K.Thoosimuthu @ Saravanan vs Http://Www.Judis.Nic.In

Author: S.Vaidyanathan

Bench: S.Vaidyanathan, N.Anand Venkatesh

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

JUDGMENT RESERVED ON : 15.10.2019

JUDGMENT DELIVERED ON : 16.10.2019

CORAM:
THE HON'BLE MR.JUSTICE S.VAIDYANATHAN
AND
THE HON'BLE MR.JUSTICE N.ANAND VENKATESH

Crl.A(MD)Nos.348 & 349 of 2017 and 15 & 178 of 2019
and
Crl.M.P.(MD).Nos.4641, 8269 & 9417 of 2018 in
Crl.A.(MD).No.348 of 2017
and
Crl.M.P.(MD).No.9418 of 2018 in Crl.A.(MD).No.178 of 2019

In Crl.A.(MD).Nos.348 & 349/2017 and 178/2019:

K.Thoosimuthu @ Saravanan .. Appellant/Accused No.1
in Crl.A.(MD).No.348 of 2017

K.Balaji .. Appellant/Accused No.2
in Crl.A.(MD).No.178 of 2019

Thangamayan .. Appellant/Accused No.3
in Crl.A.(MD).No.349 of 2017

Vs.

http://www.judis.nic.in

Crl.A.(MD).Nos.348 & 349/2017 and 15

The State of Tamil Nadu,
represented by,
The Inspector of Police,
Thideernagar Police Station (L&O),
Madurai.
(Crime No.2135 of 2010) .. Respondent / Complainant
in three cases

PRAYER in Crl.A.(MD).No.348 of 2017: Appeal is filed under Section 374(2) of the Code of Criminal Procedure, against the Judgment, dated 20.12.2016, passed in S.C.No.301 of 2014 by the learned I-Additional District and Sessions Judge, Madurai, in Crim No.444 of 2010, dated 14.09.2019 registered by the Avaniyapuram Police Station, Madurai and transferred and re-numbered as Crime No.2135 of 2010 on the file of the respondent police and to acquit the appellant/A1 herein.

PRAYER in Crl.A.(MD).No.349 of 2017:Appeal is filed under Section 374(2) of the Code of Criminal Procedure, against the Judgment, dated 20.12.2016, passed in S.C.No.301 of 2014 by the learned I-Additional District and Sessions Judge, Madurai and to acquit the accused/A3.

http://www.judis.nic.in

PRAYER in Crl.A.(MD).No.178 of 2019: Appeal is filed under Section 374(2) of the Code of Criminal Procedure, against the

Judgment, dated 20.12.2016, passed in S.C.No.301 of 2014 by the learned I-Additional District and Sessions Judge, Madurai and to acquit the accused/A2.

In Crl.A.(MD).No.15/2019:
Latha .. Appellant/L.W.6

Vs.

1. Thoosimuthu @ Saravanan
2. Balaji
3. Thangamayan .. Respondents 1 to Accused Nos.1 t
4. State Rep. by,
The Inspector of Police,
C1, Thideer Nagar Police Station,
Madurai. .. 4th Respondent/Co

PRAYER: Appeal is filed under Section 372 of the Code of Criminal Procedure, to call for the records and set aside the judgment, dat 06.09.2018 made in S.C.No.300 of 2014, on the file of IV-Additiona District and Sessions Judge, Madurai.

For Appellants : Mr.R.Gandhi
for Mr.T.Thirumurugan
for A1

http://www.judis.nic.in

in Crl.A.(MD).No.348 of 2017

Mr.C.Muthusaravanan
in Crl.A.(MD).No.15 of 2019

Mr.S.Ashok Kumar,
Senior Counsel
for Mr.M.Jegadeesh Pandian
for A3
in Crl.A.(MD).No.349 of 2017

Mr.E.Satish Rajkumar
For A2
in Crl.A.(MD).No.178 of 2019

For Respondents : Mr.M.Chandrasekaran
Additional Public Prosecutor
for respondent in Crl.A.(MD).Nos.348 &
349 of 2017 and 178 of 2019

for R4 in Crl.A.(MD).No.15 of 2019

Mr.E.Sathish Rajkumar
For R1 and R2
in Crl.A.(MD).No.15 of 2019

Mr.S.Ashok Kumar
Senior Counsel
for Mr.M.Jegadeesh Pandian
for R3 in Crl.A.(MD).No.15 of 2019

http://www.judis.nic.in

COMMON JUDGMENT

S.VAIDYANATHAN, J.

AND N.ANAND VENKATESH, J.

This is a textbook case as to how a fatal procedural lapse both in the manner in which the case was investigated and the manner in which the trial Court had dealt with the cases, has derailed the criminal case which involves a double murder committed for gain. The facts as they unfold infra will reveal the disappointment expressed by this Court in this prelude.

2. One set of appeals are filed by the accused persons, who were convicted by the trial Court and the other appeal is filed by the victim against the acquittal of the accused persons. Under normal circumstances, both these appeals should be dealt with separately, since separate charges have been framed and separate trial has been conducted and independent judgments have been rendered by

the trial Court. However, there is a reason for rendering a common judgment in the above appeals and the said reason will get unfolded in the forthcoming discussion.

http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019

3. Brief Facts of the Case:

> Thoosimuthu (A-1) in both the cases, faced financial problems due to loss in business. He was running a Carrom Board Manufacturing Company. He had heavily borrowed loan from various sources and had accumulated debts to the tune of a sum of Rs.6 lakhs.
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> He received five sovereigns of gold from one Panchavarnam [PW-8 in Crl.A.(MD).Nos.348,349 of 2017 & Crl.A.(MD).No.178 of 2019 and PW-12 in Crl.A.(MD).No.15 of 2019]. He pledged the same with Muthoot Finance. A-1 came to know that Ponmurugan (deceased in Crl.A.(MD).No.15 of 2019) was running a business wherein, he has offered to lend him more money by taking the receipt given by Muthoot Finance, where the jewels were originally pledged. Therefore, A-1 had sought for more amount by offering to surrender the receipt issued by Muthoot Finance.
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> (3.1) Manickavasagam [deceased in Crl.A.(MD).Nos.348 & 349 of 2017 & Crl.A.(MD).No.178 of 2019], was an employee in the business run by the above said Ponmurugan in the name and style of Sri Balaji Gold Finance Company. A-1 thereby got acquaintance with the deceased Manickavasagam.

http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 (3.2) The case of the prosecution in Crl.A.(MD).Nos.348 & 349 of 2017 & Crl.A.(MD).No.178 of 2019, is that A-1 to A-3 hatched a conspiracy whereby, the above said Ponmurugan will be convinced to lend a sum of Rs.3 lakhs and he will send this amount through Manickavasagam, in order to collect the receipt issued by Muthoot Finance. On the way, A-1 will convince Manickavasagam to retain some amount and give the balance to the accused persons. If he does not agree for this arrangement, Manickavasagam will be brought to the Carrom Board Company by A-1 and all the accused persons will do away with him and take the entire amount brought by him. In continuation of this conspiracy, on 09.09.2010 at about 11.00 a.m., A-1 went to Sri Balaji Finance and informed Ponmurugan that 24 sovereigns gold worth a sum of Rs.2,40,000/- is under pledge with Muthoot Finance. Ponmurugan asked A-1 to give the receipt for the jewels already pledged. A-1 informed Ponmurugan that the receipt was lost and he will execute a bond to that effect. Believing the words of A-1, Ponmurugan asked A-1 to come on 13.09.2010.

