PRATHAP & ANR. A

v.

STATE OF KERALA

(Criminal Appeal Nos. 1198-1199 of 2005)

AUGUST 27, 2010 B

[B. SUDERSHAN REDDY AND SURINDER SINGH NIJJAR, JJ.]

Penal Code, 1860 – ss. 302 and 149 – Murder – Deceased and one more attacking accused persons and co-accused – In retaliation, accused and co-accused armed with deadly weapons inflicting fatal injuries to deceased – High Court upholding conviction of accused u/s. 302/149 but setting aside the conviction u/s. 120-B – As regard co-accused, High Court upholding acquittal of four co-accused and also acquitting the other four co-accused convicted by trial court – On appeal, held: Facts and circumstances clearly prove the existence of common object of accused to eliminate the deceased – Accused had a clear motive – Evidence of eye-witnesses is reliable – Medical evidence leads to the conclusion that death resulted from injuries caused by accused – Prosecution witnesses not only identified accused as assailants with swords but also indicated injuries inflicted by them on deceased – Accused don't deserve to be acquitted on the principle of parity – Thus, order of High Court does not call for interference – Evidence – Criminal law – Common object – Principle of parity – Constitution of India 1950 – Article 136. C D E F

According to the prosecution case, 'K'-deceased and 'M'-CW 11 attacked the appellants. To seek revenge, the appellants and the other accused inflicted various injuries to 'K' resulting in his death. The appellants and the other accused were tried by the Court of Session for the offences punishable u/ss. 114, 143, 147, 148, 120-B G

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A and 302/149 IPC. The High Court upheld the conviction and sentence of the appellants u/s. 302/149 IPC, however, it set aside the conviction u/s.120 B IPC. The High Court upheld the acquittal of A3 and A8 to A10 and also acquitted accused no. 4, 5, 6 and 7. Therefore, the B appellants filed the instant appeal.

Dismissing the appeals, the Court

HELD: 1.1 The trial court as well as the High Court correctly relied upon the unflinching, coherent and C consistent evidence given by PW 1 which leaves no manner of doubt about the entire sequence of events. The evidence given by PW1 was corroborated by PW 2 in every material particular. The submission with regard to the scene of crime not being well lit is without any D substance. Similarly, the criticism with regard to the identification parade not having been held is of no consequence. PW 1 and PW 2 clearly stated that the appellants were previously known to them. PW1 certainly even knew about the previous enmity between the E deceased and the appellants. [Paras 14 and 15] [255-F; 257-C-E]

1.2 There is no reason at all to disbelieve the evidence of the eye-witnesses. The weapons used by the appellants and the injuries caused have been specifically F mentioned by PW1 and PW2. Recoveries of the swords used by them were made at the instance of the appellants. Recoveries of other weapons, clothes worn by the accused on the day of the assault were also made at the instance of the other accused. Medical evidence G also leads to the conclusion that the death resulted from the injuries caused by the appellants and the other accused with their respective weapons. In view of the proven facts, it becomes evident that the appellants had acted with a common object to eliminate the deceased. H [Para 16] [257-F-H]

Bhagwan Singh vs. State of M.P. (2002) 4 SCC 85; *Chanda vs. Stateof U.P.* (2004) 5 SCC 141 – referred to. A

1.3 It cannot be said that the appellants were perhaps unaware that the murderous assault, intended to be committed by them, would, in all probability, cause the death of 'K'. Both the trial court as well as the High Court considered the specific injuries caused by the appellants with swords. There were 20 ante-mortem injuries on the deceased. According to the opinion of the doctor, the death was due to injuries caused on the chest and on the left palm. The death could also have resulted from the cumulative effect of all other injuries. Therefore, there is no manner of doubt that 'K' died as a result of injures caused by the appellants along with the other accused. [Para 17] [259-G-H; 260-A-B] B C D

