

Madras High Court

Abuthagir @ Thagir And Ors. vs State, Represented By The ... on 17 November, 2005

Author: M Thanikachalam

Bench: R Balasubramanian, M Thanikachalam

JUDGMENT M. Thanikachalam, J.

Page 2292

1. The accused, in Sessions Case No. 111 of 2002 on the file of the Court of I Additional Sessions Judge-cum-Chief Judicial Magistrate, Coimbatore, are the appellants.

2. The prosecution case, in brief, which led to the conviction of the accused/appellants is as follows:

(a) Thiru Mohamed Yunus (P.W.20), who is the resident of Karumbukadai Saarametti, Coimbatore and doing cloth business, is the Police Informer, regarding the illegal activities of Muslim Fundamentalists, especially youngsters. All the accused are the residents of Kottaimedu, Coimbatore, where Muslims are living predominantly. After the bomb blasts, preceded by communal riots, in order to track the movements of Muslim youngsters, the Police sought the help of P.W.20 and when the same came to the knowledge of the accused, they had grievance against P.W.20, as if he is Page 2293 acting against them and the interests of Muslims. Hence, P.W.20 was watched by all the accused and in fact, just one month, even after the incident, there was an assault upon P.W.20 also, for which a case came to be registered.

(b) The accused/appellants, in order to commit the murder of P.W.20, hatched a conspiracy, between 7.1.2001 and 20.1.2001 and during that period, on 19.1.2001, at about 10.30 p.m., when P.W.20 was coming out of a wine shop, near Karumbukadai, which was witnessed by Thiru Salaludeen-P.W.11, A.1 and A.5, pointing out P.W.20, had some conversation, which was also noticed by Thiru Salaludeen.

(c) On 20.1.2001, at about 8.30 p.m., when Thiru Chelladurai-P.W.10 was returning from duty, near Karumbukadai, four persons were talking together, which revealed to P.W.10 that they have decided to finish a work.

(d) Prior to the date of incident, one Friday at about 3.00 p.m., one among A.1 to A.4, in pursuance of the conspiracy, enquired Thiru Sait @ Mustafa (P.W.6) about the place of residence of P.W.20-Yunus, which he showed them. At that time, they were informing to each other that P.W.20 should be done away with.

(e) Thiru Mohamed Rafiq (P.W.1) and Thiru Akbar Ali (P.W.4) are brothers of Abbas. P.W.2 Tmt. Fazeela is the wife of P.W.1. Thiru Abbas was living along with his brothers, in the same house. He was employed in the shop of P.W.7-Thiru Hussain, for a weekly salary of Rs. 750/= . On 20.1.2001, at about 10.30 p.m., Abbas had dinner in his house and left the house, which was known to P.Ws.1,2 and 4.

(f) Thiru Amanullah @ Aman (P.W.5) is the friend of Thiru Sait @ Mustafa (P.W.6). The maternal aunt of P.W.6 was living at Karumbukadai, which is the suburban area of Coimbatore. On 20.1.2001, at about 10.00 p.m., P.Ws.5 and 6, went to the house of the maternal aunt of P.W.6, in order to see her and after that, they were returning home at about 11.00 p.m., through Nataraj Petrol Bunk Lane, where there was sufficient light to witness the incident.

(g) Pursuant to the conspiracy, hatched by A.1 to A.5, when they attempted to follow and commit the murder of P.W.20, on 20.1.2001 at about 10.45 p.m., on seeing Abbas, near the scene of crime, under the mistaken impression that he is Mohamed Yunus-P.W.20, accused 2 to 4, attacked Abbas, by using M.Os.2 and 6, which they had purchased from Thiru Muthu-P.W.19, on 19.1.2001 under Ex.P.17 Bill. On seeing the accused cutting the throat of Abbas, near Nataraj Petrol Bunk, P.Ws.5 and 6 raised alarm and on hearing the same, after cutting and assaulting Abbas, the accused ran away from the scene of crime, leaving two knives also, along with a cover, which was noticed by Thiru Mohamed Ali-P.W.9, who went to Nataraj Petrol Bunk, at about 11.00 p.m., in order to park his vehicle. P.Ws.5 and 6, frightened by the acts committed by the accused, left to their place.

(h) One Shahool Hameed and Siraz, who are the members of Muslim Jamayat, coming to know about the death of Abbas, went to the house of Page 2294 P.W.1 and informing about the death of Abbas, took him to the scene of crime, where P.W.1 had noticed two knives and a cover, near the body of his brother. Thereafter, P.W.1 went to Podanur Police Station at about 3.00 a.m. on 21.1.2001 and preferred Ex.P.1 complaint to the Head Constable-P.W.22, who was available in the Podanur Police Station.

(i) On receipt of Ex.P.1, P.W.22 registered a case in Cr. No. 46/2001, for the offence under Section 302 IPC, prepared the printed FIR-Ex.P.24 and submitted the same to the Judicial Magistrate No. VII, Coimbatore, in addition to submitting the copies of Ex.P.24 to the higher authorities.

(j) Thiru Dhanraj (P.W.23), the then Inspector of Podanur Police Station, upon information from P.W.22, through VHF, went to the scene of occurrence, where he received the copy of FIR also at about 3.45 a.m. on 21.1.2001. He had made arrangements for taking the photographs of scene of crime with the help of the photographer Thiru Jerald (P.W.12).

(k) At about 4.00 a.m. on 21.1.2001, P.W.23 prepared observation mahazar-Ex.P.3, in the presence of P.W.8-Thiru Ismail and another, in addition to preparing sketch-Ex.P.25. Having noticed some weapons in the scene of crime and some dresses also, in addition to some money, he had recovered those articles under the cover of Ex.P.4-mahazar. Under the same mahazar, he had also recovered the bloodstained earth, as well as sample earth and they are M.Os.1,2,4,5 and 7 to 12.

(l) Between 6.00 a.m. and 8.00 a.m., on the same day i.e. on 21.1.2001, P.W.23 conducted inquest over the body of Abbas, in the presence of panchayatdars and the result was incorporated in the Inquest Report-Ex.P.26. He had also examined P.Ws.1,2,4,7 and 9 and recorded their statements. After completing the inquest, in order to ascertain the actual cause of death of Abbas, giving requisition-Ex.P.14, he had made arrangements, for conducting autopsy.

(m) On receipt of Ex.P.14 and upon identification of the body of Abbas by the Head Constable, Dr. Edwin Joe-P.W.15 conducted autopsy, on the same day at about 10.15 a.m. He had noticed several stab injuries and abrasions over the body of Abbas and as described in the Post Mortem Certificate-Ex.P.15, they are:

"1. An oblique stab wound of 2.5 x 1 cm. in the front of right abdomen. The inner lower end of the wound is 8 cms. above and right of umbilicus and 3 cm. lateral to the midline. The wound passes obliquely backwards, inwards and upwards and caused a stab in the anterior aspect of lower part of the stomach 1 x 0.5 cm. and entered into the cavity. The margins of the wound were found abraded and both ends are bruised and blunt. Total depth of the wound tract is about 11 cms.