(3.3) On 13.09.2010 at about 10.15 a.m., A-1 went to the shop of Ponmurugan and waited. At that point of time, http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 Manickavasagam was given cash of a sum of Rs.2,50,000/- by Ponmurugan and had sent Manickavasagam along with A-1 in a two-wheeler to Muthoot Finance at Villapuram. While both

were travelling in the two-wheeler, A-1 offered Manickavasagam a sum of Rs.1 lakh and told him that the balance amount Rs.1,50,000/- must be given to him. Manickavasagam did not accept this offer. Therefore, A-1 informed Manickavasagam that the receipt must be available in the Carrom Board Company and therefore, he asked Manickavasagam to go along with him to the Company to get the receipt. The deceased Manickavasagam was brought to the Carrom Board Company at Avaniyapuram. Immediately, after the deceased Manickavasagam entered the Company, A-1 to A-3, as per the earlier plan, attacked Manickavasagam with hands and legs and he was held by A-2 and A-3 and A-1 is said to have strangulated Manickavasagam with a cable wire and killed him and taken away a sum of Rs.2,50,000/- from him. A-4 was made as an accused on the ground that he had harboured A-1 and A-2 and concealed them, in spite of knowing that they had committed the offence of murder.

(3.4) Based on the above facts, the trial Court framed the following charges against the accused persons. http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 Sl.No. Rank of the Accused Offence under which charges framed

1. A-1 U/s 120(b),364, 404 and 302 IPC

2. A-2 & A-3 U/s 120(b), 404 and 302 IPC

3. A-4 U/s 212 of IPC (3.5) The case of the prosecution in Crl.A.(MD).No.15 of 2019, is that after the commission of the offence and the murder of Manickavasagam, A-1 & A-2 realised that Ponmurugan will spill the beans, since he knows about the fact that the deceased Manickavasagam was sent along with A-1. Therefore, they decided to murder Ponmurugan. They thought that by murdering Ponmurugan, their involvement in the murder of Manickavasagam will not come out. Pursuant to the said conspiracy, A-1 and A-2 went to the shop of Ponmurugan on 13.09.2010 at about 12.20 p.m., armed with a knife and scissor and Ponmurugan was stabbed indiscriminately on his neck and back, resulting in his instantaneous death. A-3 was added as an accused, on the ground that he was also present in the scene of occurrence and in furtherance of the common intention, he informed A-1 and A-2 about the presence of Ponmurugan and while the incident was happening, he was watching the movements of the general public. A-4 was made as an accused, on the ground that he harboured A-1 and http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 A-2 knowing fully well that they had committed the crime.

(3.6) Based on the above facts, the trial Court framed the following charges against the accused persons. Sl.No. Rank of the Accused Offence under which charges framed

1. A-1 U/s 120(b), 449 & 302 IPC

2. A-2 U/s 120(b), 449 & 302 IPC

3. A-3 U/s 120(b), 302 r/w 34 IPC

4. A-4 U/s 212 of IPC

4. Complaint and materials collected in the course of investigation :

> On the same day, i.e., on 13.07.2010 at about 12.30 p.m., P.W-1 to PW-3 (in Crl.A.(MD).No.15 of 2019) went to the shop of the deceased Ponmurugan and found him lying in a pool of blood dead.
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> They immediately went to Thideernagar Police Station and gave a complaint. FIR in Crime No.1957 of 2010 was registered at about 1.00 p.m. Investigation was handed over to the Inspector of Police [R.Shanmugasundaram PW-31 in Crl.A(MD).No.15 of 2019 and PW-20 in Crl.A(MD).Nos.348 & 349/2017 & 178 of 2019]. He came to the scene of occurrence at about 01.45 p.m., and prepared the Observation Mahazar and Rough Sketch. He also recovered material objects in the http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 scene of occurrence under Mahazar in the presence of witness. He conducted inquest over the dead body of the deceased Ponmurugan between 03.15 p.m. and 05.15 p.m. and prepared the Inquest Report.
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> In the course of investigation, he came to know that Manickavasagam was sent from the shop by Ponmurugan and he has not returned back to the shop. He immediately went to the house of Manickavasagam and he enquired about the whereabouts of Manickavasagam with his brothers Marimuthu and Kanagasabapathy. One Senrayaperumal (PW-3 in Crl.A(MD).Nos.348 & 349/2017 & 178 of 2019 and PW-4 in Crl.A.(MD).No.15 of 2019) informed the Investigating Officer that Manickavasagam went along with A-1. Immediately, Investigating Officer went to the house of A-1 and found his house locked. From there, he went to the Carrom Board Company and that was also locked.
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> The owner of the Carrom Board Company premises is one Ravi (PW-6 in Crl.A(MD).Nos.348 & 349/2017 & 178 of 2019). The lock of the Carrom Board Company was broken open and the dead body of Manickavasagam was found inside the Company. This was around 03.00 a.m., on 14.09.2010.

(4.1) Immediately, Marimuthu (P.W-1 in Crl.A(MD).Nos. 348 & 349/2017 & 178 of 2019 and PW-8 in Crl.A.(MD).No.15 of 2019) http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 gave a complaint before the Avaniyapuram Police Station (jurisdictional Police Station) and an FIR came to be registered at 04.00 a.m., in Crime No.444 of 2010. Investigation was taken up by the Inspector of Police of Avaniyapuram Police Station (PW-18 in Crl.A(MD).Nos.348 & 349/2017 & 178 of 2019].

(4.2) The Director General of Police, Madurai District, by proceedings dated 15.09.2010 in Rc.No.197557/Crime III(1)/2010 transferred the case registered at Avaniyapuram Police Station in Cr.No. 444 of 2010 to Thideernagar Police Station on the ground that there is a link between both the cases. A further direction was also given to the Commissioner of Police, Madurai City to ensure that both the cases are investigated by the same Investigating Officer and investigation to be

completed at the earliest possible time.

(4.3) Pursuant to the above proceedings, the FIR in Cr.No. 444 of 2010 was transferred to Thideernagar Police Station and it was re-registered in Cr.No.2135 of 2010. The investigation was handed over to the same Investigating Officer and simultaneous investigation was carried out in both the FIRs.

http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 (4.4) The Final Report in Cr.No.1957 of 2010 came to be filed on 10.08.2011 before the Judicial Magistrate No.V, Madurai. This Final Report was filed by the Inspector of Police S.V.Nagaraja (P.W-33 in Crl.A.(MD).No.15 of 2019). The same Investigating Officer (PW-21 in Crl.A(MD).Nos.348 & 349/2017 & 178 of 2019) filed the Final Report in Cr.No.2135 of 2010 before the same Magistrate Court on 31.01.2012. Both the cases were committed before the I Additional District and Sessions Judge, Madurai and it was numbered as S.C.Nos.300 & 301 of 2014 and separate charges were framed in both the cases. Simultaneous trial was conducted in both the cases by the same Court.

