 2003, whereby the High Court dismissed the criminal appeals filed by the appellants and confirmed their conviction and sentences for various offences punishable under Sections 148, 302, 201 and 120B of the Indian Penal Code, 1860 (hereinafter referred to as "IPC").

2. The brief facts necessary to dispose of these appeals are that after the Coimbatore serial blasts, a conspiracy was hatched to do away with Dr. Sridhar (deceased), who was BJP Town Secretary at Trichy,

A and also actively involved in the propagation of the Hindu religion in the town. There were a total of 13 accused that hatched conspiracies in two separate groups to kill Dr. Sridhar and curb the growth of BJP in the city. A1 to A6 formed one group and hatched a conspiracy under the leadership of A1. The second group was formed under the guidance of A8 and included A7 to A13 who conspired at Tirunelveli. Both these groups had planned to kill the deceased in two separate conspiracies at two different places. In pursuance of the conspiracy, A1 to A7 formed an unlawful assembly on 2.2.1999 and attacked the deceased at about 10 p.m. when he was returning back from his clinic. A1 to A6 attacked the deceased with weapons in pursuance of the common object and caused his death and A7 stood nearby unarmed. As claimed by the prosecution, this incident was witnessed by the daughter of the deceased (Lakshmi Priya-PW1), neighbours of the deceased (Domnic Raja-PW2, Sagayarajan-PW3 and Dr. Soundirarajan-PW65) and the night-watchman in the area (Mr. Marimuthu-PW5).

D 3. After investigation, Police filed charge-sheet against all the 13 accused persons. Upon considering the material on record and hearing the counsel on both sides, the accused persons were charged for various offences punishable under Sections 148, 302, 201 and 120-B of the IPC. The charges were read over and explained to them. All the accused persons pleaded 'not guilty' and claimed for trial.

E 4. The Trial Court by its judgment and order dated 7.10.2003, convicted and sentenced the accused/appellants for the offences as follows: A1 to A6 for the offences punishable under Sections 120-B read with Section 302, Section 148 and Section 302 IPC. A3 and A6 were acquitted of the offences punishable under Section 201 read with Section 302 IPC. A7 was convicted for the offence punishable under Section 147 and Section 109 read with Section 302 IPC. However, he was acquitted of the charges under Section 120-B read with 302 and Section 201 read with Section 302 IPC. A8 to A13 were acquitted of all the charges framed against them.

G 5. The matter came up before the Madras High Court (Madurai Bench) vide Criminal Appeal No.1736 of 2003 filed by A5 and Criminal Appeal No.1807 of 2003 filed by A1, A2, A3, A4, A6 and A7. No appeal was filed by the State against the acquittal of A8 to A13. The High Court by the impugned judgment and order dismissed both the appeals

on the ground that the prosecution had established beyond reasonable doubt that A1 to A6 had conspired to kill Dr. Sridhar and A7 was a part of the unlawful assembly and participated in the murder of Dr. Sridhar (deceased). Since the conspiracy and murder were proved, the High Court refused to interfere with the judgment of the Trial Court. A

6. Aggrieved by the judgment and order dated 22.02.2008 passed by the Madras High Court, the accused have filed the appeals before this Court against their conviction and sentence. Criminal Appeal Nos.2118-2119 of 2009 is filed by A1 to A6 and Criminal Appeal No.2117 of 2009 is filed by A7. We shall first discuss the culpability of A1 to A6 and subsequently deal with the conviction and sentence of A7. B C

