

Muthu Naicker and Others

Vs

State of Tamil Nadu

Criminal Appeal Nos. 230 and 238 of 1972 and 97 of 1973

(P. N. Shinghal, D. A. Desai JJ)

10.08. 1978

JUDGMENT

DESAI, J. -

1. These three appeals arise out of the judgment rendered by a Division Bench of the High Court of Madras in Criminal Appeal 295 of 1970 convicting 27 appellants for different offences, who were acquitted of all charged levelled against them by the learned Sessions Judge, Chingleput Division in Sessions Case 25 of 1969 in which 28 persons were put up for trial for various offences including the one under Section 302/34, Indian Penal Code against accused 1 to 10, 16, 17, 19 and 20, and under Section 302/149, IPC against rest of the accused and 37 other charges for specific offences under Sections 323, 324, 325 and read with Section 149 and Section 427 read with Section 34, IPC. The learned Sessions Judge entertained a reasonable doubt about the veracity of the prosecution evidence and giving benefit of doubt, rejected the prosecution case in its entirety and acquitted all the accused. The State of Tamil Nadu preferred an appeal to the High Court of Madras against original accused 1 to 27. No appeal was preferred against the acquittal of original accused 28 and it has become final. The High Court practically accepted the entire prosecution case and convicted accused 1 to 27, i.e. all the accused in respect of whom the State had preferred counts. Original accused 1-7 and 19 were convicted amongst others, for an offence under Section 302 read with Section 34 of the Indian Penal Code and each of them was sentenced to suffer imprisonment for life. These 8 accused preferred Criminal Appeal 230 of 1972 under Section 2(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1971. Original accused 8 to 18 to 20 to 27 applied for and obtained special leave in Criminal Appeal 238 of 1972. Original accused 1 to 7 and 19 were also convicted for various other offences and in respect of their convictions for offences other than the one under Section 302/34, IPC, they applied for and obtained special leave in Criminal Appeal 97 of 1973. Thus, these three appeals arise from the same judgment and accordingly were heard together and are being disposed of by this common judgment.

2. A curious feature of this case which has caused us not inconsiderable anxiety is that in all 28 persons were challaned before the learned Sessions Judge who framed charges against the accused under 39 different heads. The prosecution in all examined 34 witnesses including prosecution witnesses 1, 2, 4, 6, 7, 8 and 13 who are alleged to have suffered injuries at the scene of occurrence and in all probability in the course of the occurrence and yet the learned Session Judge was not impressed by the evidence of any of these witnesses and rejected the entire prosecution case as unworthy of belief and acquitted all the accused. When the matter the matter was taken to the High Court by the State against all accused, except the last, High Court was of the opinion that the appreciation of evidence by the learned Sessions Judge has been.

so unreasonable that the evidence given by the witness was discarded only on the ground that it is the evidence of partisan witnesses and the judgment of the trial Court is vitiated by incoherent and heterogeneous medley of confused thinking, clarity and cogency being foreign to the judgment of the trial Court.

With this cryptic observation the High Court accepted almost the entire prosecution case except where a concession was made by the learned Public Prosecutor appearing for the State and convicted all the appellants, viz., original accused 1 to 27 for various offences. Accused 1 to 7 and 19 were convicted for an offence under Section 302/34, IPC and each of them was sentenced to suffer imprisonment for life. Accused 1, 6, 7, 8, 11, 12 to 15, 19, 20, 22, 23, 26, and 27 were convicted for an offence under Section 147, IPC and the remaining accused were convicted for an offence under Section 148, IPC. Accused 7, 17, 21 and 29 were convicted for an offence under Section 323, IPC. Accused 7, 11, 13, 23, and 25 were convicted for an offence under Section 325, IPC and all the accused were convicted with the aid of Section 149, IPC for the aforementioned offences. Some of the accused were also convicted for an offence under Section 427/34, IPC. they were awarded varying sentences on each count simultaneously directing that the substantive sentences would run concurrently.

3. Karpakkam village was no exception to the ordinary faction-ridden rural community, the dispute vivisectioning the village community dating back to 1956 when accused 11 Kuppu Naicker who has a well in land bearing Survey No. 102, wanted to lay a pipeline to take water to the field bearing 166/2 belonging to his wife, Dhanammal. There was another well sunk by the local Panchayat in Survey No. 170 for the use of the village community and when accused 11 wanted to take water from his well in Survey No. 102, an apprehension was entertained by the residents of the village that there would not be enough water in the well in Survey No. 170 and there would be water shortage. Grappled by this apprehension, a majority of the village community resisted the attempt of accused 11 to take water by laying pipelines. This became a prestige issue which led to attacks and counter blasts. Rival parties were led by accused 11 on one side who was keen to lay the pipeline for flow of water including through Survey No. 170 described as 'Meykal Poramboke' in which it was proposed to construct a school building, and the opponents were led by PW 31. On March 4, 1967, accused 24 Kumaraswami dug a channel for laying the pipeline through Survey No. 170 whereupon PW 31 approached the Collector on March 6, 1967, objecting to the digging of the channel for laying pipelines in 'Meykal Poramboke' and on his representation on March 7, 1967, the Collector suspended the permission granted to accused 11 to lay the pipelines. Accused 11 and his companions ignored the order of the Collector and continued to dig the channel. Apprehending that PW 31 and his companions may obstruct, accused 24 instituted original suit 2216/67 in the Court of the District Munsif, Poonamalle against PW 31 and 9 others, seeking to injunct them from obstructing in any manner in laying the pipelines. Subsequently, the District revenue Officer passed an order Ext. P-5, on July 29, 1968, for laying the pipelines along the cart track in Survey 169 and 170 and the Tahsildar was asked to demarcate the route along which the pipeline should be laid. One T. A. Thandapani, PW 5, at the relevant time Revenue Divisional Officer was directed as per order Ext. P-6 to take immediate action to finalise the track along which the pipeline had to be laid he was directed to visit the village after giving advance notice to both the contending parties. He visited the village on November 11, 1968 when a written memorandum, Ext. P-1 signed by 63 residents of the village, including PWs 1, 2, 4, 6, 7 and deceased Gajarajan was submitted to him objecting to laying of pipelines. He marked the track along which the line was to be laid by use of lime powder. A crowd collected at the spot and obstructed marking of the proposed pipeline and part of it was erased as evidenced by Ext. P-20. The officers then withdrew as tension was mounting and PW 5 submitted his report Ext. P-7 dated November 14, 1968. The first outward manifestation of hostility