2. A transversely oblique stab wound of 3.5 x 1.5 cms. on the front of the left lower chest in the subcostal margin. The inner lower end of the wound is 11 cms. above and left of umbilicus and 3 cms. lateral to the midline. The wound passed obliquely upwards, backwards and inwards cutting the costal cartilages of 7,8 and 9 ribs and entered the left pleural cavity.

3. An oblique stab wound of 2.5 x 1 cm. in the front of right side of the chest. The lower lateral end of the wound is 2.5 cms. above right nipple. Page 2295 The wound passes obliquely backwards and downwards through third intercostal space and caused stab in the upper lobe of the right lung 1.5 x 0.5 x 4 cms. The deepest part ending as a point. Right pleural cavity contains 600 ml. of blood with clots. The margin of the wound are mildly abraded and bruished. Both ends are blunt and bruished. Total depth of the wound tract is about 9 cms.

4. A vertically oblique stab wound 3 x 1 cm. on the front of right lower chest. The wound passes obliquely backwards, downwards and inwards through the 6th intercostal space, causing stab 3 x 1 cm. in the diaphragm and has entered the peritoneal cavity. Then, it has caused a stab in the inner aspect of right lobe of liver 3 x 1 x 6 cms. The deepest part ending as point. The total depth of the wound tract is 10 cms. The margins of the wound are clean cut, both ends are pointed.

5. Transversely oblique stab wound 2.5 x 1 cm. on the left side of front of chest. The lateral end of the wound is 5 cms. above and inner to left nipple and the medial end of the wound is 2.5 cms. lateral to midline. The wound passes obliquely backwards and outwards through the fourth intercostal space, piercing lower aspect of upper lobe of left lung 2 x 1 x 4cms. The deepest part ending as a point. The margins of the wound are abraded and bruished. Both ends are blunt and bruished.

6. Transversely oblique stab wound 2 x 1 cm. on the left upper chest. The wound passes obliquely backwards. Inwards and upwards in the muscle plane to a depth of 6 cms. The margins of wounds are mildly abraded and bruished. Both ends are blunt and bruished.

7. Vertically oblique stab wound 3.5 x 1 cm. on the right side back 2 cms. lateral to T12 vertebra. The wound passes oblique forwards, downwards and little outwards in the muscle planes to a depth of 6 cms. The margins of the wound are clean cut. Both ends are pointed.

8. Oblique stab wound 2.5 x 1 cm. on the right lateral back. Middle of the wound is 11 cms. lateral to T12. The wound passed obliquely inwards and little upwards and has entered in the peritoneal cavity. Then, it has pierced the right lobe of the liver 2.5 x 1 x 10 cms. The deepest part is ending as a point. Total depth of the wound tract is about 15 cms. The margins of wounds are mildly abraded and bruished. Both ends are blunt bruished.

9. Vertically oblique stab wound 3 x 1 cm. on the left side back. The middle of the wound is 4 cms. lateral to midline at the level of L1 vertebra. The wound has passed obliquely forwards outwards in the muscle planes to a depth of 5 cms.

10. Transverse incised wound 17 x 4 cms. seen on the front right side of neck. The right end of the wound is 7 cms. below little behind right ear. The left end of the wound is 6 cms. below angle of left side mandible and in the front of neck, the wound passes 8 cms. below chin. Underlying food pipe, wind pipe and all blood vessels on the right side of the neck found totally cut upto the C5 level. The body of C5 and lateral process of C6 found partially cut.

Page 2296

11. Incised wound 6.5 x 1.5 cms. x 1 cm. bone deep seen in the right lower jaw region. The inner lower end of the wound is 5 cm. below right angle of mouth. The outer upper end is 3 cm. above angle of right side mandible, underline outer table of lower jaw bone found partially cut along the line of the wound.

12. Oblique stab wound 2 x 1 cm. seen on the front of upper right side neck. The inner upper end of the wound is 4 cms. below and a little right of the chin. The wound passes backwards to a depth of 4.5 cm. cutting the underline muscle, vessels and nerves. The deepest part is ending as a point. The margins of the wound are mildly abraded and bruished and both ends blunt and bruished.

13. Abrasions seen in the following regions:

- 5 x 0.25 cms. right side back of right chest close to midline at the level of T8.

- 2 x 0.25 cms. back of left chest close to midline.

- 1 x 0.5 cms. lower part of left side neck.

- 2 x 1 cms. front of upper part of left side chest.

- 1 x 0.5 cms. lateral aspect of right shoulder.

- 1 x 0.5 cms. over right cheek.

- 2 x 0.5 cms. 2 in number on the right upper front of chest."

On dissection of the body, the Post Mortem Doctor had noticed the internal injuries also. The assessment of the above injuries, disclosed that the deceased would appear to have died of shock and haemorrhage due to multiple injuries, stab and cut injuries sustained by the deceased, 10-12 hours prior to the Post Mortem.

(n) After Post Mortem, M.Os.3,18 and 19 were recovered from the body of Abbas and were handed over to P.W.23 by the Post Mortem Head Constable 1617 Thiru Palanichamy, under Ex.P.27 Special Report.

(o) On 22.1.2001, P.W.23 examined P.Ws.5,6,10,11, 20 and other witnesses and recorded their statements.

(p) After committing murder of Abbas, after disposing the weapons and bloodstained clothes, all the accused went to a lodge at Theni, where P.W.14 Thiru Veerannan was working as a Manager and requested a room for stay, informing that they want to take bath and they may not require the same for continuous stay. While allotting the room, P.W.14 prepared Exs.P.12 and P.13, receiving a sum of Rs. 200/= as advance. After taking bath, all the accused left at about 10.20 a.m. on 21.1.2001, receiving the balance of Rs. 100/=, the rent being Rs. 100/=.

(q) Thereafter, all the accused went to Gobichettipalayam, where P.W.17 Palanichamy was working as a night watchman in a company, where A.5 was also employed. Therefore, at the request of A.2 to A.5, he accommodated the accused during the night, on 21.1.2001, and they left the company by 5.00 a.m. on 22.1.2001. Thereafter, on the same day night, at about 2.30, returning from elsewhere, as if they were returning after attending a marriage, once again, they requested P.W.17 for Page 2297 accommodation, which was accepted. Then, at about 5.30 a.m. on 23.1.2001, informing that they are going to Coimbatore, the said four persons left Gobichettipalayam.

(r) In continuation of the investigation, on 23.1.2001, upon information, P.W.23 had arrested A.1 and sent him to the Court concerned, for remand. Thereafter, applying to the Court, he took the custody of A.1 on 26.1.2001, for interrogation. Upon the information received by P.W.23, on 27.1.2001, he had arrested A.3 in the presence of P.W.18 Village Administrative Officer as well as P.W.13 another Village Administrative Officer. A.3, voluntarily gave a confession that he would disclose the whereabouts of A.2 and A.4, under Ex.P.5. Pursuant to Ex.P.5, upon identification by A.3, A.2 and A.4 were arrested by P.W.23 at about 12 Noon on 27.1.2001, in the presence of the above said witnesses. A.2 confessed voluntarily, under Ex.P.7, informing the Investigating Officer, that he would show the place where the weapon was concealed, assuring to take out and hand over the same, if he was taken to that place. In the same manner, A.4 also gave a confession, under Ex.P.10, disclosing that he would take out and hand over the bloodstained shirt, if he was taken to the place, where it was concealed. At the same time, A.4 handed over Ex.P.2 Medical Prescription, which was issued by P.W.3 Dr. Kesavan, for the treatment given to him, for the injuries sustained, which was recovered under Ex.P.28.