(4.5) It is seen from records that in S.C.No.300 of 2014, PW-1 to PW-15 were examined. This trial went simultaneously along with the trial in S.C.No.301 of 2014. For reasons unknown, the trial in S.C.No.300 of 2014 came to a grinding halt and trial proceeded further in S.C.No.301 of 2014. In the meantime, A-4 in both the cases filed a quash petition before this Court and this Court, by order dated 16.08.2016 made in Crl.OP.No.14202 of 2016, dismissed both the quash petitions and directed the I Additional District and Sessions Judge, Madurai, to dispose of both the cases as expeditiously as possible. http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 (4.6) As stated supra, the I Additional District and Sessions Judge, Madurai proceeded with the trial in S.C.No.301 of 2014 and by judgment dated 20.12.2016, convicted and sentenced A-1 to A-3 and acquitted A-4 from all charges. Insofar as S.C.No.300 of 2014 is concerned, in view of this judgment, it was thought fit to transfer the case to some other Court and therefore, the case got transferred to the file of the IV Additional District and Sessions Judge, Madurai. After the case was transferred, PW-16 to PW-33 were examined on the side of the prosecution. The case ultimately ended in acquittal of all the accused persons, by judgment dated 06.09.2018. Hence, there are two sets of appeals, one as against conviction and the other as against acquittal.

Submissions:

> 5.When the matter was taken up for final hearing and the arguments had progressed for sometime, this Court entertained a doubt and found a fundamental flaw, in the manner in which the proceedings were conducted by the trial Court. This Court was of the considered view that there should have been a joinder of charges and one trial must have been conducted (at least a joint trial) for all the accused persons, since all the accused persons have committed different http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 offences in the course of the same transaction. Therefore, this Court requested the counsel appearing for the parties to address this issue also.

(5.1) Mr.Ashok Kumar, learned Senior Counsel appearing on behalf of the appellant (A-3) in Crl.A.(MD).No.349 of 2017 made the following submissions:

It is a case based on circumstantial evidence and the circumstances relied upon are the last seen theory, recovery of the material object based on confession and the discovery of the dead body in the Carrom Board Company belonging to A-1 and the chain of circumstances is not complete and none of the circumstances are proved and the fundamental requirements of proving a case through circumstantial evidence has not been fulfilled in this case.

There is not even an iota of evidence to prove the conspiracy as put forth by the prosecution, since PW-8 had turned hostile.

None of the witnesses have spoken about the overtact attributed to A-3 and the charge under Section 302 IPC has not been proved.

http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 No one has spoken about A-3 being last seen before the incident. There is nothing to connect A-3 with the discovery of the body in the Carrom Board Company belonging to A-1.

M.O.16, black colour bag, was recovered on the confession made by A-1 even before A-3 was arrested at Madurai. Therefore, there is nothing to connect A-3, even with regard to recovery of M.O.16.

Section 218 of Cr.P.C., embodies the general rule as to trial which provides for separate trial of each accused person for every distinct offence and Section 218(2) of Cr.P.C., is only an enabling provision and it is left open to the trial Court to decide with regard to the joinder of charges and joint trial. Just because, a joint trial has not been conducted in this case, that cannot be a ground not to independently consider the cases based on the evidence recorded and to order for a re-trial at this stage will cause prejudice to the accused person.

Joint trial cannot be claimed at this stage of appeal and due to lapse of time, the remand will cause prejudice to the accused persons and they are already undergoing imprisonment for the last three years.

http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 The learned Senior Counsel in order to substantiate his submissions, relied upon the following judgments:

(a) Chhutanni v. The State for U.P., reported in AIR 1956 SC 407.

(b) D.K.Chandra v. The State reported in AIR 1952 Bombay 177.

(c) Chandrawati v. Ramji Tiwari and Another reported in (2010) 13 SCC 281.

(d) Bimla Devi and Another v. State of Jammu and Kashmir, reported in (2009) 6 SCC 629.

(f) Navaneethakrishnan v. State by Inspector of Police, reported in AIR 2018 SC 2027.

(g) Dev Kanya Tivari v. State of U.P., reported in AIR 2018 SC 1377.

(5.2) Mr.R.Gandhi, learned counsel appearing on behalf of the appellant (A-1) in Crl.A.(MD).No.348 of 2017 and Mr.E.Sathish Rajkumar, learned counsel appearing on behalf of the appellant (A-2) in Crl.A.(MD).No.178 of 2019, made the following submissions:

With regard to the circumstantial evidence, the learned counsel adopted the arguments of the learned Senior Counsel Mr.Ashok Kumar and they submitted that none of the three circumstances have been proved by the prosecution.

http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 The case of the prosecution is that the conspiracy took place at 6.15 a.m., on 13.09.2010 and Manickavasagam was murdered at 11.00 a.m. However, PW-3 speaks about the deceased last seen along with A-1 at about 11.15 a.m., at Balaji Finance Company and that by itself shows that his evidence is totally unreliable.

The distance between Avaniyapuram and Balaji Gold Finance Company at Nethaji Road is about 8 kms. The conspiracy is said to have taken place at 10.15 a.m. at Avaniyapuram and then, A-1 went to Nethaji Road, returned along with deceased Manickavasagam at 11.00 a.m., and murdered him along with the other accused persons and thereafter, A-1 and A-2 are said to have again visited Nethaji Road at 12.20 a.m., and murdered deceased Ponmurugan. The sequence of events is completely unbelievable.

PW-4 is a chance witness and a friend of the deceased Ponmurugan and he is said to have travelled from Erode to Madurai and seen A-1 in the Company of the deceased Manickavasagam. This evidence is totally unreliable.

The statements of PW-3 and PW-4 was recorded on 11.10.2010 and had reached the Court only on 05.06.2012. The delay has not been explained. http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 There is absolutely no evidence to show that A-1 took the deceased Manickavasagam to the Company and there is no last seen witness either for taking him inside the Company or A-1 along with other accused persons coming out of the Company after the incident. Barathikannamma, who is an independent witness was examined in one case and was not examined in the other case and she has also been examined to prove the last seen theory and her evidence is totally unreliable since she says that she saw all the accused persons in the shop of the deceased Ponmurugan.

PW-6, who is said to be the owner of the Carrom Board Company did not have, even a single piece of paper to show that the property was leased to A-1 and it is unusual that he possessed the key for one lock and the other lock was broken open.

The recovery of M.O.16 roshan bag does not in any way connect either the deceased or the accused persons and the witness PW-12, who is the VAO has admitted that he deposes as a witness at least in ten cases every year, which clearly shows that he is a stock witness. In a case of circumstantial evidence, motive is a very important factor and the same has not been proved in http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 this case and PW-8, who was examined by the prosecution, did not support the case of the prosecution.

The respondent Police have completely concealed the genesis of the case and the case as projected by them is totally unbelievable and therefore, the benefit of doubt must be given to the accused persons.