7. Mr. Sidharth Luthra and Mr. Ratnakar Daš, learned senior counsel appearing on behalf of appellants A1 to A6 have inter alia reiterated that the judgments of the Trial Court as well as the High Court were erroneous as the prosecution had been unable to bring home its case. He assailed the reasoning given by the High Court in arriving at a wrong conclusion i.e. the guilt of the accused on the following grounds: Firstly, the presence of PW1 (daughter of the deceased) was doubtful at the spot as it was not reflected in the earliest available records and her testimony cannot be the sole basis of conviction as it was unreliable. Secondly, the number of assailants was not clear. Thirdly, due to the distance of the place of occurrence and insufficient light thereat, the identity of the accused was rendered doubtful and the weapon of the murder was also not clearly established, being contrary to what was stated in the post-mortem report. Fourthly, the Test Identification Parade was vitiated in law and delayed as well. Fifthly, the conspiracy was not proved. Lastly, the investigation was defective and biased and various material documents were suppressed and the forensic evidence was also not reliable. D E F

8. Mr. Subramonium Prasad, learned senior counsel appearing for the State has vehemently rebutted the grounds argued by the learned senior counsel appearing for the appellants and has stated that the motive and conspiracy behind the incident and the involvement of the appellants was proved, beyond reasonable doubt, by the testimony of PW-1 as corroborated by PW-65's evidence in particular. The post-incident conspiracy was also proved and there were no such irregularity in the H

A Test Identification Parades which would vitiate the case of the prosecution.

B 9. Mr. M. Karpaga Vinayagam, learned senior counsel appearing on behalf of A7, submitted that the offence under Section 147 IPC was not made out against A7 as the evidence of PW-1, even when corroborated by the evidence of PW-65, could not establish the identity and presence of A7 at the place of the incident. He also argued that since A7 had been acquitted of the conspiracy with A8 to A13, his conviction under Section 109 read with Section 302 IPC, could not be sustained.

C 10. The main issues are whether the conspiracy was proved or not and whether the presence of the accused at the place of incident was established or not. We shall deal with A1 to A6 first and subsequently with A7. We have perused the oral and documentary evidence on record. We shall now examine each and every contention in light of the arguments adduced before us.

D 11. The first aspect for consideration before us is the testimony of the eye-witnesses. There were allegedly 5 eye-witnesses to the murder who were examined: the daughter of the deceased (Laxmi Priya-PW1), neighbours of the deceased (namely, Dominic Raja-PW2, Sagayarajan-PW3 and Dr. Soundirarajan-PW65) and the night-watchman in the area (Mr. Marimuthu-PW5). PW1 stated that she was studying in her house when she heard a scream- "Save me". Realizing that it was of her father, she went out of the gate and saw 6-7 persons stabbing her father with knife-like weapons. She was standing at about a 100 feet distance from the place of incident and though it was around 10 p.m. but still she could clearly see the incident as it took place at a spot which was then lit up by the tube lights of PW65's house. Apart from the lights of PW65's house, the street lights as well as her own compound lights were on. She shouted at the accused persons to stop, but they only turned and saw her and thus she could see them clearly. After the incident, she saw them going away on their bikes and they also took her father's bike. She immediately went to the house of the deceased's elder brother Shanmugasundaram (informant), who came along with her and saw the deceased lying in a pool of blood. The elder brother could not be examined as he died before the trial could commence. PW1 also identified all the seven accused appellants in the Test Identification Parade. PW65, on

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the other hand, stated that he heard the distress call of the deceased and came outside and saw 4-5 persons attacking the deceased, but he only saw PW1 when she came near the dead body of her father after the assailants had left. A

12. When we analyse the statements of PW1 and PW65, they are not contradictory to each other, rather they are complementary to each other. Merely because PW65 did not see PW1 until the accused had left, does not mean that she was not present at the place of occurrence and she did not witness the occurrence. She has already stated that she was afraid of her own life and so she was hiding to some extent, and thus, PW65 might not have seen her. PW65 made a call to the police but did not mention PW1's presence to the police at that time. This fact is quite natural as in the commotion, he had made a police call only to inform the police about the incident and could not provide details for the same. B C