(s) While P.W.23 was returning along with accused, A.5 was identified by the other accused, resulting his arrest at 2.45 p.m. Upon examination, A.5, giving the confession, took out a

knife-M.O.6 from the nearby bush near Authupalem, which was recovered under Ex.P.8 at about 5.00 p.m. on 27.1.2001. Pursuant to the confession of A.2, M.O.16-shirt was recovered under Ex.P.9. Pursuant to the confession given by A.3, at about 5.30 p.m., near Railway Line, M.O.15-shirt was recovered, which was seized under Ex.p.6 Mahazar. At about 6.00 p.m., pursuant to the confession of A.4, M.O.4-shirt was recovered under Ex.P.11 Mahazar. Thereafter, P.W.23, bringing the accused to the Police Station, sent them for remand, as well as submitted the material objects to the Court.

(t) In order to ascertain, whether the accused arrested are the real persons, who had committed the murder of Abbas, P.W.23 has applied to the Court of Chief Judicial Magistrate, Coimbatore, for deputing a Judicial Magistrate, to conduct Identification Parade. Further, under Ex.P.19, he had requested the Judicial Magistrate No. VII, Coimbatore, to send the material objects, submitted to the Court, for chemical examination.

(u) Pursuant to the requisition given by P.W.23, P.W.16- Tmt. Sarvamangalam, Judicial Magistrate No. 3, Coimbatore was nominated by the Chief Judicial Magistrate, for conducting Identification Parade of the accused, through witnesses. P.W.16 conducted Identification Parade on 2.2.2001, at about 3.30 p.m., at Pollachi sub Jail, where, she requested P.Ws.5,6 and 9 to identify the suspected accused, following the procedure, followed and prescribed. In the identification parade, A.2 and A.3 were identified by P.Ws.5 and 6, Page 2298 whereas P.W.9 had identified A.3 alone. The file connecting to the Identification Parade and the connected proceedings is marked as Ex.P.16.

(v) As per the requisition given by P.W.23, under Ex.P.19, as per the direction of the Judicial Magistrate, P.W.21, the Head Clerk of the Judicial Magistrate Court No. VII, Coimbatore, sent the material objects, along with Ex.P.20, for chemical examination. Upon the examination of the material objects, the Forensic Department Scientists have submitted the Chemical Examination Report-Ex.P.21 and Serological Reports-Ex.P.22 and Ex.P.23.

(w) The examination of the above said witnesses, including the preparation of the documents and collection of the material objects, revealed that all the accused have conspired together, to commit the murder of P.W.20, whereas, by mistaken identity, they have committed the murder of Abbas. In this way, a final report came to be filed before the Judicial Magistrate No. VII, Coimbatore."

3. Upon committal, on receipt of records, the I Additional Sessions Judge-cum-Chief Judicial Magistrate, Coimbatore, when perused the materials, formed an opinion that there are unquestionable materials, to frame charges against the accused and proceed further. In this way, the first charge came to be framed against A.1 to A.5 under Section 120B IPC, the second charge came to be framed under Section 302 IPC against A.2 to A.5 and the third charge came to be framed under Section 302 read with 120B IPC against A.1.

4. All the accused, when questioned, after explaining the charges, refused to plead guilty, thereby praying for trial.

5. On behalf of the prosecution, 23 witnesses have been examined, seeking aid from 28 documents and 19 material objects.

6. After closing the prosecution evidence, to comply the mandatory provisions of Section 313 Cr.P.C., when the accused were examined, explaining the incriminating circumstances, available against them, in the evidence of the prosecution witnesses, they have denied the same, stating that all the witnesses are lying i.e. not telling the truth.

7. On behalf of the accused, in order to disprove their arrest, as well as to invalidate the Identification Parade, they have examined three witnesses as D.Ws.1 to 3, who were cited as prosecution witnesses, not examined by them. D.Ws.1 and 2 have stated that on 22.1.2001, they have seen all the five accused at Podanur Police Station, further stating, that the police have requested them to give evidence against the accused, failing which they would be implicated as accused in this case, for which they refused. D.W.3 is the Judicial Magistrate, who recorded the 164 Cr.P.C. statements of Anwar Basha @ Anwardeen and Muzibur Rehman @ Muzi @ Beta on 7.2.2001 at 3.00 p.m., under Exs.D.1 and D.2 and the proceedings file is marked as Ex.D.3. On the defence side, two more documents are also marked as Exs.D.4 and A.5 further marking one material object as M.O.1, which is a photo out of the six photos in the M.O.13 series marked on behalf of the prosecution.

Page 2299

8. The learned I Additional Sessions Judge, Coimbatore, evaluating the above materials, scanning the same, according to his assessment, from proper perspective, came to the conclusion, that there was conspiracy between the accused to commit the murder of P.W.20-Mohamed Yunus; that pursuant to the conspiracy, A.2 to A.5 have attacked and assaulted Abbas, thinking that they are attacking Mohamed Yunus, under the mistaken identity, and therefore, the act committed by A.2 to A.5 comes under Section 302 IPC and that A.1 being the member of conspiracy, he is also liable to be dealt with under Section 302 read with 120B IPC. Thus concluding, A.1 to A.5 are convicted for the offence under Section 120B IPC and were sentenced to undergo life imprisonment and to pay a fine of Rs. 5,000/= each, in default to undergo Rigorous Imprisonment for one year. A.1 is convicted under Section 302 read with 120B IPC and sentenced to undergo life imprisonment and to pay a fine of Rs. 5,000/= in default to undergo Rigorous Imprisonment for one year. A.2 to A.5 are convicted for the offence under Section 302 IPC and they are sentenced to undergo life imprisonment and to pay a fine of Rs. 5,000/= each in default to undergo Rigorous Imprisonment for one year, ordering the sentences to run concurrently and also giving set-off, which is under challenge in this Criminal Appeal.

9. Heard the learned Senior Counsel, Mr. V. Gopinath for appellants 2 to 4, learned counsel, Ms. Sudha Ramalingam for appellants 1 and 5 and the learned Public Prosecutor, Mr. S. Jayakumar for the respondent.