Even if the present case falls within the requirements of Section 223(d) of Cr.P.C., the trial Court is given the discretion to decide the issue regarding joint trial and it is not compulsory in every case.

Even in case of misjoinder of cases, the Hon'ble Supreme Court has held that it is only an irregularity and not an illegality. Therefore, the non-joinder of charges cannot automatically vitiate the entire trial and make it illegal and therefore, there is no ground to order for retrial.

The accused persons have been acquitted in one case and convicted in the other case and to order for a retrial at this length of time, will cause prejudice to the accused persons. Therefore, the case should not be remanded back to the trial Court.

http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 The following judgments were relied upon to substantiate the submissions.

(a) Ranchhod Lal v. State of Madhya Pradesh, reported in AIR 1996 SCC 1248.

(b) Mohinder Singh v. State of Punjab, reported in (1998) 7 SCC 390.

(c) Kamalanantha and Others v. State of T.N., reported in (2005) 5 SCC 194.

(d) Rajaram Shaw and etc., v. State, reported in 1998 Crl.L.J.592.

(e) Satyajit Banerjee and Others .Vs. State of W.B.and Others, reported in (2005) 1 SCC 115.

(f) Sangili @ Sangilimadasamy v. State rep., by the Inspector of Police, reported in (2018) 2 MLJ (Crl) 23.

(g) P.Ramesh v. State Rep. by Inspector of Police, reported in AIR 2019 SC 3559.

(5.3) Per contra, the learned Additional Public Prosecutor appearing on behalf of the State submitted that a grave miscarriage of justice has been caused, since it is a clear case of murder for gain, where two lives had been taken away and the Court below, by adopting a wrong procedure has weakened the case of the prosecution. The learned Additional Public Prosecutor further submitted that the trial Court was proceeding further with the case, by conducting a simultaneous trial in both the cases and it is not known as to why, the http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 trial was abruptly stopped in one of the cases and proceeded further in the other case. The learned Additional Public Prosecutor further submitted that all the main witnesses are common in both the cases and there was no reason as to why, the trial Court did not conduct a joint trial in this case. He further submitted that the case on hand squarely falls under Section 223(d) of Cr.P.C., and the Court below ought to have seen that the accused persons have committed the offences in the course of the same transaction. The learned Additional Public Prosecutor therefore submitted that this Court in exercise of its appellate jurisdiction, must remand the case to the trial Court with a direction to frame common charges by bringing the case under Section 223(d) of Cr.P.C., and to conduct a single trial. While concluding his arguments, the learned Additional Public Prosecutor submitted that in a crime of such a serious nature, the accused persons must not be let out freely by taking advantage of serious procedural lapses and there will be failure of justice, if the case is not remanded for fresh trial.

(5.4) Mr.C.Muthusaravanan, learned counsel appearing on behalf of the victim/appellant in Crl.A.(MD).No.15 of 2019, adopted the arguments of the learned Additional Public Prosecutor and submitted that the judgment, if rendered, independently in Crl.A.(MD).Nos.348 & http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 349/2017 & 178 of 2019), will have a direct bearing while deciding Crl.A.(MD).No.15 of 2019. The evidence collected in both the cases should have been tried jointly, since the offence has been committed by the accused persons in the course of the same transaction and it will be absurd, if for the offence committed in the same transaction, one death ends in a conviction and another death ends in an acquittal. Therefore, the learned counsel strenuously urged this Court to order for a retrial in this case. The learned counsel in order to substantiate his submissions, relied upon the following Judgments:

(a) Ukha Kolhe v. The State of Maharashtra, reported in AIR 1963 SC 1531.

(b) Lakshmanan Sundaram v. State of Kerala, reported in 1990 Cri.L.J. 1800.

(c) Satyajit Banerjee and others v. State of W.B., and others, reported in 2005 SCC (Cri) 276.

DISCUSSION:

6. A charge is defined in Section 2(b) of the Code as including “any head of charge when the charge contains more heads than one”. It is clear that the definition is merely illustrative and it does not purport to exhaustively define a charge. The Supreme Court in http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 BirichhBhuian v. State of Bihar 1963 Supp (2) SCR 32 defined a charge as “a precise formulation of a specific accusation made against a person of

an offence alleged to have been committed by him."

7.The object of a charge in general and Chapter XIX of the 1898 Code (corresponding to Chapter XVII of the present 1973 Code) was lucidly explained by Vivian Bose, J in Willie (William) Slaney v. State of M.P., AIR 1956 SC 116, in the following words:

> "5..... The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice. If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is substantial compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the Code is based."

8. Under the scheme of the Code, the chapter on charges is in two parts. Part A of Chapter XVII comprising of Sections 211 to 217 sets out the contents and the particulars ofa charge, the effect of errors etc., Part B of Chapter XVII comprising of Sections 218 to 224 http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 deal with joinder of charges. Section 218 (1) of the Code embodies the general rule that that an accused shall be charged separately for every distinct offence, and that every such charge shall be tried separately. The object of this rule is to save the accused from being embarrassed in his defence if distinct offences are lumped together in one charge or separate charges and tried together. The legislature has, however, engrafted certain exceptions to this general rule and these are enumerated in Sections 219-223 of the Cr.P.C. In Satwant Singh v State of Punjab (AIR 1960 SC 266) the Supreme Court cited avoidance of multiplicity of trials, harassment of the accused, and waste of judicial time as the chief reasonsforming thejustification of these exceptions. Thus, under the Code, a separate trial under Section 218(1) is the norm and a joint trial is the exception.

9. Discussing the scope and effect of an identical general rule and its exceptions in the Code of Criminal Procedure, 1898 Subba Rao, J in BirichhBhujan v State (AIR 1963 SC 1120) observes as under "To summarise: a charge is a precise formulation of a specific accusation made against a person of an offence alleged to have been committed by him. Sections 234 to 239 permit the joinder of such charges under specified http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 conditions for the purpose of a single trial. Such a joinder may be of charges in respect of different offences committed by a single person or several persons. If the joinder of charges was contrary to the provisions of the Code it would be a misjoinder of charges. Section 537 prohibits the revisional or the appellate court from setting aside a finding, sentence or order passed by a court of competent jurisdiction on the ground of such a misjoinder unless it has occasioned a failure of justice."

10. It may, however, be of interest to note Section 233 of the 1898 Code read as under:

> "For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in Section 234, 235, 236 and 239." Section 218 of the 1973 Code reads as follows "For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately:
>
> Provided that where the accused person, by an application in writing, so desires and the Magistrate is of opinion that such person is not likely to be prejudiced thereby, the Magistrate may try together all or any number of the charges framed against such person. (2)Nothing in sub- section (1) shall affect the operation of the provisions of sections 219, 220, 221 and 223" It will be noticed that the general rule contained in http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 Section 218(1) is the same as Section 233 Cr.P.C, 1898.

By the proviso to Sub-section (1) of Section 218, it has been enacted that where the accused desires a joint trial for any number of charges, the Court may try together all or any number of charges framed against him provided by such trial no prejudice is caused to the accused. In inserting this proviso the legislature appears to have overruled the views of the Law Commission (41st Law Commission Report pp., 163) that such provisions were of little practical value since such requests, particularly from an accused, were extremely rare.