13. The fact that PW1 was not named in the inquest report is of no consequence as the inquest report relates to the cause of death and not the witnesses' account of the incident. The first informant though had not named PW1 in the complaint such omission is not fatal in the face of otherwise cogent and convincing evidence of PW1, corroborated by PW65. The other three eyewitnesses: PW2, PW3 and PW5 turned hostile during the trial and did not support the prosecution case at all, but that does not affect the statements of PW1 and PW65. PW1's statement cannot be rejected only on the ground that she is an interested witness as she has been particularly corroborated by PW65's testimony. D E

14. The next aspect for our consideration is the distance and brightness of the place of incident from where PW1 witnessed it and whether it was possible for her to see the assailants at night from a distance of about 100 feet. This aspect has been dealt with by the High Court in great details and we agree with the High Court that PW1 could have seen the assailants at night because the area was illuminated by the electric lights all around and there was sufficient light to see them. Also, the fact that she was sitting in an air-conditioned room was not conclusively proved and it is quite natural that at 10 p.m. in the night, when the roads and neighbourhood are quiet, and there is no hustle-bustle like daytime, even a slight noise can be heard. Thus, the screams of the deceased could have been easily heard and identified by his F G

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A daughter and there was nothing unusual for her to come out and witness the incident, as she was by then already expecting the return of her father from the clinic.

15. The next question is regarding the weapon of murder not conforming to the post-mortem report opinion. The post-mortem was done by PW40 - Dr. Vijayalakshmi who stated that many of the injuries found on the deceased were all cut injuries and could have been caused by cutting weapons, like an *Aruval* and not by knives as stated by PW1 in her testimony. A knife is essentially used for stabbing but it can also be used for slicing and cutting depending upon the manner and angle at which it is used. PW1 had stated that she saw the accused attacking the deceased and it cannot be technically taken to be stabbing or slicing. The post-mortem report states that most of the wounds are deep cut wounds but the same can be caused by a knife. To this extent, the statement of PW1 is corroborated by the medical examination.

16. The next question is whether the Test Identification Parades were vitiated on account of delay or for holding those TIPs jointly, or on account of the identity of the accused having been already revealed before the TIP could be conducted. It is clear from the evidence that there is no inordinate delay in conducting the TIP. As and when the accused were arrested, within reasonable time they were produced for the TIP. Also, there is no invariable rule that two accused persons cannot be made part of the same TIP. Joint TIP would thus, in no manner, affect the validity of the TIP. The purpose of a TIP is to ensure that the investigation is going on the right track and it is merely a corroborative evidence. The actual identification must be done in the Court and that is the substantive evidence. If the accused is already known to the witness, the TIP does not hold much value and it is the identification in the Court which is of utmost importance. PW1 identified all the seven accused appellants in the Court as well as in the TIP.

17. The fact that the deceased had a few strands of hair in his hand which did not match with any of the accused except A13, who was already acquitted by the Trial Court as well as the High Court, does not hold much ground as it, by itself cannot exonerate the accused only because the samples do not match.

18. The most important question is whether the conspiracy hatched

by A1 to A6 was proved or not. A conspiracy is always hatched in A  
secrecy and it is very difficult to gather direct evidence for the proof of  
the same. The conspiracy before the incident is proved by the statements  
of PW23, PW36 and PW37. PW23 was a coolie (daily-wage worker)  
who had overheard indistinct conversations between 6-7 persons in the B  
first week of January, 1999, when they had come to take bath at the  
Mukkombu Dam. But this witness's testimony cannot be directly used  
to implicate the accused as he did not remember their faces and refused  
to identify them in Court because of fear. The same is the case with  
PW24 who was a caretaker at the garden near Mukkombu Dam who  
also could not identify the accused in the Court. C