10. Mr. V. Gopinath, learned Senior Counsel appearing for appellants 2 to 4, supported by the arguments of Ms. Sudha Ramalingam the learned counsel appearing for other accused, submitted that the conviction and sentence slapped upon the accused/appellants are not sustainable, liable to be interfered with by this Court on the following grounds viz., that

(i) absolutely there is no legal evidence to implicate the accused, bring them within the ambit of Section 120B of I.P.C. and this being the position, the conviction and sentence for the said offence are illegal and unsound;

(ii) the alleged eye witnesses viz., P.Ws.5 & 6 would not have been present at the scene of crime or in other words, they might not have seen the actual incident also, for which ample evidence are available on the side of the prosecution, such as vital contradictions, omissions, and discrepancies, which were ignored by the learned trial Judge and in this view, believing the oral evidence of P.Ws.5 & 6, which are mutually contradictory to each other, destroying its evidentiary value, conviction based is unsustainable;

(iii) admittedly all the accused are strangers to P.Ws.5 & 6 and therefore, in order to say empathetically, there should be acceptable test identification parade, which is absent in this case, not properly assessed by the trial Court;

(iv) there is unassailable evidence to indicate that the accused were shown to the alleged eye witnesses, either in person or through photographs before identification parade and this being the position, the fact that P.Ws.5 & 6 had identified two accused and P.W.9 had identified one accused, should Page 2300 be meaningless, which is supported by the Apex Court ruling, which fact was not considered by the learned trial Judge;

(v) the investigation itself is shabby since to prove the presence of P.Ws.5 & 6 at the scene of crime, the neighbours have not been examined and for the non examination, adverse inference has to be drawn against the prosecution as if P.Ws.5 & 6 would not have been present;

(vi) If really P.Ws.5 & 6 had been the eye witnesses, and were examined as spoken by the investigating officer on the next day of the occurrence, the statements recorded from them under Section 161(3) Cr.P.C. would have been sent forthwith to the court as laid down by this Court and the fact that the statements of P.Ws.5 & 6 were despatched to the Court belatedly, after the filing of the final report, i.e. on 3.5.2001, would probabalise the case of the defence, improbablising the case of the prosecution that P.Ws.5 & 6 have witnessed the incident;

(vii) there is no motive for attacking the deceased even as per the case of the prosecution, and the accused had no enmity against the deceased also and in this view, in order to say that the accused had attacked the deceased by mistaken identity, it is not at all proved that there was similarity of the deceased with the person aimed by the accused viz., P.W.20 and in the absence of the same, it is improper and illegal to say that by mistaken identity, in order to commit the murder of P.W.20, the accused have committed the murder of Abbas, thereby bringing their acts under Section 301 I.P.C. followed by 302 I.P.C.

On the above points, the learned Senior Counsel elaborating the arguments, taking us in depth to the entire evidence available on record, oral as well as documentary, strenuously urged, that unfortunately, the learned trial Judge has not considered all the above points, which led him to land in an erroneous conclusion, which should be set aside to meet the ends of justice.



11. In response to the above submissions, the learned Public Prosecutor would contend, that the inconsistencies pointed out, to disbelieve the oral evidence of P.Ws.5 & 6 are minor in nature, should be ignored, if ignored there is no reason to disbelieve their oral testimony, which had established the guilt of the accused beyond all reasonable doubt, that the identification parade was conducted properly by the Judicial Magistrate, where P.Ws.5, 6 & 9 have identified some of the accused and to ignore the same, there is nothing on record and believing the same, conviction slapped upon the accused should stand that the defective investigation, if any, as held by the Apex Court, should not come in the way of punishing the culprit, when there are satisfactory acceptable evidence, that too in the nature of eye witnesses. The learned Public Prosecutor in support of the above submissions, and to thrash the submissions made by the learned Senior Counsel, drew our attention in depth to the materials available on record, supporting the reasons assigned by the learned trial Judge, for convicting the accused for the said offences.

12. We have given our anxious thought, after hearing the elaborate arguments on either side, by going through the deposition of P.Ws.5 & 6, as well as the other materials placed before us, by perusing in depth, considering the Page 2301 gravity of the offence, in order to decide whether the offences reported against the accused stand proved or not.

13. The brother of P.Ws.1 & 4 by name Abbas was subjected to homicidal violence, resulting his termination of life prematurely on 20.1.2001, is not seriously under challenge. Ex.P.15 is the postmortem certificate issued by P.W.15 for the autopsy conducted by him over the body of Abbas on 21.1.2001 at about 10.15 a.m. The doctor had noticed over the body of Abbas as many as 12 cut and stab injuries in addition to abrasions, in several parts of the body. The external injuries have caused internal injuries also, thereby damaging the internal organs, causing profuse bleeding. Therefore, the doctor assessing the external as well as the internal injuries, its after effect, certified in Ex.P.15 that the deceased would appear to have died of shock and hemorrhage, due to multiple injuries such as stab and cut injuries sustained by him, prior to 10-12 hours to the postmortem. The injuries explained by the doctor either internal or external, who had noticed and the cause assigned for the death of Abbas are not at all challenged. Therefore, we find no difficulty in this case in concluding that the life of the deceased Abbas came to an end after he met homicidal violence, which should come within the meaning of murder, attracting Section 302 I.P.C.

14. The case of the prosecution in short is that accused 1 to 5 conspired together to commit the murder of P.W.20, but on the date of the incident, by mistaken identity, they have committed the murder of the deceased Abbas. Therefore, in order to rope in all the accused under Section 120B I.P.C., first it must be established beyond all reasonable doubt, with all probabilities, that the accused had grudge against P.W.20, because of his act, which prompted them to conspire together to commit murder, but unfortunately, the murder landed on the deceased Abbas. Our effort by going through the materials to unearth the conspiracy, which should have taken place in secrecy ordinarily, ended in vain. In fact the theory of conspiracy is on the shaken ground because of the absence of foundation and supportive materials. It is the definite case of the prosecution, as reflected in the first charge also, that the accused have entertained enmity against Yunus, who has been examined as P.W.20, because of the fact that they have entertained a suspicion, that he was the informer to the police about the alleged illegal activities of the accused, they being the members of a

banned Islamic Organisation or they have indulged in communal violence, which was sought to be curbed by the police. The proper person to speak about the information, if any furnished to the police, though it need not be divulged, must be P.W.20. It is not the case of P.W.20 that he had informed any of the illegal activities of the accused if any, to the police, in the examination in chief. In fact, he has stated that he came to know on the next day, that the accused, instead of murdering him, as the police informer, had murdered Abbas under mistaken identity and nothing more. The further evidence given by P.W.20, that he was assaulted by the friends of the accused after this incident, certainly will not come to the aid of the prosecution to prove the conspiracy. In fact in an unequivocal terms, P.W.20 has admitted during the cross examination that he was not the informer of the police, which is corroborated by the investigating officer. P.W.23 admits that P.W.20 has no connection of any kind with the police, thereby clearing Page 2302 the cloud that P.W.20 never acted as the informer to the police. This being the position, there would not have been any necessity, for the accused to conspire, in order to commit murder of P.W.20, leading to mistaken identity and murdering of Abbas, the deceased.

15. In a case of mistaken identity, to attract Section 301 I.P.C. followed by 302 I.P.C., there should be similarity of the deceased as well as the person whose murder was aimed or the deceased and the person whose life was aimed must have been in the same place at the time of the incident, thereby inadvertently the deceased involving and the person who was aimed escaping. In this case, to make out a case that there was similarity between the deceased and PW.20, no evidence is let in as recorded by the learned trial Judge even as admitted by PW.23 also. It is also not the case of the prosecution that PW.20 and the deceased were close friends, moving together wherever they go, thereby inadvertently leading to the mistaken identity. This being the position, we are unable to accept the case of mistaken identity in murdering Abbas instead of P.W.20. This aspect also in a way should belie the case of the prosecution, which was not properly considered by the learned trial Judge, though an attempt was made, but ignored.