11. Clause (2) of Section 218 is a marked departure from the 1898 Code. The clause begins with the expression "Nothing in sub- section (1) shall affect the operation of the provisions of" which is, quite obviously, a non-obstante clause to clause (1) of Section 218. In Aswini Kumar Ghose v. Arabinda Bose [AIR 1952 SC 369], a Constitution Bench of the Supreme Court opined that a "non-obstante clause can reasonably be read as overriding 'anything contained' in any relevant existing law which is inconsistent with the new enactment." Sastri, CJ, however, added that "the enacting part of a statute must, where it is clear, be taken to control the non-obstante clause where both cannot be read harmoniously." One possible way to construe Section 218(2) Cr.P.C is to http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 adopt the course taken by the Supreme Court in Dominion of India v.Shrinbai A. Irani [AIR 1954 SC 596], where N.H Bhagwati, J. observed as under

> "10. ... although ordinarily there should be a close approximation between the non obstante clause and the operative part of the section,the non obstante clause need not necessarily and always be co-extensive with the operative part, so as to have the effect of cutting down the clear terms of an enactment. If the words of the enactment are clear and are capable of only one interpretation on a plain and grammatical construction of the words thereof a non obstante clause cannot cut down the construction and restrict the scope of its operation. In such cases the non obstante clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the legislature by way of abundant caution and not by way of limiting the ambit and scope of the operative part of the enactment." Thus, the exceptions contained in Section 218(2) Cr.P.C cannot be read

as cutting down the clear terms of the general rule spelt out in Section 218(1) Cr.P.C. This construction is in consonance with the interpretation of Section 218 Cr.P.C by the Supreme Court in State of West Bengal v LaisalHaque (AIR 1989 SC 129) wherein the Court treated Section 218(1) Cr.P.Cas containing the general rule for joinder of charges, and the Sections 219-223 as containing the exceptions to this rule.

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12. Turning to the exceptions, the first of these is contained in Section 219Cr.P.C which provides that a person, who is accused of more offences than one of the same kind committed within the space of twelve months, may be charged with and tried at one trial for any number of them not exceeding three. Section 219 requires sameness of offences and not of transactions (See Sheo Saran Lal v Emperor 7 All LJ 225). It is also clear from its plain language that the operation of this section is confined to a case of a single accused (See Ram Prasad v Emperor –AIR 1921 Allahabad 246(DB). This section can be contrasted with Section 223 (c) Cr.P.Cwhich is an identical provision permitting a joint trial inthe case of several persons being accused of more offences than one of the same kind committed by them jointly within the space of twelve months. The word "jointly" in the clause (c) of Section 223 is crucial, for unless the various persons committed the offences jointly, there would be no logic behind trying them jointly. Unlike Section 219, the operation of Section 223 (c) is not restricted to three offences within a space of 12 months.

13. Section 220 of the Cr.P.C provides for a case where in a series of acts forming one transaction, more offences than one are committed by the same person, and permits that he may be charged http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 with and tried at one trial for all of them. Like the preceding provision, Section 220 (1) applies only to a single accused. In case there is more than one accused, a corresponding provision is found in Section 223(d) Cr.P.C. Section 219 and 220(1) Cr.P.C are mutually exclusive as there cannot be a case where offences are simultaneously committed on one transaction and also in different transactions (See Raghavendra Rao v Emperor 12 Cr.L.J 567).

14. Section 220 (3) provides for a case where the acts alleged constitute an offence falling within two or more separate definitions of any law. In such a case, the person accused of them, may be charged with and tried at one trial for each of them. The illustrations appended to Section 220 (3) Cr.P.C clearly brings out its operative scope. Section 220 (4) Cr.P.C deals with a case where several acts of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with and tried at one trial for the offence constituted by such acts when combined and for any offence constituted by any one or more of such acts. It was pointed out by a Division Bench of the Allahabad High Court in T.B Mukerji v The State (AIR 1954 Allahabad 501) that in the corresponding provisions http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 under the 1898 Code viz., Section 235 (2) and (3) Cr.P.C“the word "person" includes persons because there is nothing in the context to show that the word was used only in singular. If an act is punishable under two different Sections and the accused can be tried jointly for both, it does not matter whether he is tried singly or jointly with others.”The learned judges of the Division Bench opined that contextually this

interpretation was logical since “there are no similar provisions expressly applicable to a case in which there are two or more accused.”It is, therefore, clear that Section 220(3) and (4) Cr.P.C applies to cases involving more than one accused as well.

15. Sections 221 and 222 of the Code are two provisions which permits the Court to convict the accused of an offence which is not included in the charge. The primary condition for application of Section 221 of the Code is that the court should have felt a doubt, at the time of framing the charge, as to which of the several acts (which may be proved) will constitute the offence on account of the nature of the acts or series of acts alleged against the accused. In State of W.B. v. LaisalHaque, (1989) 3 SCC 166, the Supreme Court considered the applicability of Section 221 and opined as under:

> http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 “There must not be any doubt as to “a single act or series of acts” which constitutes the transaction, that is to say, there must not be any doubt as to the facts. The doubt must be as to the inference to be deduced from these facts, thus making it “doubtful” which of several offences the facts which can be proved will constitute.”

16.Section 222 Cr.P.C was fully considered by the Supreme Court in Shamnsaheb M. Multtani v. State of Karnataka, (2001) 2 SCC

577. Speaking for the Court, Thomas, J opined as under:

> 15.Section 222(1) of the Code deals with a case “when a person is charged with an offence consisting of several particulars”. The section permits the court to convict the accused “of the minor offence, though he was not charged with it”. Sub-section (2) deals with a similar, but slightly different situation.

“222. (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.”

16.What is meant by “a minor offence” for the purpose of Section 222 of the Code? Although the said expression is not defined in the Code it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two illustrations provided in the http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 section would bring the above point home well. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-à-vis the other offence.” Thomas, J was, however, cautious to point out that a generous application of this provision was apt to result in miscarriage of justice. The learned judge illustrates this with the following example :

> 32.The serious consequence which may ensue to the accused in such a situation can be limned through an illustration: If a bride was murdered within seven years of her marriage and there was evidence to show that either on the previous day or a couple

> of days earlier she was subjected to harassment by her husband with demand for dowry, such husband would be guilty of the offence on the language of Section 304-B IPC read with Section 113-B of the Evidence Act. But if the murder of his wife was actually committed either by a dacoit or by a militant in a terrorist act the husband can lead evidence to show that he had no hand in her death at all. If he succeeds in discharging the burden of proof he is not liable to be convicted under Section 304-B IPC.

But if the husband is charged only under Section 302 IPC he has no burden to prove that his wife was murdered like that as he can have his traditional defence that the prosecution has failed to prove the charge of murder against him and claim an order of acquittal." Holding that it would be necessary to call upon the http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 accused, in such cases, to enter his defence, the Court held as under:

> "34.In such a situation, if the trial court finds that the prosecution has failed to make out the case under Section 302 IPC, but the offence under Section 304-B IPC has been made out, the court has to call upon the accused to enter on his defence in respect of the said offence. Without affording such an opportunity to the accused, a conviction under Section 304-B IPC would lead to real and serious miscarriage of justice. Even if no such count was included in the charge, when the court affords him an opportunity to discharge his burden by putting him to notice regarding the prima facie view of the court that he is liable to be convicted under Section 304-B IPC, unless he succeeds in disproving the presumption, it is possible for the court to enter upon a conviction of the said offence in the event of his failure to disprove the presumption."