occurred on November 24, 1968 when PW 31 who was returning to the village from Madras, was attacked by a stone hurled at him by accused 5 who was then in the company of accused 1, 4 to 7 and 16 to 19. An information was lodged with the police and PW 31 was taken to Royapettah Hospital where he was admitted as indoor patient. This incident appears to be the signal for the tragic events of November 27, 1968. On that day around 2.30 p.m. deceased Gajarajan, brother of PW 31 arrived by bus coming from Madras side and was passing through Battai leading to Gangamal Koil on the way to his house and when he was near Gasuarina Thope a crowd of about 50 to 60 persons including accused 1-23 and 28 emerged from the Thope and attempted to waylay the deceased. Deceased Gajarajan tried to escape and he was chased and when he was near the well situated near the Teacher's Quarters he was encircled by the crowd and from amongst them he was attacked and beaten by accused 1 with a stick on his right shoulder, by accused 2 on his head with patta knife and by accused 3 on his head with Vettu Kathi. Deceased Gajarajan took to heels and was chased by the crowd and fell down near the house of PW 10 where accused 4 and 5 inflicted injuries with patta knife and accused 6 and 7 hurled stones and accused 19 dropped a big stone on Gajarajan. In the incident that occurred near the house of PW 10, several prosecution witness also suffered injuries at the hands of different accused. It is alleged that accused 1 beat PW 6 and PW 8 with a stick; accused 2 inflicted injury with patta kathi on PW 6; accused 4 caused injuries with patta kathi to PWs 2 and 7; accused 5 attacked PW 1 with spear and then hurled a stone at him; accused 8 and 10 caused grievous hurt to PW 4; accused 19 hurled a stone at PW 2 and caused grievous hurt; accused 23 caused hurt to PW 13; accused 24, 25, 26 and 27 inflicted injuries on PW 4. Some of the accused committed mischief. PW 32 Subramaniam, A.S.I. Police, Triuvanmyvur received a telephone message that a riot had occurred at Karpakkam Village and before he could get details on phone, the connection was snapped. He rushed with some police constables to the village simultaneously sending intimation for additional police help. When he reached the house of PW 10, he found Gajarajan lying injured. PWs 1, 2, 4, 6, 7 and 13 came to the house of PW 10. He arranged for a conveyance for taking injured Gajarajan and PW 4 to the General Hospital and then he asked PWs 1, 2, 6 and 7 to when accompany him and at the police station recorded First Information Report, Ext. P-2 as narrated by PW 1 and registered an offence and commenced investigation. After completing the investigation he submitted challan against 28 accused for various offences. The trial of the accused resulted in acquittal and in appeal by the State, the Court reached the conclusion as hereinbefore recorded.

4. In the appreciation of evidence by the trial Court as well as in appeal against acquittal of the accused by the High Court there is very little or no meeting ground with the unfortunate though unavoidable result that both the sides practically read the entire evidence before us and wanted us to reach the conclusion on our own appreciation of evidence. Unfortunately, in respect of those accused who have been convicted for an offence under Section 302/34, IPC, there is an appeal to this Court as of right, but in appeals by special leave ordinarily this Court does not undertake to reappraise evidence. However, in a situation in which we are placed in this case, where the learned Session Judge rejects the entire prosecution evidence as unworthy of belief and the High Court implicitly relies on almost the entire evidence, we could not escape the duty to examine the evidence for the purpose of ascertaining whether there has been any such error of law or fact as to vitiate the findings in the impugned judgment.

5. Here is a case in which in all 28 accused were put up for trial and as many as 34 witnesses were examined, 6 of whom are alleged to have been injured at the scene of occurrence and in all probability in the course of occurrence. The High Court in one paragraph of the judgment (para 60) agrees with the trial Court that the evidence of prosecution witness 10, 12 and 13 so far as they implicate accused 8, 9, 10, 16 and 17 fails to inspire confidence but in para 62 their evidence is

accepted as reliable on minor charges but in this background we would exclude their evidence from further consideration. Even then there are 27 accused who are before this Court and there is evidence of 31 witness which is to be examined.

6. Where there is a melee and a large number of assailants and number of witness claim to have witnessed the occurrence from different places and at different stages of the occurrence and where the evidence as in this case is undoubtedly partisan evidence, the distance possibility of innocent being falsely included with guilty cannot be easily ruled out. In a faction-ridden society where an occurrence takes place involving rival factions it is but inevitable that the evidence would be of a partisan nature. In such a situation to reject the entire evidence on the sole ground that it is partisan is to shut one's eyes to the realities of the rural life in our country. Large number of accused would go unpunished if such an easy course is charted. Simultaneously, it is to be borne in mind that in a situation it unfolds in the case before us, the easy tendency to involve as many persons of the opposite faction as possible by merely naming them as having been seen in the melee is a tendency which is more often discernible and is to be eschewed and therefore, the evidence has to be examined with utmost care and caution. It is in such a situation that this Court in *Masalti v. State of U.P.* ((1964) 8 SCR 133 : AIR 1965 SC 202 : (1965) 1 Cri LJ 226)., adopted the course of adopting a workable test for being assured about the role attributed to every accused. To some extent it is inevitable that we should adopt that course.