16. In Section 8 of the Indian Evidence Act, it is incorporated that, 'any fact is relevant, which shows or constitutes a motive or preparation for any fact in issue or relevant fact'. In this way, if it is shown that the accused have acted in such a way, that may be a relevant factor to unearth the conspiracy. Section 10 of the Indian Evidence Act also enables the Court to take into account that the things said or done by the conspirators in reference to their common intention for the purpose of proving the existence of conspiracy as for the purpose of showing that any such person was a party to it. On the above basis, by showing the acts of the accused, in order to establish the conspiracy, aid is sought from the oral evidence of P.Ws.6, 10 & 11.

17. P.W.10 would state that on 20.1.2001 at about 8.30 p.m. near a bakery at Karumbukadai, four persons were chatting together, but exhibiting his ignorance viz., who are they, thereby showing his evidence is worthy of nothing. P.W.11 would state that on 19.1.2001 at about 10.30 p.m. when he came out from Idayam Bakery after taking tea, he had seen A-1 and A5, who were talking together pointing out P.W.20. P.W.11 was examined prior to the examination of P.W.20 by the investigating officer, as seen from his deposition. Therefore, if really P.W.11 had seen P.W.20 near Idayam Bakery, P.W.20 should have stated about his presence there, thereby corroborating the oral evidence of P.W.11, probablizing the theory that A-1 & A5 might have seen P.W.20, but later on

mistaken identity crept in. But unfortunately, neither P.W.20 nor P.W.23 has spoken about the presence of P.W.20 near Idayam Bakery or nearby elsewhere, as deposed by P.W.11.

18. P.W.6, who claims to be the eye witness would state that prior to the incident on one Friday at about 3.00 p.m. accused 1 to 4 enquired about the house of Yunus, which he identified, further stating that at that time, four persons have declared that they should murder Yunus. The evidence so given by P.W.6 fails to inspire us, since in our considered opinion, he is not dependable, for which we will assign reasons infra in detail. Therefore, the Page 2303 oral evidence of P.Ws.6, 10 & 11 fails to bring surface, the alleged conspiracy hatched between the accused to commit the murder of P.W.20. Apart from the conspiracy to commit murder of P.W.20 thinking as if he is the police informer, no other reasons are assigned, to commit the murder of Abbas, under the mistaken identity. Since the mistaken identity, as well as the conspiracy vanishes, it is very difficult to convict A-1 to A5 under Section 120B or A-1 under Section 120B read with 302 I.P.C. as incorrectly did by the trial Court, not based upon legal evidence. In the light of the above discussion, we are constrained to set aside the conviction slapped upon accused 1 to 5 under Section 120B I.P.C. and A-1 under Section 120B read with 302 I.P.C.

19. The failure on the part of the prosecution to prove the conspiracy would not automatically lead to draw the inference that all the accused should have acquittal, since there may be a possibility of convicting all the accused or any one of them, if their individual acts are proved, in committing the murder of Abbas even in the absence of motive. In this view, we have to see what are the materials available to rope in, any one of the accused directly under Section 302 I.P.C. For this purpose, we have to purely depend upon the oral evidence of P.Ws.5 & 6. In case, if the oral evidence of P.Ws.5 & 6 is not accepted, on the basis that they are not the eye witnesses, even then the accused could be dealt with, if it is proved by the unquestionable circumstantial evidences that all the accused or any one of them should have committed the murder of Abbas. In this view, now we would sieve and sift the other part of the evidence, including the circumstances.

20. As rightly submitted by the learned Public Prosecutor, neither the defective investigation, if any, nor the discrepancy in the oral evidence of P.Ws.5 & 6 alone would be sufficient, to acquit the accused, throwing the case of the prosecution, as not trustworthy. In the case of a defective investigation if any, as laid down by the Apex Court, in *Dhanaj Singh v. State of Punjab* (2004 (3) SCC 654), which is also the dictum of the Apex Court in *Zahira Habibulla H. Sheikh v. State of Gujarat* (2004 SCC (Cri) 999), if the accused are to be acquitted solely on account of defect in investigation it would tantamount to playing into hands of investigating officer, if investigation is designedly defective and perpetuating the designed mischief. Therefore, as rightly submitted by the learned Public Prosecutor, ignoring the defective investigation, if any, not cutting the root of the case or which failed to create any shadow of doubt over the evidence adduced through prosecution witnesses, the court would be justified in dealing the accused independently, even eschewing that kind of investigation, accepting the other part of the evidence.

21. The defective investigation pointed out in this case is the non examination of some material witnesses, not examining the alleged eye witnesses; on the same date, when they said, they were present, and not submitting their statements to the Court, forthwith, that too to prove or establish

that P.Ws.5 and 6 are the eye witnesses. The discrepancy pointed Page 2304 out by the learned senior counsel for the appellants also is aimed, to discredit the trustworthiness of P.Ws.5 & 6, not for any other reason. We are fully conscious of the fact that, no two witnesses would depose uniformly, without any contradiction when they speak about the incident, which took place in the month of January 2001, when they have been examined after two years. Human memory certainly will vary individual to individual depending upon their genius. Their reproducing capacity also certainly would vary depending upon the preservations of the incident and its storage in the memory cell. Further, when two persons have witnessed the incident with all facilities in the perfect light without any tension certainly when they were called upon to give account at later point of time, there may not be much contradictions. On the other hand, if the incident had been seen in an imperfect light under a tensed atmosphere, charged with fear, while giving evidence regarding that account, certainly there will be more variations. In this view of the matter, certain omissions and discrepancies are bound to be there. Further it is natural and probable, when the witnesses have spoken about an incident, which had taken place about two years ago, there bound to be some contradictions or discrepancies and if there is no discrepancy at all, then it could be described as something like replaying the tape, because of the subsequent tutoring. Therefore, we are not going to ignore or eschew the oral evidence of P.Ws.5 & 6 only on the ground of mere discrepancy or contradiction. But if the discrepancy or contradiction or omission as the case may be, brought to surface the fact that they would not have witnessed the incident or they might not have even gone to the scene of crime, then the cumulative effect of the contradiction or discrepancy or omission should take its predominant role, creating doubt spontaneously. In that case, the doubt should have been clarified by the examination of the material witnesses. In this view alone, the non examination of certain witnesses, who were said to be present at the time of the incident or subsequent to the incident, certainly will take its important role, even urging the Court to draw an adverse inference against prosecution or disbelieving the evidence of the alleged eye witnesses.