17. Section 223 Cr.P.Cis the last of the exceptions which envisages a joint trial of several persons. The provision consists of seven clauses of which clauses (c), (e), (f) (g) were originally introduced into the in parimateria provision in the 1898 Code (Section

239) in 1923 (Vide Act XVIII of 1923). Under clause (d) of Section 223, several persons accused of different offences committed in the course of the same transaction may be charged and tried together. http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019

18. The principle behind Section 223(d) and its preceding Section 220(1) of the Code was spelt out by the Law Commission of India in its 41st Report on the Code of Criminal Procedure, 1898 in the following words "In Section 235(1) the principle is the relation between offences forming part of the same transaction, separate trials whereof will naturally result in an incomplete comprehension of the totality of the crime even where they do not lead to conflicting judgments."

19. To attract the operation of clause (d) of Section 223 Cr.P.C it must be shown that the different offences committed by several persons were done in the course of the same transaction. This issue must be examined by the trial court at the beginning of trial and cannot be determined on the basis of the result of the trial (See Chandra Bhal v State of U.P; 1971 3 SCC 983).

20. The expression "same transaction" has been the subject matter of several judicial pronouncements. The Madras High Court considered the import of the expression in Gam Mallu Dora v. King-Emperor, ILR (1926) 49 Mad 74, where Krishnan, J opined as http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 under:

> "The expression "the same transaction" has been tried to be explained in several cases which have been brought to my notice. After all it cannot be said that any very satisfactory definition of the words has been given. Each case must be judged in my opinion on the facts of that particular case. Generally speaking I am prepared to follow the observations of the learned Judges in Choragudi Venkatadri v. Emperor [(1910) I.L.R., 33 Mad., 502.] , in which the effect of the previous decisions has also been considered, as to the meaning of the expression. ABDUR RAHIM, J., says that the usual tests applied to decide whether different acts are parts of the same transaction are proximity of time, unity of place, unity of purpose or design and continuity of action. It is not necessary that all of them should be present to make the several incidents parts of the same transaction. Unity of place and proximity of time are not important tests at all; but the main test, so far as I can see, is the unity of purpose. Continuity of action goes with unity of purpose. If the various acts are done in pursuance of a particular end in view and as accessory thereto, they may, as ABDUR RAHIM, J., observes, be treated as parts of the same transaction."

21. The Calcutta High Court took the same view in Kushai Malik v. Emperor, AIR 1924 Cal 389. The following passage lucidly http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 sets out the legal position in the following words:

> "5.The expression "same transaction", used in sections 235 and 239 of the Cr PC, has been the subject of discussion in numerous cases. It has been held in some cases that, if a series of acts are so connected together by proximity of time, community of criminal intention and continuity of action and purpose, or from the relation of cause and effect, as to constitute, in the opinion of the Court, one transaction, then the accused may be charged with and tried at one trial for every offence committed in such series of acts, and if more persons than one are accused of different offences in a series of acts so connected, they may be tried together. In other cases it has been held that the word "transaction" suggests not necessarily proximity in time so much as continuity of action and purpose, i.e., it is not necessary that the acts should have been committed all on the same occasion, but it is sufficient that, though separated by a distinct interval of time, they are closely connected by continuity of purpose or progressive action towards a single object. In accordance with the last mentioned view it has been held that, where the accusation against all the accused persons is that they carried out a single scheme by successive acts done at intervals, and there was a complete unity of project, and the whole series of acts were so linked together by one motive and design as to constitute one transaction within the meaning of http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 section 239, a joint trial is not only legal but is demanded in the interest of public time and

> convenience. In all these cases, however, the foundation for the procedure is the association of two or more persons concurring from start to finish to attain the same end."

22. In State of A.P. v. Cheemalapati Ganeswara Rao, AIR 1963 SC 1850, the analogous provisions of Section 235 (1) were considered by the Supreme Court. Considering the import of the expression "same transaction" the Court held:

"25...What is meant by "same transaction" is not defined anywhere in the Code. Indeed, it would always be difficult to define precisely what the expression means. Whether a transaction can be regarded as the same would necessarily depend upon the particular facts of each case and it seems to us to be a difficult task to undertake a definition of that which the Legislature has deliberately left undefined. We have not come across a single decision of any Court which has embarked upon the difficult task of defining the expression. But it is generally thought that where there is proximity of time or place or unity of purpose and design or continuity of action in respect of a series of acts, it may be possible to infer that they form part of the same transaction. It is, however, not necessary that every one of these elements should co-exist for a http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 transaction to be regarded as the same. But if several acts committed by a person show a unity of purpose or design that would be a, strong circumstance to indicate that those acts form part of the same transaction."

23. Finally in Balbir v. State of Haryana, (2000) 1 SCC 285 a three judge bench of the Supreme Court set out the test for the application of Section 223 (d) Cr.P.C in the following words:

> 12.For several offences to be part of the same transaction, the test which has to be applied is whether they are so related to one another in point of purpose or of cause and effect, or as principal and subsidiary, so as to result in one continuous action. Thus, where there is a commonality of purpose or design, where there is a continuity of action, then all those persons involved can be accused of the same or different offences "committed in the course of the same transaction".

24. The necessity of invoking Section 239 (d) Cr.P.C to order a joint trial where different offences are committed by several persons in the course of the same transaction was reiterated by the Supreme Court in KadiriKunhahammad v. State of Madras, AIR 1960 SC 661, the relevant extract reads as under:

> http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019
> "4.Section 239(d) authorises a joint trial of persons accused of different offences committed in the course of the same transaction; and there can be no doubt that, in deciding the question whether or not more persons than one can be tried together under the said section, the criminal court has to consider the nature of the accusation made by the prosecution. It would be unreasonable to suggest that though the accusation made by the prosecution would justify a joint trial of more persons than one, the validity of such a trial could be effectively challenged if the said accusation is

> not established according to law. It is true that, in framing the charge against more persons than one and directing their joint trial, courts should carefully examine the nature of the accusation; but if they are satisfied that prima facie the accusation made shows that several persons are charged of different offences and that the said offences prima facie appear to have been committed in the course of the same transaction, their joint trial can and should be ordered."

25. More recently in R. Dineshkumar v. State, (2015) 7 SCC 497 the Supreme Court formulated the test in the following words:

> 20. According to us, the principle enunciated in Ganeswara Rao case [AIR 1963 SC 1850 : (1963) 2 Cri LJ 671] is that where several persons are alleged to http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 have committed several separate offences, which, however, are not wholly unconnected, then there may be a joint trial unless such joint trial is likely to cause either embarrassment or difficulty to the accused in defending themselves.