1.4 It is always open to a court to differentiate the accused who had been acquitted from those who had been convicted. Both the courts below applied the said principle in distinguishing the case of the appellants from those who have been acquitted. The appellants were known to be associates of the deceased. They had previous social interaction. For some time they had differences of opinion. This led to an assault by the deceased and his companion CW 11, on the appellants, A1 and A2. Consequently, the appellants wanted to settle the score with the deceased. They had a clear motive. This apart, PW 1 and PW 2 not only identified the appellants as assailants with swords but also indicated the injuries inflicted by them on the deceased. On the other hand, the accused persons who had been acquitted were not known to PW 1 and PW 2. In fact, PW 1 in the evidence categorically admitted that the other accused were not from the locality but were sometimes seen there. The courts below rightly declined to acquit the appellants on the principle of parity. [Paras 18 and 19] [260-C-G] E F G H

A *Gangadhar Behera vs. State of Orissa* **(2002) 8 SCC 381 – referred to.**

1.5 The trial court as well as the High Court rightly convicted the appellants, as the facts and circumstances of the case unequivocally proved the existence of the common object of the appellants. They had come looking for 'K' armed with deadly weapons with the intention of causing grievous bodily injuries. There was a pre-planned attack. They located him and caused serious injuries with swords, choppers and other weapons, which led to his death. Thus, they were rightly convicted and sentenced u/s. 302/149 IPC. The concurrent views taken by the trial court as also the High Court cannot be said to be either clearly illegal or manifestly erroneous and does not call for any interference under Article 136 of the Constitution of India. [Paras 20 and 21] [261-D-F]

Siri Kishan and Others Vs. State of Haryana **(2009) 12 SCC 757;** *Mummidi Hemadri and Others Vs. State of Andhra Pradesh* **(2007) 13 SCC 496;** *Chanda and Others Vs. State of U.P. and Another* **(2004) 5 SCC 141 – referred to.**

Case Law Reference:

(2009) 12 SCC 757	**Referred to.**	**Para 5**
(2007) 13 SCC 496	**Referred to.**	**Para 5**
(2004) 5 SCC 141	**Referred to.**	**Para 5**
(2002) 4 SCC 85	**Referred to.**	**Para 16**
(2004) 5 SCC 141	**Referred to.**	**Para 16**
(2002) 8 SCC 381	**Referred to.**	**Para 19**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1198-1199 of 2005.

From the Judgment & Order dated 28.06.2004 of the High Court of Kerala at Ernakulam in Crl. Appeal No. 432 of 2003 (B) and Crl. Appeal No. 873 of 2003. A

C.N. Sreekumar, T.G.N. Nair, V.K. Sidharthan for the Appellants. B

R. Sathish, S. Geetha for the Appellant.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. These two appeals have been filed against the common judgment of the High Court of Kerala at Ernakulam dated 28.6.2004 in Criminal Appeal No. 432 of 2003 and Criminal Appeal No. 873 of 2003 whereby the High Court dismissed the appeal filed by the appellants herein by confirming the judgment of the trial court convicting and sentencing them under Section 302 and 149 of the Indian Penal Code. By the same judgment, their conviction under Section 120 (B) was set aside. C D

2. The appellants along with eight other persons were tried by the Sessions Court, Kollam, in Sessions case no. 564/1999 for the offences punishable under Section 114, 143, 147, 148, 120(B) & 302 read with Section 149 of Indian Penal Code. It was the case of the prosecution that the deceased Kochukuttan and Murali (CW-11) had assaulted the appellants on 19.5.1997 *"at 9.00 p.m. at a place at Chaithram Restaurant"* run by the appellant Devakumar @ Jayakumar. Seeking revenge, the two appellants, Rajeev (A3) and Venu (A4) assembled at Chaithram Restaurant at Veliyam junction on 20.6.1997 at 7.45 p.m. and hatched a conspiracy to murder Kochukuttan. On 24.6.1997, all the ten accused in furtherance of a common object, armed with deadly weapons such as swords, iron rods, chopper, knife and stick etc. came to Chaithram Restaurant in a jeep KL-2B/9938. The jeep, which belonged to CW-16, was driven by Venu (A4). All the accused came out of the jeep at a place in front of the restaurant. Accused Prathap (hereinafter E F G H