22. The occurrence took place at Karumbukadai near Nataraj Petrol Bunk lane during night hours. P.Ws.5 & 6 are residing at Sunnambu Kalavai, which is 4 kms. away from the scene of crime, thereby showing generally P.Ws.5 & 6 had no chance or occasion to visit the place, where this crime had taken place often, in the ordinary course. If at all, they should have gone there for some specific purpose. It is the case of P.Ws.5 & 6 also, that they went to Karumbukadai to see the aunt of P.W.6 by name Jamalia, whose husband is Karim. If really, as rightly pointed out by the learned Senior Counsel, P.Ws.5 & 6 had been to Karumbukadai and happened to see the incident incidentally, while returning from the house of P.W.6's aunt, then there could not be any discrepancy, in their evidence regarding the purpose, for which they had been to Jamila's house or regarding the presence of person in the house of Jamila especially the husband of Jamila, when there was no tension or any disturbance to their mind. According to P.W.5, he accompanied his friend P.W.6. Jamila is not related to P.W.5. When P.W.5 was questioned for what purpose he and P.W.6 had been to the house of Jamila, P.W.5 would state that they had been to the house of P.W.6's aunt, for getting some amount Page 2305 for the business by Mustafa-P.W.6. It is elicited in the cross examination of P.W.5 that when he and P.W.6 had been to the house of the aunt of P.W.6, her husband was also there. He has stated further, when Mustafa P.W.6 requested amount for his business, his aunt and her husband had told them that they have no money. It is the further case of P.W.5 that, after talking to them for some time, they left their house at about 10.45 p.m. and while returning to their house

they have witnessed the incident. As far as some discrepancy regarding the incident is concerned, such as the actual role played by the accused, there may be, that too when it is said, they have witnessed a gruesome murder during night hours by the assailants, armed with deadly weapons, but there cannot be any discrepancy, for what purpose P.Ws.5 & 6 had been to the house of the aunt of P.W.6, that too, regarding the presence of the husband of the aunt. P.W.6 contradicted the oral evidence of P.W.5 regarding the above aspect.

23. P.W.6 would state that on the date of the incident, he went to the house of his aunt, in a casual way and after talking with her for 15 or 20 minutes, he returned along with P.W.5. In the further cross examination, after recalling, it was elicited from P.W.6 that the husband of Jamila died 15 years ago, thereby showing certainly on the date of the incident, when P.W.5 had been to the house of Jamila, her husband would not have been present. Thus on two aspects viz., for what purpose they had been to the house of Jamila, whether the husband of Jamila was present or not, P.W.5 contradicted the oral evidence of P.W.6, thereby showing that both might not have gone to the house of Jamila, and that is why these kind of material discrepancies came to surface, which cannot be ignored as minor discrepancies, since that will belie the presence of P.Ws.5 & 6 together in the house of Jamila. Jamila is the proper person to speak about the presence of P.Ws.5 & 6 on the night of the incident in her house. No explanation is forthcoming why Jamila was not examined. If Jamila had been examined, the visit of P.Ws.5 & 6 to Jamila's house during the relevant time, could be well established. In our view, for the non examination of Jamila, there is nothing wrong in drawing an adverse inference, that she was not examined, since she may not support the case of P.Ws.5 and 6 regarding their visit to her house, since they might not have gone there. This conclusion is based not only on the non examination of Jamila, but also the other witnesses who were present as spoken by P.W.5, which is not supported by P.W.6.

24. Ex.P.25-the sketch would disclose that there are number of houses nearby the incident including a petrol bunk called Nataraj Petrol Bunk, which would be functioning even during night hours. After all, the incident had taken place at 10.45 p.m. where there should be movement of public including the residents in and around. If really P.Ws.5 & 6 raised alarm, on seeing the incident, it is natural and probable to infer that nearby people would have come out from their aboard, though they had taken their bed, out of curiosity. It is the case of P.W.5 also. P.W.5 had stated, on seeing the murder committed by A-2 to A5, when they have raised alarm, the accused took their heels and the people in and around gathered. It is the further specific case of P.W.5 that the wife of one Ismail came out and saw the scene of crime, later when they were present. As per the sketch, the incident took place just on Page 2306 the left side of Ismail's house. It is also the claim of the witnesses that they have seen the incident with the help of the light viz., the tube light which was burning in the house of Ismail. It is further admitted by P.W.5 that a watchman also came out from the house, thereby showing people in and around had gathered near the scene of crime. It may be true that they might not have seen the occurrence and accused, since they had already left, while P.Ws.5 & 6 raised alarm. If the prosecution had examined the wife of Ismail, who came out, the watchman and other people, who gathered there certainly they would have disclosed that they have seen P.Ws.5 & 6 and P.Ws.5 & 6 also in turn would have informed them about the incident, which would throw much light upon the matter in issue viz., in proving not only the presence of P.Ws.5 & 6, but the subsequent events, thereby compelling us to believe their oral evidence as eyewitnesses. This kind of opportunity

though available, the prosecution has not performed well and this could not be described as a mere technical defect in investigation, whereas it should be described as colossal failure on the part of the investigation, to prove not only the incident, but also to prove the presence of P.Ws.5 & 6 as eyewitnesses, whose evidence is mainly relied on in proving the case of the prosecution. At least, if P.W.6 had confirmed the oral evidence of P.W.5, being present together, we may not have any grievance in their oral evidence, but this is also not available in their testimony. It is the case of P.W.5 as elicited from the cross examination, after seeing the incident, they once again went to the house of P.W.6's aunt, informed her, then returned to their houses. In this view, the non examination of the aunt of P.W.6, as said supra, takes predominant role, once again compelling us to take adverse view.

25. P.W.6, who claims that he took P.W.5, contradicted his evidence on main events also. According to P.W.6 when they have raised alarm, no one came to the spot, till they returned back. It is the further assertion of P.W.6 that till they left the place, no one reached the scene of crime. It is not the case of P.W.6 that after seeing the incident, they once again went to his aunt's house and informed the incident. In this context, we have to see the suggestions put to P.W.6. It is the specific case of the defence to P.W.6 that near the scene of occurrence, there is no house of his aunt situated, thereby showing he would not have gone to the scene of crime preceded by the visiting the house of his aunt. In the sketch also, we are unable to see any reference about the house of Jamila or Karim. In the observation mahazar also, there is no mention. The above facts coupled with the vital contradictions pointed out by us supra and the non examination of P.W.6's aunt would suggest with certainty that P.Ws.5 & 6 would not have gone to the place where the incident had taken place, and consequently would not have seen the incident also and that is the reason why there are unexplained vital contradictions and omissions, eclipsing the case of the prosecution, compelling us to disbelieve the oral evidence of P.Ws.5 & 6, though they claim to be the eye witnesses.

26. Admittedly, all the accused are strangers to P.Ws.5 & 6 and they had no acquaintance with them also on any other occasions. It is brought to surface that they have seen the accused for the first time only in the scene of crime, that too with the help of a tube light which was burning nearby. As far Page 2307 as the question of light available in the scene of crime, it may be true and it is not in much controversy. By seeing the accused only at the time of the incident, according to prosecution, P.Ws.5 & 6 have identified only two accused, before the Judicial Magistrate, who has been examined as P.W.16, whose report is Ex.P.16. It is not known, under what circumstances P.Ws.5 & 6 were unable to identify the other accused, though it is said A-2 to A5 had attacked the deceased, with knives. In this context, we have to see the effect of test identification and the evidentiary value therein.

27. The Apex Court in *D. Gopalakrishnan v. Sadanand Naik* has held that if the accused is available for identification, his photograph should not be shown, though police is entitled to show photograph to confirm whether the investigation is going on in the right direction. It is further held, that if the suspect is available for identification or for video identification, the photograph shall never be shown to the witness in advance. It is also held by the Apex Court in *N.J. Suraj v. State rep. by Inspector of Police* (2004 (11) SCC 346) that if it is brought to surface that the photograph of the accused was shown to the witnesses before conducting identification parade, the test identification parade becomes meaningless and the same may not have any evidentiary value. It is held as follows:

"The appellant was put to the test identification parade where these witnesses are said to have identified the appellant, but in their evidence they admitted that the photograph of the accused was shown to them before holding the test identification parade. In view of the fact that the photograph of the accused was shown to the witnesses, their identification in the test identification parade becomes meaningless and no reliance could be placed thereon."