7. Before we proceed to look into the evidence it is also necessary to make it clear that whenever in uneventful rural society something unusual occurs, more so where the local community is faction ridden and a fight occurs amongst factions, a good number of people appear on the scene not with a view to participating in the occurrence but as curious spectators. In such an even mere presence in the unlawful assembly should not be treated as leading to the conclusion that the person concerned was present in the unlawful assembly as a member of the unlawful assembly. Vicarious liability would attach to every member of the unlawful assembly if that member of the unlawful assembly either participates in the commission of the offence by overt act or knows that the offence which is committed was likely to be committed by any member of the unlawful assembly in prosecution of the common object of the unlawful assembly and becomes or continues to remain a member of the unlawful assembly. If one becomes a member of the unlawful assembly and his association in the unlawful assembly is clearly established, his participation in commission of the offence by overt act is not required to be provided if it could be shown that he knew that such offence was likely to be committed in prosecution of the common object of the unlawful assembly. But while finding out whether a person was a curious spectator or a member of an unlawful assembly it is necessary to keep in mind the life in a village ordinarily uneventful except for small squabbles where the village community is faction ridden and when a serious crime is committed people rush just to quench their thirst to know what is happening. In this case we will have occasion to point out that there are accused who are convicted with the aid of Section 149, IPC but in respect of whom we have no doubt in our minds that there were mere spectators and could hardly be said to be members of the unlawful assembly.

8. At the outset let us briefly analyse the charges framed against the accused. In all distinct and separate charges were framed under 39 heads. Accused 1, 6, 7, 8, 11, 12, 19, 20, 22, 23, 26, 27 and 28 were charged for an offence committed under Section 147, IPC and the remaining accused were charged for an offence under Section 148, IPC under heads 1 and 2. Accused 1, 2, 3, 4, 6, 7, 8, 9, 10, 16, 17, 19 and 20 were charged under Section 302 read with Section 34, IPC under head 3 and under head 4 the remaining accused were charged under Section 302/149, IPC. Accused 1 was charged for having committed an offence under Section 323, IPC under heads 5 and 7 for causing

hurt to PW 6, Subramaniam and PW 8 Gangappa Naicker. Accused 2 was charged for committing an offence under Section 324, IPC for causing hurt to PW 6, Subramaniam with patta kathi under head 9. Accused 2 was also charged under head 35 for committing an offence under Section 427, IPC for committing mischief in the house of PW 7, Krishnappa Naicker. Accused 4 was charged under two distinct heads 11 and 13 for committing an offence under Section 324, IPC for causing hurt with patta kathi to PW 2, Vedagiri and PW 7 Krishnappa Naicker respectively. Accused 5 was charged for committing an offence under Section 324 and 323, IPC under heads 15 and 17 for causing hurt to PW 1, Rajamanickam. Accused 19 was charged for an offence under Section 325, IPC for causing grievous hurt to PW 2, Vedagiri under head 19. Accused 23 was charged for an offence under Section 323, IPC for causing hurt to PW 13, Kanammal under head 21. Accused 24 was charged for an offence under Section 324, IPC under head 23 for causing hurt to PW 4, Gnanamurthi with patta kathi. Accused 25 was charged under head 25 for an offence under Section 324, IPC for causing hurt with iron pipe to PW 4, Gnanamurthi. Accused 26 was charged for an offence under Section 323, IPC under head 27 for causing hurt to PW 4, Gnanamurthi. Accused 27 was charged for committing an offence under Section 323, IPC under head 29 for causing hurt to PW 4, Gnanamurthi. Accused 8 was charged for an offence under Section 325, IPC under head 31 for causing grievous hurt to PW 4, Gnanamurthi. Accused 10 was charged for an offence under Section 325, IPC under head 33 for causing grievous hurt to PW 4, Gnanamurthi. Under charges 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32 and 34 all the accused were charged for offences under Sections 323, 324 and 325, IPC read with Section 149, IPC. Accused 7, 8 and 10 were charged for an offence under Section 427/34, IPC under head 36 for causing mischief in the house of PW 16, Karpagammal. Accused 5, 8 and 9 were charged for an offence under Section 427/34, IPC under head 37 for causing mischief in the house of PW 17, Rajammal. Accused 3, 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 19, 20, 21, 23 and 28 were charged for an offence under Section 426/34, IPC under head 38 for causing damage to the engine and pump of PW 13, Ranganathan. Accused 2, 3, 8 and 9 were charged for an offence under Section 427 read with Section 34, IPC under head 39 for causing mischief in the house of PW 18, Andammal.

9. Defence of all the accused except accused 4 was of total denial. Accused 4 admitted the dispute consequent upon attempt of accused 11 to take water by laying pipelines, the visit of PW 5 on November 11, 1968, demarcating of route along which pipelines, was to be laid and erasure of it by the opposite faction. It was alleged that they were involved on account of enmity. Accused 4 admitted that when he was examined on November 27, 1968 by the Medical Officer he had injuries on his person but he did not know who caused them. He had filed a complaint in which he had stated that he was beaten on November 27, 1968 at 12 noon by a mob consisting of 10 persons including deceased Gajarajan and his relatives.