A referred to as A1) and Rajeev (hereinafter referred to as A3) were in the front whereas Padmachandran (A5) to Deepu (A10) followed behind them. They came to a place in front of Harishree Bakers on the Eastern side of Kottarakkara Oyoor Public Road at Veliyam junction at about 7.45 p.m. At that time, B the deceased was talking to PW-1 Hareendranathan. A3, Rajeev, called Kochukuttan by saying "*Kochukuttan Come here*". Thereafter, appellant no. 1 Prathap (A1) assaulted the deceased with his sword and caused an injury on his head. At the same time, appellant no. 2 (A2) shouted "*cut this man*". He C was also armed with a sword and made a cut with the same on the side of the chest of the deceased. As a result of the injuries, Kochukuttan fell down on the road on the side of the verandah of Harishree Bakers. Thereafter, Padmachandran (hereinafter referred to as A5), Arjunan (hereinafter referred to D as A6), Siddikishan (hereinafter referred to as A7), Saji @ Sajith(hereinafter referred to as A8), Rajesh(hereinafter referred to as A9) and Deepu(hereinafter referred to as A10) are alleged to have inflicted various injuries with their weapons such as iron rods, chopper, sword, knife and stick. After causing mortal injuries to Kochukuttan, the assailants left the place in E the same jeep in which they had arrived. The deceased was moved to the hospital initially in a car driven by CW-14. However, the lights of the car developed some problem and the deceased was transferred to the jeep driven by CW-15. Kochukuttan succumbed to the injuries at 8.10 p.m. on F 24.6.1997. Upon completion of the investigation, the ten accused were put on trial. The prosecution cited PW-1, PW-2. PW-4 and PW-5 to PW-10 as eye–witnesses. It is noticed by the High Court that PW-6 to PW-10 were declared hostile as they did not fully support the prosecution story. PW-3 was G examined mainly to prove the criminal conspiracy which had been hatched at the hotel of Chaithram owned by A2, appellant in Criminal Appeal No. 873 of 2003 in the High Court. The trial court convicted A1, A2, A5, A6 and A7 under Section 302 of IPC and sentenced them to imprisonment for life and fine of

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Rs. 20,000/- each, in default to undergo R.I. for a period of 6 months. A1, A2, A5, A6 and A7 were also convicted under Section 149 and sentenced to R.I. for 1 year each. A1, A2 and A4 were also convicted of the offence under Section 120B IPC and sentenced to R.I. for 5 years each. Accused A3 and A8 to A10 were acquitted.

3. The two appellants herein challenged the aforesaid judgment by filing Criminal Appeal No. 873 of 2003 and 432 of 2003 before the High Court. The other accused persons filed Criminal Appeal No. 319/2003, 400/2004, 422/2003, 479/2003. State of Kerala preferred Criminal Appeal No. 901/2003 against the acquittal of 5 accused persons. All the appeals were heard together by the High Court and decided by a common judgment dated 28.6.2004. The appeals filed by the two appellants herein against the conviction and sentence under Section 302 IPC read with Section 149 of the IPC were dismissed. However, the conviction of these two appellants under Section 120(B) was set aside. The appeals filed by the State against the acquittal of A3 and A8 to A10 were also dismissed. At the same time, the appeals filed by accused no. 4, 5, 6 and 7 were allowed and their conviction as well as the sentence was set aside. These two appeals have been filed by the two appellants against the judgment of the High Court rendered in Criminal Appeal No. 873 and 432 of 2003.