Having the above principles in mind, we have to see the effect of the test identification parade in this case.

28. The investigating officer has stated that the first accused was arrested on 23.1.2001, accused 2 to 5 were arrested on 27.1.2001, thereby showing prior to that they were not in custody. D.Ws.1 to 2 were cited as witnesses for the prosecution and in fact they have given statements under Section 164 Cr.P.C. before D.W.3 at the request of the Investigating Officer also. They have stated that on 22.1.2001 all the accused were shown to them, requesting them to give evidence against them for which they have refused. This evidence given by D.Ws.1 & 2 in a way, in our considered opinion, is supported by the other witnesses also, indicating that the arrest spoken by P.W.23 may be incorrect and the accused might have been taken before that P.W.9 was examined on 21.1.2001. He would admit during the cross examination that the police have examined him not only showing the photograph of the accused, but also the shirt. He has also identified one of the accused before the Judicial Magistrate. He further admits that he identified the third accused only on the basis of the photograph shown Page 2308 to him previously, thereby disproving the arrest and making the test identification as meaningless, as declared by the Apex Court in the above said rulings. It is also admitted by P.W.11 that after seeing the accused on 19.1.2001, he had also seen the photographs of the accused in the dailies, giving the specific date namely 23.1.2001, thereby showing before the test identification conducted on 2.2.2001 by P.W.16, the photographs of the accused were shown to the witnesses including P.Ws.5 & 6 also. Therefore, the test identification parade in this case viz., P.Ws.5 & 6 identifying A-2 and A-3, as if they have seen them in the scene of crime, would not have any evidentiary value and it should be held that they were able to identify only A-2 and A-3 not on the ground that they have seen the accused at the scene of crime, but only on the fact that they have seen the photographs thereafter as shown to them by the police. Under the above said circumstances, placing reliance upon the test identification parade as well as the alleged identification by P.Ws.5 & 6 regarding A-2 & A-3, it may not be legally sound to conclude that P.Ws.5 & 6 would have seen these two, while assaulting the deceased. If really they have seen A-2 & A-3 nothing would have prevented them from identifying A-4 and A5 also at the time of test identification parade, which they failed to do so. Unfortunately, the trial Court, without considering the above facts, as well as the evidence available on record, that there was an opportunity for the witnesses to see the photographs of the accused before the test identification parade, based its conclusion on the basis of the test identification, which is not acceptable to us, that too in view of the dictum laid by the Apex Court.

29. It is expected from the prosecution that the papers connecting the crime starting from F.I.R. should reach the Judicial Magistrate concerned without any delay as far as practicable. If any delay occasioned unavoidably, that alone should not cast cloud provided that delay is explained. As pointed out by the learned senior counsel, a Division Bench of this Court in Karunakaran Jabamani

Nadar In re (1974 L.W. CrL. 190) held that the statements of witnesses recorded under Section 161(3) of Cr.P.C. having special importance they should be despatched by the Investigating Officer without any delay to the Magistrate and they should bear the initials of the Magistrate with reference to both the date and time of the receipt. Though Criminal Procedure Code does not prescribe any such guideline, it is declared by this Court, that the documents, which are coming within the meaning of special importance should reach the judicial authority in time, thereby preventing its challenge at later point of time as if concocted one utilizing the delay etc. to suit the convenience of the prosecution. If the important documents had reached the judicial hand, then it could be safely said that the averments contained in the documents came into existence at appropriate time, not utilising the delay, thereby it should be given its due weight and credence. This kind of safeguard was not made available to the statements of P.Ws.5 & 6, thereby creating a dark cloud upon their statements even compelling us to say that the statements might have been recorded at later point of time, fixing the accused even after identification.

Page 2309

30. The investigating officer is expected to conduct an inquest, at the first instance, probably in order to satisfy himself prima facie, whether the death was the result of homicidal or suicidal. In this way, when the investigating officer conducts an inquest, he is expected to examine summoning not only the witnesses, who had seen the incident, if it came to his knowledge or if the witnesses are present, but also he should record the same in the appropriate column prescribed for inquest. In the inquest form, column No. 4 prescribes "who had seen the deceased alive last, where, when along with whom." As said above, if P.Ws.5 & 6 were the eye witnesses, present at the inquest and examined by the investigating officer, then in the ordinary course that should find place in Column 5, which is absent in Ex.P.26. It is the duty of the investigating officer to attach the summon form also indicating, who are all the witnesses summoned, examined, in which also the names of P.Ws.5 & 6 does not find a place. According to prosecution theory, P.Ws.5 & 6 alone had seen the deceased alive last. The position being so, if that case is true, that should reflect in the inquest report and the non reflection of the above facts, whereas its reflection that the wife of P.W.1 alone had seen him last alive, would indicate that certainly P.Ws.5 & 6 would not have seen the incident and that is why their names also do not find place in the inquest report, and they were not examined on 21.1.2001, their statements also had not submitted to the Judicial Magistrate concerned either on the same day or subsequently without any delay. The investigating officer had arrived the conclusion of homicidal death only on the basis of the decision reached by the panchayatars, not on the basis of the evidence given by P.Ws.5 & 6. This fact also lends support to the case of the defence that P.Ws.5 & 6 could not be the eye witnesses and they are the witnesses, brought for the occasion, to speak something which they have not actually seen.

31. According to P.Ws.5 & 6, they have been examined on the next day of 21.1.2001, when they had been to the scene of crime, out of curiosity, to see what had happened to the body, since they have seen the incident during the previous night. P.W.23 would state that he had examined P.Ws.5 & 6 as well as P.Ws.11 & 12 including P.W.20 on 22.1.2001, thereby contradicting P.Ws.5 & 6 making it impossible to believe that they might have seen the incident or they might have been present on 21.1.2001 at the scene of crime, when the police came to the spot. It is the case of the prosecution, on



21.1.2001, after P.W.23 received the information, he reached the scene of crime at 3.45 a.m. It is the case of P.Ws.5 & 6 that they went to the scene of crime on the next day morning. Whether P.Ws.5 & 6 were examined on 21.1.2001 or 22.1.2001 as the case may be, in the normal course, as guided by Division Bench of this Court, the statements of P.Ws.5 & 6 would have reached the Judicial Magistrate the next day or within the reasonable time. Here some of the statements recorded by P.W.23 on 21.1.2001 were submitted to the Judicial Magistrate, immediately received by him, as seen from the initials available in those statements. After investigation, final report was prepared on 30.4.2004 and it was filed on the same day. But curiously, the statements of P.Ws.5 & 6 had reached the hands of the Judicial Magistrate only on 3.5.2001 Page 2310 i.e. after the filing of the final report or at least along with the final report. This inordinate unexplained delay coupled with the above said contradictions and omissions and the defect in identification parade, as well as the non examination of the important witnesses would suggest that there are some incurable defect in the investigation and this being the position, believing the oral evidence of P.Ws.5 & 6 as eye witnesses, convicting the accused may not be safe in our considered opinion. Even coming to the actual evidence given by P.Ws.5 & 6 they failed to inspire our confidence by their intrinsic destructive contradictory evidence, in connecting or not connecting the accused.