26. The facts of the present case clearly brings this case under Section 223(d) of Cr.P.C. It is seen that the entire sequence of events is connected to each other and they are related to one another in point of purpose and it constitutes one continuous action. In other words, there is continuity of purpose and design and towards the same, there is continuity of action. The transaction started with a conspiracy between A-1 to A-3, proceeded with the murder of the deceased Manickavasagam and ended with the murder of Ponmurugan. All these offences were committed during the course of the same transaction jointly by the accused persons. There cannot be a better case than the present one, which can be cited as a case falling under Section 223(d) of Cr.P.C. Unfortunately, the trial Court has failed to take note of these rudimentary principles of joinder of charges.

27. The Director General of Police, Tamil Nadu, in the proceedings dated 15.09.2010, has clearly understood the scope of http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 investigation and that is the reason why both the FIRs were directed to be investigated by the same Investigating Officer. The link between the cases was clearly spelt out in the said proceedings. At least at that point of time, the entire case should have been investigated as a single case, by clubbing both the FIRs and a single charge sheet should have been filed by bringing the case under Section 223(d) of Cr.P.C. The concerned Directorate of Prosecution ought to have given an opinion to that effect. Somehow, it had escaped the attention of the prosecution, which resulted in two separate charge sheets filed for each of the FIR. The recoveries that were made pursuant to the alleged confession made by the accused persons pertained to the entire incident and only if those recoveries are seen in totality, it will have some meaning and will help in understanding the case of the prosecution. Similarly, the statements recorded under Section 161(3) of Cr.P.C., must also be seen in totality and should not be confined to the respective Final Reports. By so confining it, the same will not help the prosecution in substantiating the case.

28. In one of the FIR, what was recovered was a black Roshan Bag (M.O.16). In the other FIR, what was recovered was a sum of Rs.1,49,500/- (Ex.P.13 & Ex.P.16). This amount and the black

http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 Roshan bag were recovered at different places. It is too ridiculous to look at these two recoveries independently and confine it to the respective cases. One more instance that can be cited is that, a witness named Barathikannamma was examined for the purpose of proving one link in the chain of circumstances viz; last seen theory. This witness was examined in one case and was not examined in the other case. The evidence of this witness is common for both the cases and it cannot be confined to one case. This is just a sample that is taken to show how absurd the investigation has proceeded and ultimately, tried separately by the trial Court. The main witnesses in both the charge sheets is common and they have been independently examined by confining them to the facts of that particular case. The chart hereunder will illustrate the said fact.

COMMON WITNESSES Sl.No. Name C.A.Nos.348 & 349 C.A.No.15 of 2019 of 2017 & 1 Marimuthu P.W-1 P.W-8 2 Kanagasabapathi P.W-2 P.W-11 3 Senrayaperumal P.W-3 P.W-4 4 Vasudevan P.W-4 P.W-5 5 Gajendrapandian P.W-7 P.W-1 6 Panchavarnam P.W-8 P.W-12 http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 Sl.No. Name C.A.Nos.348 & 349 C.A.No.15 of 2019 of 2017 & 7 Muniyandi P.W-10 P.W-13 8 Ganesh P.W-11 P.W-14 9 Dr.Natarajan P.W-17 P.W-23 10 Gnanasekaran S.I P.W-19 P.W-15 11 Shanmugasundaram.I.O. P.W-20 P.W-31 12 Nagaraja I.O. P.W-21 P.W-33 In one case, their evidence has been believed and relied upon and in the other case, it has been disbelieved. The absurdity is too patent which has resulted in miscarriage of justice.

29. This Court has to squarely blame the learned I-Additional District and Sessions Judge, Madurai, who is supposed to have identified that the case squarely falls under Section 223(d) of Cr.P.C. Even, if the prosecution has committed a mistake, it is for the trial Court to have rectified that mistake. The trial Court ought to have taken both the Final Reports and brought the case under Section 223(d) of Cr.P.C. and framed common charges against the accused persons and conducted a single trial in this case. A Sessions Judge is supposed to know this fundamental principle of joinder of charges and the manner in which, the trial has proceeded in this case really shocks this Court. It is not known as to why, all of a sudden the trial Court, which http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 was proceeding further conducting a simultaneous trial, stopped the trial in one case and proceeded with the trial in the other case and passed a judgment. It is a fundamental mistake to have conducted a simultaneous trial in this case. This mistake was confounded by stopping the trial abruptly in one case. The procedure adopted by the Court below is patently illegal, resulting in miscarriage of justice. In a double murder case for gain, this was not what was expected of a Sessions Court. The Second case ultimately ended in acquittal, after nearly two years, in a different Court. Obviously dealing with offences committed in the course of the same transaction with two different trials, will certainly weaken the case of the prosecution. Separate trials in this case will naturally result in an incomplete comprehension of the totality of the crime. This Court is of the considered view that such serious procedural lapses on the part of the trial Court should not be allowed to be taken advantage by the accused persons.

30. Under Sections 386(a) and (b)(i), the power to direct retrial has been conferred upon the appellate court when it deals either with an appeal against the judgment of conviction or an appeal against acquittal. There is a difference between the powers of an appellate court under clauses (a)

(appeals against acquittals) and (b) (appeals http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 against conviction). Under clause (b), the appellate court is required to touch the finding and sentence, but under clause (a), the court may reverse the order of acquittal and direct that further enquiry be made or the accused may be retried or may find him guilty and pass sentence on him according to law.

31. In Issac v. Ronald Cheriyan, (2018) 2 SCC 278, the Supreme Court held that"a retrial may be ordered when the original trial has not been satisfactory for particular reasons like..., appropriate charge not framed, evidence wrongly rejected which could have been admitted or evidence admitted which could have been rejected, etc. Retrial cannot be ordered when there is a mere irregularity or where it does not cause any prejudice, the appellate court may not direct retrial. The power to order retrial should be exercised only in exceptional cases."

32. In UkhaKolhe v. State of Maharashtra, (1964) 1 SCR 926, the Supreme Court examined the scope of this power and held as under:

> "11.An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons."

33. In ZahiraHabibulla H. Sheikh v. State of Gujarat, (2004) 4 SCC 158 in the context of examining the requirements of a fair trial and the power to order de-novo trials, the Supreme Court observed:

> "This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 and violation of public rights and duties, which affect the whole community as a community and are harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society are not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an overriding duty to maintain

> public confidence in the administration of justice — often referred to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators."

34. All the earlier authorities were reviewed and the the power of re-trial was fully examined by a three Judge Bench in Mohd. Hussain v. State (Govt. of NCT of Delhi), (2012) 9 SCC 408, wherein it was held as under:

> "The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A de novo trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no straitjacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked."

35. The appellate Court has been conferred with very wide powers to order for a retrial in a criminal case. It is true that the same can be done only in exceptional cases. This is one such exceptional case, where this Court has to necessarily set aside both the judgments and order for retrial. The trial that was conducted before the Court http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 below is vitiated by serious illegalities on account of misconception of the nature of the proceedings. The appellate Court cannot merely express its helplessness and give the benefit to the accused persons. The power has been given to the appellate Court only to exercise it in appropriate cases. This Court is of the considered view that this is a case, where the proceedings before the Court

below is not a mere irregularity but suffers from serious illegality.