4. We have heard the learned counsel for the parties.

5. The submissions made by the learned counsel for the appellants before the High Court have been reiterated before this Court. Learned counsel appearing for the appellants, Mr. C.N. Sreekumar, has submitted that the presence of the eye-witnesses is doubtful. Even if the alleged eye-witnesses were present, their evidence cannot be relied upon as it would have been impossible to identify the assailants as the scene of occurrence was not a well lit place. Assault which led to the death of Kochukuttan is alleged to have taken place at about 7.45 P.M. At the relevant time, there was load shedding of

A electricity in Kerala. On the date of the incident, the load shedding commenced at about 7.30. P.M. Therefore, it would not have been possible to identify the appellants. It would also not have been possible for the eye-witnesses to notice the weapons which were allegedly used by all members of the B unlawful assembly. Learned counsel further submitted that the eye-witnesses have failed to state categorically as to which injury was caused by which appellant and with which weapon. The learned counsel submitted that the eye-witnesses account is highly suspicious. Attacking the evidence of PW1, the C learned counsel has submitted that the witness is the brother-in-law of the deceased. He has been deliberately introduced by the prosecution. If he was an actual witness to the incident, he would have tried to save his brother-in-law and would have certainly received some injuries. Apart from this, when the D deceased was being moved to the hospital, this witness did not accompany the deceased in the same car. According to the learned counsel, the evidence of PW2, suffers from the same infirmities. Learned counsel further submitted that the High Court having acquitted all the accused from the charge of criminal conspiracy, there was hardly any evidence of unlawful E assembly or common object. Therefore, a conviction under Section 302 IPC cannot be recorded on the basis of such evidence. At best, the appellants could have been convicted under Section 304 IPC. In support of the submissions, learned counsel has relied on three judgments of this Court, viz.,

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(1) *Siri Kishan and Others Vs. State of Haryana,* (2009) 12 SCC 757

(2) *Mummidi Hemadri and Others Vs. State of Andhra Pradesh,* (2007) 13 SCC 496

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(3) *Chanda and Others Vs. State of U.P. and Another,* (2004) 5 SCC 141

6. Learned counsel further submitted that in any event, the H evidence of the eye-witnesses cannot be believed as there was

no identification parade held by the investigating officer to identify the accused persons, who have actually committed the offence. It is further submitted by the learned counsel that the identification of the appellants in the Court is of no consequence as the appellants along with the other co-accused had been shown to the witnesses in the police station. Their weapons were also shown to the witnesses. As a result of these infirmities, the co-accused of the appellants have been acquitted. Therefore, on the principle of parity, the appellants also deserved the benefit of doubt. According to the learned counsel, apart from the unsatisfactory identification of the appellants, the case of the prosecution has not been supported by PW6 to PW10, who were having shops in the neighbourhood at the junction where the assault had taken place. Therefore, it was submitted that the very genesis of the assault has not been proved.

7. On the other hand, Mr. R. Sathish, learned counsel appearing for the State of Kerala submitted that the trial court as well as the High Court has given concurrent findings. The evidence having been appreciated twice, by the trial court as also the High Court, does not leave any iota of doubt as to the involvement of the appellants in the murder of the deceased. He has submitted that the first information report was registered on the basis of the first information statement given by the brother-in-law of the deceased, PW1 very soon after the incident. The consistent story given by PW1 was fully corroborated by the eye-witnesses account of the PW2. The conspiracy has been duly proved by the evidence of PW3. He has further submitted that the submission of the learned counsel with regard to the place of assault being not properly lit is factually incorrect because the Veliyam junction where the murder took place is a very busy place and well lit throughout the night. Learned counsel further submitted that the injuries which caused the death of Kochukuttan have been specifically pointed out by the medical evidence in the inquest report as also in the postmortem report. Coming to the evidence with

A regard to the identification of the appellants, learned counsel submitted that any infirmities in not holding the identification parade would be totally irrelevant in case of the appellants as they were previously well known to PW1 and PW2. The evidence of PW1 and PW2 has been duly corroborated by the B evidence of other eye-witnesses PW4 and PW5. So far as the submissions with regard to the non-identification of the weapons and the non-attribution of the particular injuries to the appellants, learned counsel submitted that their participation is such that they would not be entitled to the benefit of the very C limited exception which is permissible to a by-stander in a charge under Section 149 IPC. Learned counsel further submitted that this is a clear case of enmity as the deceased and CW-11 had attacked appellants on the night before the murder. With regard to the load shedding, learned counsel has D submitted that the entire assault incident took place within a span of 3 to 4 minutes. It is alleged to have commenced at 7.25 P.M. and would have been over by 7.28. P.M. The load shedding if any does not commence till after 7.30 p.m. Even otherwise, it is submitted that on the fateful night of 24.6.1997, it was a moonlight night, therefore, it would not be a case of E complete darkness at night.