10. As stated earlier, the learned Session Judge found serious discrepancies and contradiction in the evidence of witnesses whom he considered partisan and interested and, therefore, discarded their testimony in entirety and acquitted all the accused of the offence with which they were charged. When the matter came up before the High Court in appeal against acquittal by the State, the High Court convicted accused 1, 6, 7, 8, 11, 12, 13, 14, 15, 19, 20, 23, 26 and 27 for an offence under section 148, IPC under head 1 and also convicted accused 3, 4, 5, 9, 10, 16, 17, 18, 21, 24, and 25 for an offence under section 148, IPC under head 2. The High Court also convicted accused 1, 2, 3, 4, 5, 6, 7 and 19 for an offence under Section 302/34, IPC and sentenced each of them to suffer imprisonment for life and confirmed the acquittal of accused 8, 9, 10, 16, 17 and 20 for the said offence under head 3. Consequently, under head 4 the High Court convicted accused 11, 12, 14, 15, 18, 21, 22, 23, 24, 25, 26 and 27 for an offence under Section 326/149, IPC holding the minimum common object to be one of causing grievous hurt, and sentenced each of them to suffer rigorous

imprisonment for a period of 6 months. Accused 1 was convicted for an offence under Section 323, IPC under head 7 for causing hurt to PW 8, Gangappa Naicker. Accused 2 was convicted under head 9 for an offence under Section 324, IPC for causing hurt to PW 6, Subramaniam. Accused 4 was convicted for committing an offence under Section 324, IPC under two different heads 11 and 13 for causing hurt to PW 2, Vedagiri and PW 7, Krishnappa Naicker respectively. Accused 5 was convicted for an offence under Section 323, IPC for causing hurts to PW 17, Rajammal under head 17. Accused 19 was convicted for an offence under Section 325, IPC for causing grievous hurt to PW 2, Vedagiri under head 19. Accused 23 was convicted for an offence under Section 323, IPC for causing hurt to PW 13, Kanammal under head 21. Accused 24 and 25 were convicted for an offence under Section 324, IPC under heads 23 and 25 for causing hurt to PW 4. Gnanamurthi with patta kathi and iron pipe respectively. Accused 27 was convicted for an offence under Section 323, IPC for causing hurt to PW 4 Gnanamurthi under head 29. Accused 3, 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 19, 20, 21 and 23 were convicted for an offence under Section 427/34, IPC for causing mischief under head 38. Accused 2, 3, 8, and 9 were convicted for an offence under Section 427/34, IPC under head 39. The High Court convicted all the accused except the one substantively charged under corresponding heads, 8, 10, 12, 14, 18, 20, 22, 24, 26 and 30 with the aid of Section 149, IPC. Charge under heads 5, 6, 15, 16, 27, 28, 31, 32, 34, 35, 36 and 37 were held not proved and the accused were acquitted for the same. For the various offences under Sections 323, 324 and 325, IPC read with Section 149, IPC, sentences of imprisonment varying from three months to six months were imposed upon each of the accused. In reaching this conclusion the High Court largely accepted the evidence of prosecution witness except PWs 10, 12 and 13. 11. A very detailed argument was addressed to us by Mr. Chitale on behalf of accused 1, 2, 3, 4, 5, 6, 7, and 19 who have been convicted for an offence under Sections 302/34, IPC. It was that said accused 1 to 7 and 19 have been convicted for an offence under Section 302/34, IPC by the High Court not on the basis of any constructive or vicarious liability but on the finding that each one actively participated in the assault on deceased Gajarajan. Each one is assigned a particular role and, therefore, unless participation by the overt act is satisfactorily established it cannot be said that the charge is brought home to the particular accused. There is considerable force in this submission. It is all the more so because the High Court convicted the remaining accused under Section 326/149, IPC which would mean that the High Court did not accept the prosecution case that the common object of the unlawful assembly was to commit murder of deceased Gajarajan. We would, therefore, have to analyse the evidence about overt act attributed to each of accused 1 to 7 and 19.

12. Mr. Mulla on the other hand urged that this Court should bear in mind that there was strong motive for the accused to cause harm to deceased Gajarajan; that in all the deceased and the prosecution witnesses suffered as many as 64 injuries including 29 by deceased, 14 by PW 2, 12 by PW 4, 6 by PW 7, 2 by PW 6 and one each by PWs 1 and 8. It was pointed out that from amongst the 29 injuries suffered by the deceased, three were individually fatal and three cumulatively fatal and from amongst those three injuries which were cumulatively fatal some could be caused by pelting stones. It was pointed out that the incident is not in two parts but it was one continuous transaction and the prosecution was not to benefit by dividing it into two parts. He said that at any rate, Ext. P-8, does corroborate PW 1 in respect of the incident at the well. Mr. Mulla strenuously contended that the evidence of PW 1 on its own is trustworthy and it is further assured by being corroborated by Ex. P-2 and the medical evidence provides corroboration to the evidence of PW 1. It was urged that the matter should be looked at from a broad spectrum in that there was long standing feud between the parties and the incident of November 24, 1968 has to be properly appreciated. Along with this, the fact that the F.I.R. was lodged soon after the occurrence and this in respect of it some contradictory suggestions have been made would not detract from its credibility.

He said that the approach should be : Is the story on the whole reliable and whether appreciation of evidence by the High Court is fair and balanced ? It was urged that when participants in assault are being convicted with the aid of Sections 34 and 149, IPC, the question of individual conduct is hardly relevant at all. Lastly, he said that if the Court is not satisfied about the role attributed to accused 19, even though the stone weighing about 4 kg. is found at the scene of occurrence, because the medical evidence may not justify the allegation of dropping of the stone on the head of the deceased, the Court may give him the benefit of doubt but aside of that, the Court may only examine special features in respect of the role attributed to individual accused with regard to injuries being caused to some prosecution witnesses and decide whether on those specific charges any one is entitled to benefits of doubt.

13. Mr. Chitale submitted that motive alleged is such that it may cut both the ways. Long standing feud may erupt into open hostility and assault. Simultaneously it may provoke victims to rope in as many members of the opposite faction as could be conveniently inter-woven in the main fabric of the prosecution case.