32. It is not the case of the prosecution that A-1 also assaulted the deceased, whereas the actual assault was committed only by A-2 to A5 and that is why they alone were charged under Section 302 I.P.C. But P.W.5 would state that A-1, A-4 A-2 attacked, cut the deceased, including his throat, while A-3 standing nearby, which he had witnessed with the help of the light emitted from the tube light, which was burning in the adjacent house as well as in the petrol bunk. It is also the case of P.W.5 that in the next morning i.e. on 21.1.2001, he informed the same to the police, but he was not examined on 21.1.2001, he was examined on 22.1.2001 as pointed out supra. The another alleged eyewitness, who claims so viz., P.W.6 would state that A-2 to A5 have cut the throat of the deceased as well as stabbed him exhibiting his ignorance viz. unable to say the individual acts. He has not implicated A-1. When P.W.5 said A-3 has not played any key role causing any injuries to the deceased, P.W.6 would state that A-3 also cut or stabbed the deceased. This contradiction alone available, it may not be vital, considering the time of the incident and the situation in which the eye witnesses, if at all might have seen. But it takes its predominant role when we consider the same coupled with other materials pointed out supra. Thus the direct evidence involving the accused given by P.Ws.5 & 6 to indict the accused is also not convincing and in this view also, it should be held that they might not have seen the incident, and that is why the inconsistency had taken place.

33. The prosecution, tracking the movement of the accused after the commission of the offence, attempted to prove the murder as if they were avoiding the police, being away from the village and in this view, P.W.14 & P.W.17 have been examined. P.W.14 would state that on 21.1.2001 at about 9.20 p.m. five persons came to the lodge requested a room for the limited purpose of taking bath, after receiving amount, he had allotted one room, that while they have vacated the room, a sum of Rs. 100/- was refunded from the advance paid by them viz., Rs. 200/- and that the person who received the amount is A-2. Admittedly, A-2 was not known to P.W.14 previously. He was not asked to identify A-2 in the test identification conducted. Though Ex.P.13 entries were made by A-2, according to P.W.14, by examining Ex.A13 scientifically, with the admitted signature or hand writing of A-2, it was not brought to surface that A-2 had written Ex.P.13. Even assuming the worst that A-2

along with others had stayed in the lodge at Theni for some time, where P.W.14 was the Manager, we failed to understand how this will prove the guilt of the accused, since Page 2311 it is not the case of the prosecution, from the lodge any blood stained cloth or the weapon used by the accused while committing the offence had been seized or recovered under the confession or otherwise.

34. P.W.17 claims that A5 was working along with him. It is his case that on 21.1.2001 at about 9.00 p.m. A5 along with A-2 to A-4 came to the company, where he was working as a watchman, requested him for night accommodation stating that they want to go to a marriage at Mysore and the accommodation was required, since no bus was available at that time. It is the further case of P.W.17 that after staying night, they left in the morning, once again returned on the same night on 22.1.2005 at about 2.00 a.m. requesting accommodation till morning and thereafter, returned to Coimbatore. Assuming that the accused have stayed in the company, where P.W.17 was asking as a watchman, in our considered opinion, in the absence of their stay connected with their alleged act, certainly will not advance the case of the prosecution, in proving the guilt of the accused as if concluding, after the commission of the offence, they were moving away in order to escape from the clutches of the police and in that process they have stayed either at Theni or at Gobichettipalayam, where P.W.17 was working as a watchman in the company. In this view, for the foregoing reasons, the evidence of P.Ws.14 & 17 also does not support the case of the prosecution, which was not properly considered by the trial Court, whereas the trial Court has took the view, as if the accused were tracked correctly after the commission of the offence to which we are unable to prescribe our view.

35. It is the case of the prosecution that pursuant to conspiracy, A-2 had purchased two knives from a shop, in which P.W.19 was working as Manager on 19.1.2001, under Ex.P.17. P.W.19 also would state that the second accused had purchased from his shop two knives and they are M.Os.2 & 6 for which he issued the bill Ex.P.17. The original of Ex.P.17 was not recovered from A-2, thereby connecting the act of the second accused viz., as if he had purchased the knives under the original of Ex.P.17. Admittedly in Ex.P.17, there is no reference about A-2. P.W.19 has not stated that A-2 was known to him previously. From the oral evidence of the investigating officer also, it is not seen that P.W.19 was identified by A-2 on the basis of the confession given by him. This being the position, it is not known how P.W.19 was identified as the person from whom the second accused had purchased knives under Ex.P.17. Therefore, accepting the oral evidence of P.W.19 also, it is impossible to say that he should have purchased M.Os.2 & 6 from the shop of P.W.19 prior to the incident and they were used for committing the murder of Abbas. In this view, the oral evidence of P.W.19 also fails to prove any circumstances leading to prove the guilt of the accused.

36. In the course of the investigation, after the arrest of A-2, A-3 and A-4, P.W.23 recovered, pursuant to the confession given by them, three shirts, which are M.Os.16, 15 & 4. When these shirts were subjected to chemical examination and serological test, they revealed human 'O' Group blood stain in those shirts. The dresses recovered from the body of the deceased also would disclose, that his blood was 'O' Group. The knives recovered on the basis of the confession does not disclose human 'O' group Page 2312 blood, though it disclosed that they contained human blood. On the basis of the blood group in the dresses recovered, pursuant to the confession given by the accused, an attempt was made to show that because of the assault committed by these accused, the blood of

the deceased would have stained in their dresses. Only on this basis, if the accused are to be convicted, then there must be clinching evidence that they were wearing M.Os.16, 15 & 4 at the time of the incident, which should have been spoken by P.Ws.5 & 6, who claimed that they have seen the accused. Unfortunately, these dresses were not shown to P.Ws.5 & 6 and in fact, they have also not identified. In fact, P.W.9 though had stated that the police have shown a shirt of the accused and enquired him, that shirt was also not identified by him as one worn by any one of the accused. Under the above said facts and circumstances of the case, when this is not connected with any other circumstances or by any material evidence, believing the serologist's report alone, convicting the accused may not be safe and in this view, this circumstance also deserves only rejection.

37. The trial Court without properly analysing and scanning the evidence from its proper perspective, in our considered opinion, had committed an error, thereby landed in an erroneous conclusion, convicting the accused and therefore, we are constrained to interfere with the same.

38. For the foregoing reasons and in the light of the above discussions, we conclude that the prosecution has failed to bring the guilt of the accused beyond all reasonable doubt and giving the benefits of doubt also to the accused, which had arisen spontaneously from the evidence of the prosecution, as mandated under criminal jurisprudence, we would choose to allow the appeal.

In the result, the appeal is allowed and the conviction and sentence imposed by the Judgment of the I Addl. Sessions Judge-cum-Chief Judicial Magistrate, Coimbatore in S.C. No. 111 of 2002 dated 24.2.2003 are set aside and the appellants are acquitted from all the charges. The appellants are directed to be released forthwith, unless they are required in connection with any other case.