8. We have given due consideration to the rival submissions made by the learned counsel. The High Court in the impugned judgment has clearly observed that the identity F of the deceased and the place of occurrence etc. are not disputed in this case. Postmortem of the dead body of Kochukuttan was conducted by PW-18 at 11.40 a.m. on 25.6.1997. Ex. P17 is the postmortem certificate which shows that there are 20 ante mortem injuries. PW-16 has opined that G the death was due to injuries sustained to the chest and left palm, that is, injuries No. 14 to 20 and death can also be due to the cumulative effect of all the injuries. Both the Courts have concluded that the medical evidence is consistent with the eye-witnesses account given by PW-1, PW-2, PW-4 and PW-5. As H noticed above, PW-6 to PW-10 although cited as eye-

witnesses were declared hostile and did not support the prosecution. A

9. The trial court formulated 5 points for consideration, which are as follows:-

(1) Whether the death of Kochukuttan was because of the injuries sustained in the occurrence? B

(2) Whether the accused persons had inflicted injuries on deceased? C

(3) Whether the accused persons A1 to A4 had conspired together to cause the murder of deceased Kochukuttan?

(4) What offence, if any, accused persons had committed? D

(5) Regarding sentence?

On point no. 1, the trial court concluded on the basis of the findings in the inquest report as follows: E

"The inquest on the dead body of deceased was conducted by PW19, sub inspector on the morning on 25.6.1997 at the District Hospital on the direction given by the Circle Inspector, Kottarakara and Ext.P20 is the inquest F report prepared by PW.19. In Ext.P20, PW.19 had noted the injuries found on the dead body. By Ext.P20, the cause of death is due to the injury sustained by beating, stabbing and cutting. In Ext.P20, it is stated that as per the information received, the injuries were inflicted on the G deceased by A1, A2 and others due to their animosity against deceased Kochukuttan. Ext.P17 is the postmortem certificate prepared by PW16, doctor who has conducted the postmortem examination on the dead body of the deceased. In Ext.P17, 20 ante mortem injuries H

A are noted on the body of the deceased and the cause of death stated in Ext.P17 'due to the injury sustained to the chest and left palm'."

10. In the post mortem report (Ex.P17), the following injuries
B were noticed on the deceased:-

(1) Incised wound 4.5x2 cm skin deep oblique reflecting a flap backwards on the left side of face, the upper outer and being 4 cm in front of ear.

C

(2) Incised wound 5x1 cm bone deep obliquely placed on the left side of head the lower inner and being 9 cm outer to midline 6 cm. Above eyebrow.

D

(3) Abrasion 2x1 cm on the left side of forehead 2 cm outer to midline and 2 cm above eyebrow.

(4) Incised wound 3.5 x 0.5 cm bone deep
E obliquely placed on the left side of back of head the lower inner and being 5 cm outer to midline and 18 cm above root of neck.

(5) Incised punctured wound 3 x 1 x 9 cm.
F Oblique on the right side of root of neck, the lower inner blunt and being 10 cm below right ear. The upper outer and was sharply cut. The wound was directed downwards, forwards and the left through the muscle plane.

G (6) Incised punctured wound 2.5x1x6.5 cm oblique on the right side of root of neck, its lower inner blunt end being 2 cm, above the injury No. 5. The upper outer end was sharply cut. The wound was directed downwards,

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forwards and the left through the muscle plane. A

(7) Abraded contusion 2 c 1.5x05 cm. On the front of right shoulder 2 cm inner to its tip.