14. The motive alleged for the offence is that there were well divided factions in the village - One led by accused 11 and the other led by PW 31. All the accused, apart from belonging to the faction led by accused 11, are inter-related. Accused 2, 3, 24 and 25 are sons of accused 11. Accused 9 and 10 are the sons of accused 8 who is the brother of accused 11, and accused 11, and accused 26 is brother of accused 11. Accused 13 and 14 are the sons of accused 12 who is the brother of accused 11 and accused 27 is the wife of accused 12. Accused 1, 4, 15 and 23 are the sons of one Kullappa Naicker. Accused 18 and 19 are the sons of accused 4. Accused 6, 7, 16 are the sons of accused 15. Accused 22 is wife of accused 23 and accused 5 is the son of accused 23. Thus, by and large all the accused are near relations of each other. To some extent that is true of the prosecution witnesses also. PW 31 is the head of the Panchayat and was also the leader of the faction. Deceased Gajarajan was the brother of PW 31 and PW 4. PW 2 is the real brother of PW 1. The niece of PW 7 is married to PW 2. The sister of PW 4 is married to the son of PW 1. PW 13 is the wife of elder brother of PW 1. PW 16 is the wife of maternal uncle of PW 1. PW 9 is the cousin of PW 1. PW 12 is the wife of PW 9 and she is the sister of PW 31 and deceased Gajarajan. PW 19 is the elder sister of PW 31, the deceased and PW 4. Deceased was married to the daughter of PW 19. PW 20 is the wife of PW 4. PW 21 is the wife of PW 31. Thus, the prosecution witnesses are also more or less near relations of each other. The cause of discord between the two factions dates back to 1956 when accused 11 wanted to take water by laying pipelines from his well in Survey No. 102 to the field bearing Survey No. 166/2 belonging to his wife and this was objected to by a large number of villagers alleged to have been led by PW 31. Since then accused 11 made strenuous efforts to get permission for laying the pipelines and PW 31 and his supporters stoutly resisted the same. The entire history of discord is clearly set out in the evidence of PW 5 additional Revenue Officer, T. A. Thandapani and to some extent it is supported by documentary evidence. The Collector granted the permission to lay the pipeline but he suspended it on objection by PW 31 and his supporters. Subsequently, by Ext. P-5 he directed pipeline to be laid along the cart track and further directed the Tahsildar to demarcate the route and the witness PW 5 was directed to visit the village after giving notice to both the parties and actually the witness visited the village on November 11, 1968 when Ext. P-1 signed by 63 local residents including PWs 1, 2, 4, 6, 7 and deceased Gajarajan was submitted to him. He demarcated the route along which the pipeline was to be laid and a large crowd had collected there. About 100 persons obstructed the marking of the line. Some people mischievously behaved by obliterating the line whereupon witness Thandapani recorded the statement Ext. P-20 and submitted his report Ext. P-7. There is not dispute that such an event did occur. Amongst others, accused 11 has admitted these facts in his statement under Section 313 Cr.P.C. The only point submitted by Mr. Chitale on

behalf of the accused was that Gajarajan was not one of the persons who participated in obstructing demarcation of the line and on the contrary the evidence shows that he was in a conciliatory mood. There is some substance in the submission that Gajarajan did not participate in erasing the line and in fact he persuaded his compatriots to desist from such a course and not to obstruct the officers discharging their duty. The fact, however, remains that this dispute about taking water and laying pipeline had divided the local village community into two rival factions and one faction was led by PW 31, the head of the local Panchayat. Gajarajan was his brother. In this background, the submission that there was no motive to cause harm to Gajarajan cannot be accepted. There was enmity and bitterness between the two factions. Gajarajan belonged to one faction. Accused belonged to opposite faction. Therefore, this dispute about taking water and the consequent vivisection of the local village community would establish some motive and the part of the accused to cause harm to Gajarajan. But then in this background the Court has to be careful to find out whether this very fact may not induce some witnesses to involve as many of the opposite faction as possible.

15. It was said that the High Court was in error in placing implicit reliance on the evidence of PW 1 as corroborated by Ext. P-2 and the evidence of PWs 6 and 9. The High Court has observed in paragraph 52 of its judgment that the testimony of PW 1 corroborated by the contents of Ext. P-2 is wholly credible and reliable and the High Court has not hesitation in placing total reliance on his testimony. Mr. Chitale took serious exception to this certificate awarded to PW 1 and contended that there are a number of infirmities in his evidence and it would be hazardous to place implicit reliance on his testimony. Simultaneously it was said that Ext. P-2, the F.I.R. has come into existence in such circumstances and contains such details and omits such vital facts of the prosecution case that it could not render credence to the evidence of PW 1 and it was not worthy of reliance.

16. PW 1 Rajamanickam is a very material witness in this case. According to him, on the date of occurrence i.e. November 27, 1968 around 1 p.m. he returned to his house from his field and after taking food while he was on the way to the field again via Perumal Koil Street he was deceased Gajarajan alighting from a bus which arrived from Madras side and proceeded towards his house and when he was passing through the battai leading to Gangamma Koil he saw accused 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 28 coming out of Casuarina Thope along with several others and they waylaid deceased Gajarajan who was proceeding towards his house. Gajarajan started running and he was chased by the aforementioned persons and when Gajarajan reached the well situated near the Teachers' Quarters at Karpakkam, accused 1 bear Gajarajan on his right shoulder with a stick, accused 2 inflicted an injury on the head of Gajarajan with patta knife and accused 3 inflicted an injury on the head of Gajarajan with vetu kathi. After receiving these injuries Gajarajan ran towards the house of PW 10, Govindaraja Naicker. Witness PW 1 proceed near the eravanam. of the house of Govindaraja Naicker and concealed himself behind the eravanam. The witness deposed that Gajarajan fell down near the house of PW 10, Govindaraja Naicker and at that time accused 4 caused an injury with patta knife on the right hand side of Gajarajan. He saw accused 5 an injury with patta knife to Gajarajan on his right thigh. He also saw PW 2, Vedagiri coming running to the place and accused 4 caused two injuries on the head of PW 2 with patta kathi. He also saw PW 6, Subramaniam emerging from his house and accused 2 inflicted an injury with patta kathi on the left leg of the latter. PW 6 Subramaniam ran away from that place. He further stated that accused 5, Ramu alias Raman s/o accused 23 attacked him with a spear but he escaped the blow and in the process his shirt was torn. At that time accused 5 hurled a stone at him which hit him on his right knee. PW 1 stated that he entered the house of Krishnappa Naicker and bolted the door. After some time he emerged from that house and when he came out he