19. An important witness of the conspiracy is Sayeed Ibrahim  
(PW36), a purse manufacturer, who stated that he knew A1 to A6. He  
was a member of the Al-Umma movement which was a banned  
organization and his job was to collect money for the undercover or  
arrested members of the organization. In July 1998, A4 told him to go to D  
Mukkombu to meet A1, A2, A3, A5 and A6 and collect money for some  
of the convicts in the Coimbatore Blast Case. He then went to Madurai  
and he heard the discussion between A1, A2 and A4 that Dr. Sridhar  
must be killed in Trichy to stop the growth of the BJP party. Around  
20.1.1999, he along with A1 to A6, went to Mukkombu and was told that E  
the decision to kill Dr. Sridhar was finalized. This is corroborated to this  
extent by the statements of PW23 and PW24 who stated their presence  
at Mukkombu around that time. Also, after the incident, he saw A3, A4,  
A5 and A6 in Madurai, where A4 described how they murdered Dr.  
Sridhar and that A3 hurt his left hand middle finger during the attack. F  
This statement by PW36, who turned an approver, substantiates the  
allegation of conspiracy to murder Dr. Sridhar.

20. PW37 (John Basha) also testified that on the date of incident  
at around 8:30 p.m., A3 called him up and told him that they have planned  
to murder Dr. Sridhar and after that one person will come to stay with G  
him and he should permit him to do so. After the incident, A3 came to  
PW37 with A4 who had a blood-stained shirt in his hand and they were  
accompanied by A5. He also saw A3 washing six blood-stained knives  
and a wound on his left hand middle finger. The injury on the middle  
finger of A3 was seen by both PW36 and PW37 and they were supported H

A by PW17 (the doctor who dressed up the wound on A3's finger). Though he maintained no records of patients, but he stated that he stitched the wound of A3.

21. Thus, the conspiracy was proved beyond reasonable doubt between A1 to A6 and the Courts below were correct in convicting them for the offence of conspiracy. Also, the murder of Dr. Sridhar was proved by the aid of the eye-witnesses. The conviction of A1 to A6 is based on proper appreciation of evidence and requires no interference.

22. Now, we shall discuss the culpability of A7 under Sections 147 and 109 read with 302 IPC, though he was acquitted of the charges of conspiracy with A8 to A13. The prosecution alleged that A7 was standing unarmed when A1 to A6 were attacking the deceased and therefore he was charged with Section 147 IPC and not with Section 148 IPC. PW1 has stated in her testimony that 6-7 persons were attacking her father. She did not state anything about any particular person standing unarmed or any role played by such person in the incident. Though she identified A7 as well in the Court, but she did not state that he was the one standing unarmed, as is the case of the prosecution. A7 was already acquitted of the charges of conspiracy with the second group i.e. A8 to A13. He thus cannot be linked at all with the common object of A1 to A6 who had hatched a separate conspiracy. Also, PW65 did not identify A7 or any other accused in the Court.

23. Regarding the conviction of A7 for the offences under Section 109 read with Section 302 IPC, it has to be considered that A8 to A13 had been acquitted of this charge and the same reason shall apply for the acquittal of A7 as well, as this charge relates to the second group. A7 had been charged for the offence under Section 109 read with Section 302 IPC along with A8 to A13 on the basis of the conspiracy hatched at Tirunelveli, but when A8 to A13 have been acquitted, A7 must also be acquitted as the abetment is with reference to the conspiracy.

24. Also, when the offence of Section 147 IPC is not proved beyond reasonable doubt, A7's presence becomes doubtful and if that is the case, he cannot be made liable for abetment to commit murder by A1 to A6. The conviction of A7 is, therefore, set aside and he is acquitted of all the charges and is directed to be set at liberty.

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25. In the light of the above discussion, we find no ground to .A  
interfere with the judgment passed by the High Court so far as it has  
confirmed the conviction and sentence of A1 to A6. Criminal Appeal  
Nos.2118-2119 of 2009 are, accordingly, dismissed. However, the  
judgment of the High Court so far as it concerns the conviction of A7, is  
set aside. Criminal Appeal No.2117 of 2009 is, accordingly, allowed. A7 B  
is already released on bail granted by this Court on 4<sup>th</sup> July, 2011. His bail  
bond shall stand discharged.

Nidhi Jain

Appeals disposed of.