36. The learned counsel appearing on behalf of the appellants have raised the issue of prejudice caused to the accused persons, if retrial is ordered. It must be borne in mind that the concept of fair trial involves the interest of the accused persons, the victim and the society at large. Courts are duty bound to maintain public confidence in the administration of justice. Courts administering criminal justice, cannot turn a blind eye to a serious illegality that has occurred in relation to the proceedings that were conducted before the Court below. The guiding factor for retrial must always be demand of justice. In a case of such serious nature, if this Court does not order for a retrial, people will loose faith in the legal system and the interest of the society will be jeopardized. The truth has to be found out in this case, by ordering for a retrial and by fixing a time limit for the http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 completion of the proceedings.

37. The accused persons are not to be blamed in this case either for the wrong procedure followed or for the delay. The entire blame must be taken by the prosecuting agency and the trial Court before which, the proceedings were conducted. As stated above, the trial Court should have brought this case under Section 223(d) of Cr.P.C. and framed common charges against the accused persons and conducted a single trial. The trial Court failed to take note of even this fundamental procedure prescribed under the Code. The appellants are said to be undergoing imprisonment, pursuant to the judgment under which they were convicted. In view of the fact that this Court is going to set aside both the judgments and order for a retrial, this Court must balance the liberty of the appellants/accused persons and at the same time, ensure their participation during retrial to be completed within a time frame.

38. This Court reminds itself of the maxim Actus Curiae Neminem Gravabit, which means that the act of the Court does no injury to any of the suitors.

In A.R. Antulay v.R.S. Nayak, (1988) 2 SCC 602 :

> http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 1988 SCC (Cri) 372] , SabyasachiMukharji, J. speaking for the majority for the Constitution Bench, quoted the following observation of Lord Cairns in Rodger v. ComptoirD'Escompte de Paris [(1871) LR 3 PC 465 : 17 ER 120] “82. ... ‘Now, their Lordships are of opinion, that one of the first and highest duties of all courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression “the act of the Court” is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of Appeal, but the act of the Court as a whole, from the lowest court which entertains jurisdiction over the matter up to the highest court which finally disposes of the case. It is the duty of the aggregate of those tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court.’

39. The illegality committed by the trial Court by not following the procedure under Section 223(d) of Cr.P.C., and conducting a single trial, has resulted in this Court setting aside the entire judgment

passed in both the cases. In view of the same, the appellants/accused persons are now being made to again face a retrial before the Court below. While doing so, the liberty of the appellants/accused persons must be ensured by granting them bail by http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 imposing conditions.

40. This Court did not consciously deal with or go into the merits of the case, since any findings on the merits of the case will certainly cause prejudice to the accused persons and will have a bearing on the retrial to be conducted by the Court below and while ultimately considering the case on merits. Therefore, this Court is not dealing with or giving any finding on the merits of the case, projected by the counsel appearing on either side. Even though, there were four accused persons in this case, A-4 who was charged in both the cases under Section 212 of IPC on the ground of harbouring A-1 and A-2, was acquitted in both the cases. This Court does not find any materials as against A-4 and this Court is of the considered view that A-4 need not be made to again face the ordeal of retrial. A-4 is discharged of the charge under Section 212 of IPC. The order of retrial is only confined to appellants/A-1 to A-3.

Conclusion:

41. In view of the above discussions, the judgment of the I Additional District and Sessions Judge, Madurai, made in S.C.No.301 of 2014, dated 20.12.2016 and the judgment of the IV Additional http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 District and Sessions Judge, Madurai, made in S.C.No.300 of 2014, dated 06.09.2018, are hereby set aside. The matter is remanded to the file of the learned Principal District and Sessions Judge, Madurai. The learned Principal District and Sessions Judge, Madurai, is directed to consolidate the Final Reports filed in S.C.Nos.300 & 301 of 2014 and consider the same as a single Final Report by bringing the case under Section 223(d) of Cr.P.C., and assign a new case number. The Court shall proceed to frame charges against the accused persons by taking into consideration all the offences committed by the accused persons to have formed part in the course of the same transaction. The proceedings shall recommence from the stage of Section 228 of Cr.P.C., under Chapter XVIII. The list of witnesses shall be finalised by the prosecution and submitted before the Sessions Court and the dates of their examination shall also be fixed in advance to enable the defence to get themselves ready for cross-examination on the same day the witnesses are examined in-chief.

42. The appellants/accused persons shall be released on bail subject to the following conditions:

a) The appellants/accused persons shall execute a bond for a sum of Rs.10,000/- (Rupees ten thousand only) each, with two http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 sureties, each for a like sum to the satisfaction of the learned Principal District and Sessions Judge, Madurai;

b) The appellants/accused persons shall report before the learned Principal District and Sessions Judge, Madurai, daily at 10.30 a.m., till the completion of the proceedings;

c) The appellants/accused persons shall not leave the jurisdiction of Tamil Nadu without seeking leave of the jurisdictional Court;

d) The appellants/accused persons shall furnish their residential address, change of address and the phone numbers to the respondent police.

43. In the result, the Criminal Appeals are allowed and the impugned judgments in Crl.A.(MD).Nos.348 & 349 of 2017 & Crl.A. (MD).Nos.15 & 178 of 2019, namely, S.C.No.300 of 2014, dated 06.09.2018 and S.C.No.301 of 2014, dated 20.12.2016, are hereby set aside and the matter is remanded to the Court of Principal District and Sessions Judge, Madurai, for retrial in accordance with the directions given by this Court supra. The proceedings shall be completed within a period of three months from the date of receipt of a copy of this judgment. The trial shall be conducted strictly in line with Section 309 of Cr.P.C., and the guidelines given by the Hon'ble Supreme Court in http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 Vinod Kumar Vs. State of Punjab, reported in 2015 (1) MLJ (crl) 288. If the appellants adopt any dilatory tactics, it is open to the trial Court to insist upon their presence and remand them to custody as laid down by the Hon'ble Supreme Court in State of Uttar Pradesh Vs. Shambhu Nath Singh, reported in JT 2001 (4) SC 319. Consequently, connected miscellaneous petitions are closed.

44. The Registry is directed to send the original case records forthwith to the Principle District and Sessions Court, Madurai.

[S.V.N., J.] &

16.10.2019

Index : Yes / No
Internet : Yes / No
KP/PJL

To

1. I-Additional District and Sessions Judge, Madurai.

2. IV-Additional District and Sessions Judge, Madurai.

3. Principal District and Sessions Judge, Madurai.

http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019

4.The Inspector of Police, Thideernagar Police Station (L & O), Madurai.

5.The Section Officer, V.R.Section, Madurai Bench of Madras High Court, Madurai.

http://www.judis.nic.in Crl.A.(MD).Nos.348 & 349/2017 and 15 & 178 /2019 S.VAIDYANATHAN, J.

AND N.ANAND VENKATESH, J.

PJL Pre-delivery Judgment made in Crl.A(MD)Nos. 348 & 349 of 2017 and 178 & 15 of 2019 16.10.2019 http://www.judis.nic.in