(8) Incised wound 1.8x0.5 skin deep obliquely placed on the right side of front of neck, the lower inner and being 5 cm outer to midline 2.5 cm. Above collar bone. B

(9) Lenior abrasion 7.5 cm. long oblique on the outer front and cuter aspect of right arm the lower inner and being 9 cm. above elbow. C

(10) Incised wound 7 x 02 x 10 oblique on the outer aspect of right arm the lower inner and being 9 cm above elbow. D

(11) Lacerated wound 0.8x0.8x1.5 cm on the outer aspect of right arm 0 cm above elbow.

(12) Lacerated wound 1x1 cm bone deep on the outer aspect of right arm 2 cm above elbow. Underneath the humerus was found fractured 4 cm above elbow. E

(13) Abrasion 1.5x1 cm. on the outer aspect of right elbow. F

(14) Incised wound 10x1.5x2 cm obliquely placed on the left palm the lower outer and was in the web space in between the middle and ring finger. Underneath the muscle tendon and vessels were found sharply cut. G

(15) Incised wound 2.5x05 cm skin deep on the back of left ring finger 4 cm. below its root.

(16) Incised wound 8x3x3 cm horizontal on the H

back and outer aspect of left forearm, 9 cm below elbow, underneath the muscles, the radius bone was found cut and separated.

(17) Incised wound 9x3.5 cm skin deep at its upper part and 3 cm deep at its lower part oblique with tailing upwards, on front of left side of chest, the lower inner and being 3.5 cm outer to middle and 9.5 cm below the upper end of sternum.

(18) Incised wound 11x1.5x0.5 cm oblique on the right side of back of trunk, the lower inner and being 11.5 cm outer to midline 4 cm below root of neck.

(19) Incised wound 2.5x1 cm skin deep oblique on the back of right side of trunk, the lower inner end being 11.5 cm outer to midline 9 cm below root of neck.

(20) Incised penetrating wound 2.5x1 cm obliquely placed on the back of left side of trunk, the lower inner sharply cut end was 5.5 cm outer to midline and 7 cm below root of neck. The outer end of the wound showed splitting of the skin. The chest cavity was scan penetrated through the Vth intercostal space, after cutting the upper border of the Vth rib. The upper lobe of the back aspect of the lung was scan punctured 2x05x4 cm. The left chest cavity contained 300 ml. of fluid blood. The track of the wound was directed downwards and forwards to the right. The total minimum depth of the wound was 14 cms."

11. The trial court also noticed that PW-16, the doctor, who

conducted the postmortem examination, stated "that the death was due to the injuries sustained to the chest and the left palm, that is, injuries no. 14 to 20". These injuries were caused by sharp cutting weapons such as sword or chopper. Thus, the inquest report (Ex.P20) and the postmortem report (Ex.P17) would clearly show that Kochukuttan died as a result of the injuries sustained in the fatal assault by the appellants and the other co-accused.

12. The trial court on the basis of evidence given by the eye-witnesses concluded that the participation in the assault by appellants herein is proved beyond doubt. The conspiracy was held to be proved on the basis of the evidence given by PW3. On the basis of the findings, the trial court convicted the two appellants along with the other co-accused as noticed above.

13. The High Court on a re-examination of the entire body of the evidence has also concluded that the ocular evidence of PW1 cannot be discarded simply on the ground that he is the brother-in-law of the deceased. The High Court has also held that there is clear evidence that both the appellants had participated and formed an unlawful assembly with a common object to commit the murder of the deceased. The High Court, therefore, found that there is clear evidence with regard to the appellants having committed the offence under Section 149 IPC.