saw accused 6, Guruswami and accused 7, Viswanathan hurling stones at Gajarajan. The witness further stated that he also saw accused 19 bringing a stone and dropping it on the head of deceased Gajarajan at that time. The witness has been cross-examined at great length and we are constrained to observe that the learned Session Judge hardly bothered to determine whether the questions put in cross-examination were permissible or not. One curious practice not known to law adopted by him was that whenever a witness was asked about an omission with reference to the statement of the witness recorded by the investigating officer under Section 161, Cr.P.C., the learned Public Prosecutor would make a statement whether the statement referred to in evidence was to be found or was not to be found in the statement under Section 161, Cr.P.C. and no attempt was made to prove the omission. Such concession for proof of contradiction or omission lacks support of law and is likely to be unfair to the witness in that when the investigating officer is questioned with regard to the contradiction or omission, a further opportunity will be available to him to explain the contradiction or omission.

17. Mr. Chitale urged that the witness belongs to the faction of PW 31. That does not appear to be in dispute. The witness appears to have suffered one injury by a stone hurled by accused 5. He was examined by PW 11, Dr. Ramachandran. The witness has suffered a contused wound over the inner aspect of right leg just 2 inches below the knee of the size of 2 1/4 x 1 1/2 cms. Mr. Chitale urged that witness PW 1 is a partisan witness belonging to the faction led by PW 31. He admitted that he instituted a criminal complaint against the persons belonging to the accused party, including accused 1, 2, 3, 6, 7, 8, 9, 11, 12, 13, 15, 16, 17, 18 and 26. A criminal case No. 822 of 1965 was registered on the basis of his complaint and in the case the accused were acquitted. He also admitted that accused 11 had instituted 2-3 criminal cases against him in the criminal Court. He also admitted that accused 2, Raja Ram had instituted a criminal case against him. He further admitted that accused 12 had filed a criminal case against him and PW 31. He is a member of the Panchayat of which PW 31 is the President. This evidence is sufficient to show that he belongs to the faction of PW 31. One noteworthy feature of his evidence is that he admitted that witnesses Subramaniam, Krishnammal and Pattammal are related to him and that they will depose as per his direction and instigation. The type of answer elicited in cross-examination may not be give its full weight. Added to this is the fact that he is a signatory to the memorandum dated November 11, 1968, Ext. P-1 submitted to Revenue Divisional officer along with a number of other persons objecting to the grant of permission to lay pipeline for taking water as prayed for by accused 11. It would unmistakably appear that the witness belongs to the faction of PW 31 and hence a partisan witness. Unfortunately the High Court did not examine this aspect before reaching the conclusion that his testimony is absolutely trustworthy. It is not for a moment suggested that the evidence of partisan witness must be discarded on that ground alone. Times without number this Court has said that, that would not be a correct approach. That puts the Court on guard to scrutinize their evidence with more than ordinary care vide *R. Kondaiah v. State of A.P.* ((1975) 3 SCC 752 : 1975 SCC (Cri) 213.) It must focus its attention on whether there are discrepancies in the evidence; whether the evidence strikes the court as genuine, and whether the story as narrated is probable. Judicial approach has to be cautious in dealing with such evidence. The circumstances surrounding the presence of this witness at the time of the occurrence are purely fatuities coupled with the fact that he is a partisan witness and hence his evidence will have to be examined with great care and cautions.

18. In accepting the testimony of PW 1 the High Court was impressed by the fact that he is corroborated by Ext. P-2, the F.I.R. in this case Evidence of PW 32 Subramaniam, Taluk Sub-Inspector would show that on receipt of telephonic message he rushed to scene of occurrence. Soon thereafter armed police reinforcement arrived. He sent deceased Gajarajan and PW 4 Gnanamurthi to the General Hospital in a taxi and then he took PWs 1, 2, 6, and 7 in the police van to the police

station. On reaching the police station he recorded Ext. P-2, the F.I.R. as lodged by PW 1. Two suggestions were made with regard to the veracity of the contents of Ext. P-2. It was said that it was lodged by PW 1 in consultation with PW 31 who was already at Royapattah Hospital, and the details were settled in consultation with PWs 2, 6 and 7 while travelling by police van on the way to the police station. Cross-examinations of PW 1 itself reveals that part of the information contained in Ext. P-2 is stated by him on the information received by him from persons who had suffered injuries and not of his personal knowledge. The High Court has reproduced the entire Ext. P-2 in its judgment. In Ext. P-2 the names of accused 1 to 23 are mentioned though there is some controversy about the name of accused 3 being found in Ext. P-2. The weapon carried by each of them is also mentioned. But it was contended that while giving evidence in the court PW 1 over and above described the role of individual accused and the weapon wielded by him and also neatly pinpointed the seat of each injury. In the F.I.R. Ext. P-2 it is not stated as to on what part of the body the blow by particular accused landed. We are not inclined to attach undue importance to the fact that in the F.I.R. the witness has not stated as to on what part of the body the blow fell. What is worthy of note is that according to the witness, 50-60 persons emerged from Casuarina Thope and chased deceased Gajarajan and when Gajarajan was near the well he was attacked by accused 1, 2, 3, and when Gajarajan reached a further distance of 255 ft. he fell down near the house of PW 10, Govindaraja Naicker but till then no other accused could attack him. The omission of the names of accused 24, 25, 26 and 27 in Ext. P-2 is glaring. It becomes all the more glaring because accused 24 is the son of accused 11. the latter being the leader of the opposite faction. PW 6 witnessed accused 24 causing injury to PW 4 with patta knife. PW 6 was in the same police van by which PW 1 traveled to the police station and their description about the occurrence is similar and yet the name of accused 24 does not figure in the F.I.R. Ext. P-2. On an over all view of these circumstances it would be unsafe to place total reliance on the contents of Ext. P-2. Undoubtedly it would to some extent lend assurance to the evidence of PW 1 but both will have to be taken with an amount of caution.