14. A perusal of the evidence of PW1 leaves no manner of doubt about the entire sequence of events. He has graphically recounted the arrival of the assailants in the jeep. He even gave the sequence and the order in which they had advanced towards Kochukuttan. He has stated in categoric terms that he had known the appellants herein for a number of years. He had seen the others in the vicinity and at the Veliyam junction. He has categorically stated about the participation of both the appellants. He has named both the appellants in the first information statement. He has given a graphic account of the injuries caused by both the appellants. He has also narrated

A how the accused went away in the jeep after inflicting mortal injuries on the deceased. He also talks about the load shedding which according to him commenced from 7.30 p.m. He further narrated that the car in which the injured Kochukuttan was being taken had developed electrical problem and that the deceased
B had to be removed to a jeep. He has categorically stated that by reason of enmity, A1 and A2 together have murdered his brother-in-law. He identified the weapons wielded by the appellants. He could also recognize the apparels worn by the accused with clear distinction. In his examination, he also stated
C that the incident was clearly seen in the street light and light of the nearby shops. He stated that at that time, 3 bulbs were glowing over the shop where the incident happened. There was also Mercury Street light. The incident could be seen clearly. He also stated that the vicious assault was the result of
D instigation of A2. This witness was cross-examined at length. In his cross-examination, he has stated that deceased Kochukuttan was a Marxist party worker. He reiterated that he has stated before the police that A1 had taken a sword which was concealed at the back of his waist and had stabbed at the
E left side of the head of the deceased. He also went on to say that A2 also stabbed Kochukuttan on the left side of his chest pursuant to which the deceased had fallen down to the road from the *cement thinna*. Such deposition of PW1 also gets strength from the seizure of MOs Nos. 13 and 14, i.e., portion of blood stained cement and portion of removed cement without
F blood respectively. He also reiterated that he had narrated the acts done by each and every accused. He reiterated that he is able to identify all the accused persons. In the cross-examination, he seems to have further strengthened the case of the prosecution. While answering the numerous questions
G posed by the defence counsel, he elaborated that there was previous enmity between the deceased and the accused persons. So there was clear motive for the appellants to assault the deceased. He also stated that the police had not recorded the version as he had narrated. He had definitely told the police
H about the signs for identification of the accused. He admitted

that all the accused were not the residents of the place of occurrence. However, the appellants herein were certainly local residents. He even went on to narrate that the deceased told him about 2 weeks ago that the appellants had attempted to kill him through hired people. He categorically states in the cross-examination that the entire incident of assault took 3 minutes. He also stated that the deceased used to go to the junction quite regularly by about 7.00 p.m. and he would usually go home by 9 p.m.

15. In our opinion, the trial court as well as the High Court correctly relied upon the unflinching, coherent and consistent evidence given by PW1. The evidence given by PW1 has been corroborated by PW2 in every material particular. From the above narration, it becomes apparent that the submission with regard to the scene of crime not being well lit is without any substance. Similarly, the criticism with regard to the identification parade not having been held is of no consequence. PW1 and PW2 have clearly stated that the appellants herein were previously known to them. PW1 certainly even knew about the previous enmity between the deceased and the appellants.

16. We see no reason at all to disbelieve the evidence of the eye-witnesses. The weapons used by the appellants and the injuries caused have been specifically mentioned by PW1 and PW2. There were 20 ante mortem injuries on the deceased. Recoveries of the swords used by them were made at the instance of the appellants. Recoveries of other weapons, clothes worn by the accused on the day of the assault were also made at the instance of the other accused. As stated above, medical evidence also leads to the conclusion that the death has resulted from the injuries caused by the appellants and the other accused with their respective weapons. In view of the proven facts, in this case as noticed by the trial court, the High Court and by us above, it becomes evident that the appellants had acted with a common object to eliminate the deceased.

A This Court delineated the circumstances in which constructive liability can be fastened on the accused, in the case of *Bhagwan Singh Vs. State of M.P.*, (2002) 4 SCC 85, wherein it was observed:

B "9. Common object, as contemplated by Section 149 of the Indian Penal Code, does not require prior concert or meeting of minds before the attack. Generally no direct evidence is available regarding the existence of common object which, in each case, has to be ascertained from the attending facts and circumstances. When a concerted C attack is made on the victim by a large number of persons armed with deadly weapons, it is often difficult to determine the actual part played by each offender and easy to hold that such persons who attacked the victim had the common object for an offence which was known to be likely D to be committed in prosecution of such an object. It is true that a mere innocent person, in an assembly of persons or being a bystander does not make such person a member of an unlawful assembly but where the persons forming the assembly are shown to be having identical E interest in pursuance of which some of them come armed, others though not armed would, under the normal circumstances, be deemed to be the members of the unlawful assembly. *In this case the accused persons have been proved to be on inimical terms with the complainant* F *party.* The enmity between the parties had been aggravated on account of litigation with respect to the dispute over the mango trees. *Accused persons who came on the spot are shown to have come armed with deadly weapons. The facts and circumstances of the case* G *unequivocally prove the existence of the common object of such persons forming the unlawful assembly who had come on the spot and attacked the complainant party in consequence of which three precious lives were lost. The High Court was, therefore, justified in holding that the*

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accused persons, involved in the occurrence, had shared the common object." A

(emphasis supplied)

The aforesaid proposition was further reiterated in the case of *Chanda Vs. State of U.P.,* (2004) 5 SCC 141: B

"8. The pivotal question is applicability of Section 149 IPC. The said provision has its foundation on constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common C intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the D accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be E laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was F unlawful and was likely to commit any of the acts which fall within the purview of Section 141."

17. In the present case we are unable to accept the submission that the appellants were perhaps unaware that the murderous assault, intended to be committed by them, would, G in all probability, cause the death of Kochukuttan. We have earlier noticed that both the trial court as well as the High Court have considered the specific injuries caused by the appellants with swords. As noticed above, there were 20 ante mortem injuries on the deceased. According to the opinion of the doctor, H

A the death was due to injuries caused on the chest and on the left palm. It is further observed that the death could also have resulted from the cumulative effect of all other injuries. Therefore, there is no manner of doubt that Kochukuttan died as a result of injures caused by the appellants along with the other
B accused.

18. We also do not find any substance in the submission of the Learned Counsel of the appellant that since all the other co-accused have been acquitted; on the ground of parity the appellants herein also deserve to be acquitted. It is always
C open to a court to differentiate the accused who had been acquitted from those who had been convicted. Both the Courts below have applied the aforesaid principle in distinguishing the case of the appellants herein from those who have been acquitted. To remove any doubt we may emphasize that the
D appellants herein were known to be associates of the deceased. They had previous social interaction. For some time they had been having differences of opinion. This had led to an assault by the deceased and his companion Murali (CW11) on the appellants herein, namely, Prathap (A1) and Devakumar
E (A2). Consequently the appellants herein had wanted to settle the score with the deceased. They had a clear motive. This apart, PW1 and PW2 not only identified the appellants herein as assailants with swords but also indicated the injuries inflicted by them on the deceased. On the other hand the accused
F persons who had been acquitted were not known to PW1 and PW2. In fact PW1 in the evidence had categorically admitted that the other accused were not from the locality but were sometimes seen at the Veliyam Junction.

19. In our opinion the Courts below rightly declined to
G acquit the appellants on the principle of parity. The power of the Courts to distinguish the cases of one or more of the accused(s) from the other(s) is far too well recognized to need reiteration. Still, we may notice the principle as stated in the

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case of *Gangadhar Behera Vs. State of Orissa,* (2002) 8 SCC 381 wherein this Court observed as follows: A

> "Even if a major portion of the 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 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." B C

20. In our opinion the trial court as well as the High Court rightly convicted the appellants as the facts and circumstances of the case unequivocally prove the existence of the common object of the appellants. They had come looking for Kuchukuttan armed with deadly weapons with the intention of causing grievous bodily injuries. There was a preplanned attack. They located him and caused serious injuries with swords, choppers and other weapons, which led to his death. Thus they were rightly convicted and sentenced for the offence under Section 302/149 IPC. D E

21. We are also of the considered opinion that the concurrent views taken by the trial court as also the High Court cannot be said to be either clearly illegal or manifestly erroneous and do not call for any interference under Article 136 of the Constitution of India. F

22. In view of the above, both the appeals are dismissed.

N.J. Appeals dismissed.