19. The High Court then examined the evidence of PWs. 6 and 9 which according to the High Court would lend assurance to the evidence of PW 1, PW 6, Subramaniam stated in his evidence that on the date of the occurrence around 2.30 p.m. when he was sitting in the verandah he heard noise coming from the side of the school and he saw deceased Gajarajan coming running by the side of the Teachers' Quarters. He also saw 50 persons including all the accused coming running armed with sticks, knives, pipes, etc. He deposed that these persons waylaid Gajarajan. The witness developed fear and got into his house and bolted the door from inside the house. He then heard the cries of Gajarajan "ayyo ayyo" coming from near the house of PW 10, Govindaraja Naicker whereupon the witness opened the door and came out to see what had happened. He deposed that he saw Gajarajan lying in front of the house of PW 10 and accused 4 was standing armed with knife. Accused 5, Ramu alias Raman inflicted an injury with knife on the right thigh of Gajarajan. Accused 21 beat the witness with a stone on the middle of the chest but he did not sustain any external injury. The witness further deposed that accused 2, Rajaram came running with a patta knife and inflicted an injury on his calf muscle with the patta knife. PW 6 fell down as he suffered a bleeding injury on his leg. He deposed that he saw PW 1 standing near the house of PW 10, Govindaraja Naicker, and he saw accused 2, 5 and 21 chasing PW 1 by the back side of Govindaraja Naicker house. He also deposed that PW 4 was coming running towards the house of Govindaraja Naicker's and he also saw accused 24-27 coming running from Munnuswami Naicker's house. He deposed that accused 24 inflicted injury with patta knife on the head of PW 4 and accused 25 beat PW 4 with an iron pipe. Accused 26 pelted a stone on PW 4 which hit him on his stomach. He started that accused 27 was having a bag of stones and that they all went away towards the well of accused 11. Now, unfortunately, the High Court observes in paragraph 45 that on a total

consideration of the evidence of PW 1, corroborated by the testimony of PWs 9 and 6 and the contents of Ext. P-2, the offence under Section 302/34, IPC has been brought home against accused 1-7 and 19. Very unfortunately this witness PW 6 does not say one word about the attack by accused 1, 2 and 3, on Gajarajan near the well. He made a very general statement that a crowd of 50 persons including all the accused came running armed with knives, sticks and pipes. This witness could be said to lend assurance to the evidence of PW 2 about accused 4 and 5 being near deceased Gajarajan when he was found lying near the house of PW 10. The witness does not say about the accused 6, 7 and 19 causing injury by stones to Gajarajan. We are constrained to observe that the High Court without examining the evidence of the witness has made a bald statement unsupported by evidence that the evidence of PW 6 lends assurance to the evidence of PW 1. We may also point out that while the witness says he saw accused 4 standing near Gajarajan with a knife he does not say he saw him causing injury to the deceased.

20. Turning now to evidence of PW 9, Narayanaswami it should be pointed out that he is the husband of the sister of deceased Gajarajan. He deposed that on the date of the occurrence when he was coming with his cattle to his house he saw deceased Gajarajan alighting from a bus. He also saw a large number of persons rushing out of Casuarina Thope raising the alarm 'Pidida'. The witness stated that when deceased Gajarajan was near the drinking water well, he was waylaid by accused 1 who beat him with a stick. He also saw accused 2 causing injury with patta kathi and accused 3 causing injury with vetu kathi to the deceased. He deposed that as stones were being hurled he himself ran to the house of witness Doraiswami and concealed himself in the house and he came out after the police arrived at the scene of occurrence. Apart from the fact that this witness is a near relation of the deceased, his presence at the scene of the occurrence is very fortuitous. He not only belongs to the faction of PW 31 but is a near relation of PWs 31, 4 and deceased Gajarajan who are brothers. In his cross-examination he stated that he did not know whether the blows inflicted by accused 2 and 3 fell on the deceased or not. A contradiction was brought on record with reference to the police statement in which he has merely use the word 'knife' and not 'patta kathi'. Looking to the fact that the witness is a near relation of the deceased, that to some extent he is a chance witness and the contradiction from his police statement, his evidence will have to be taken with an amount of caution.

21. As pointed out earlier, the High Court has implicitly relied on the evidence of PW 1 on the ground that it is corroborated by Ext. P-2 and the evidence of PWs 6 and 9. The expense of this statement is wide of the mark. We have analysed the entire corroboratory evidence and it appears that the corroboratory evidence does not render the evidence of PW 1 wholly trustworthy. Evidence of PW 1 will have to be scanned in respect of each accused he seeks to implicate to ascertain against whom it is satisfactorily corroborated by other evidence. We will, therefore, analyse the evidence against each of the aforementioned accused.

22. Accused 1, Muthu Naicker was identified as being in the crowd that chased Gajarajan by PWs. 1, 2, 9, 18 and 22. Out of these witnesses, PW 1 saw him inflicting an injury with the stick on the shoulder of Gajarajan. PW 2 claimed to identify accused 1 by his voice. PW 9 also says that accused 1 beat deceased near the well but he did not know whether the blow landed on him or not. His name is to be found mentioned with the weapon wielded by him in Ext. P-2. Even if we apply what has been described as mechanical test in a test in a case of this nature where at least three persons identified him in the unlawful assembly and he was armed with weapon and was seen by two witnesses wielding the weapon, and the medical evidence of injury on the deceased corroborates the fact that a stick blow had landed on the right hand of the deceased, his presence in the unlawful assembly and participation in the assault on the deceased is unmistakably established and the

evidence against him deserve to be accepted.

23. Accused 2 Raja Ram was identified in the unlawful assembly by PWs 1, 6, 9, 17, 18, 20 and 22. PW 1 says that he saw accused 2 armed with patta kathi and inflicting an injury on the right side of the head deceased. He is also show to have caused an injury on the leg of PW 6. At least PW 6 who has suffered an injury, borne out by medical evidence, by a sharp edged weapon, was in a position to identify his assailant, PW 9 refers to his presence in the crowd with a knife which he has described as patta knife. The presence of this accused in the unlawful assembly and participation in the assault is very affirmatively established and the High Court was right in accepting the evidence against him.

24. Accused 3 Vedagiri was seen in the assembly by PWs 1, 9, 17, 20, 21, 22 and 23. Further PWs 17 and 18 speak of his having entered the house of PW 18 and caused damaged to the goods. PW 19 speaks of his having caused damage to the pump set and doors and windows though in this respect he has been contradicted by the police statement. Now, applying the test we have evolved in the fact and circumstances of this case, the presence of this accused is referred to by at least five witnesses and others refer to his activity which occurred at or about the time of occurrence. However, there is a serious lacuna in the evidence against him and the High Court appears to have completely overlooked it and this manifest error emanates from the fact that the copy of the F.I.R. which the High Court has used for reproduction in its judgment materially differs in respect of this accused from the copy supplied to us in Vol. V of the record. We are unable to find out how such a glaring discrepancy in the two copies has occurred but we would rely on the copy supplied to us in Vol. V. In view of this, Mr. Chitale righty urged that the name of accused 3 is not to be found in the F.I.R. and this fact was not controverted by Mr. Mulla, learned Counsel for the respondent State. The High Court had reproduced the entire Ext. P-2 in paragraph 43 of its judgment. In the middle portion of Ext. P-2 as reproduced by the High Court at p. 1426 of the record where PW 1 describe the assault it reads as under :

They obstructed Gajarajan Naicker near the Teacher's quarters. Muthu Naicker (accused 1) beat Gajarajan with a stick. Rajaram (accused 2) son of Kuppu Naicker (accused 11) cut him with the patta knife. Vedagiri (accused 3) also cut him with a vettu knife. Gajarajan Naicker managed, came running and fell down in front of the house of Govindaraja Naicker (PW 10).

25. Now, when we refer to the copy of the F.I.R. supplied to the Court at p. 5, Vol. V, it reads as under.

They waylaid him near Teacher's Quarters. Muthu Naicker (A-1) beat Gajarajan with a stick. Rajaram, son of Kuppu Naicker (A-2) cut him with a patta knife. Gajarajan escaped, came running and fell down before Govindaraja Naicker's (PW 10) house.

26. In any other portion of the F.I.R. Ext. P-2 as set out in Vol. V there is not reference to accused 3. Therefore, it appears crystal that the name of accused 3 is not mentioned in the F.I.R. Now, if PW 1 is the material witness and he has vividly described the assault on the deceased at the well where accused 3 is said to have caused injury to deceased and yet in the F.I.R. Ext. P-2 he has not mentioned the name of accused 3, it would be hazardous to accept the evidence against him as being present in the unlawful assembly and participating in the assault. It becomes all the more difficult because PW 6, who is the other witness according to the High Court as affording corroboration to the evidence of PW 1, does not say anything about accused 3 causing any injury to deceased Gajarajan. It thus becomes crystal clear that the name of this accused is not mentioned in the F.I.R.

Ext. P-2 and the evidence of PW 1 is not corroborated by the evidence of PW 6 and PW 9 is not clear about what this accused is supposed to have done. In these circumstances we are of the opinion that accused 3 is entitled to the benefit of doubt with regard to the charge under Section 302/34, IPC.

27. Accused 4 was seen in the unlawful assembly by PWs 1, 2, 6, 7, 8, 18 and 22. About the presence of accused 4 in the unlawful assembly there is unimpeachable evidence. PW 33, D. D. Srinivasan, Sub-Inspector of Police in his evidence stated that after he learnt of the occurrence at Karoakkam village, he rushed with police constables to that village and when he reached there at 4.45 p.m. he found armed Reserve Police personnel present there. PW 32, Subramaniam, Taluk Sub-Inspector was not in the village. This PW 33, started taking rounds in the village and when he reached Kalamman Koil Street, he found accused 4, Singara Naicker, lying there with injuries on his person and he was not in a position to speak. The witness at once sent accused 4 in a cart to the hospital for treatment. Accused 4 was examined by PW 15, Dr. Pragdeeswaran and the certificate of injury, Ext. P-15 shows that accused 4 had suffered a minor abrasion over ilium and lacerated wound on right mandible. Accused 4 in his statement under Section 313, Cr.P.C. stated that he had suffered a minor injury but did not know who caused the injury to him (vide question 43). Again it must be remembered that this accused gave two blows with patta kathi to PW 2 and his presence and causing injury to PW 7 is spoken by PW 7 though of course on this point an omission was brought on record in the evidence of PW 7 with reference to his evidence in the committing Magistrate's Court. Mr. Chitale also commented on the fact that while the Medical Officer had asked this accused as to how he suffered the injury, in the case of injury to PW 7 at the time of examination by the Medical Officer he has not stated that he suffered the injury at the hands of accused 4. In fact, the evidence against this accused satisfactorily establishes his presence in the unlawful assembly as also his participation in the assault on the deceased.

28. Accused 5 is alleged to have caused an injury with patta kathi on the right thigh of the deceased. This is spoken to by PWs 1, 2 and 6. PW 17 refers to his presence in the crowd but failed to identify him in the Court and, therefore, that evidence would not be of any assistance to the prosecution. PWs 18, 19 and 22 have seen this accused in the unlawful assembly. With regard to the injury alleged to have been caused by this accused this is corroboration in the form of medical evidence. There is further the evidence of PW 1 that this accused tried to give him a stab blow with his spear but he warded off the blow and in the process his shirt was torn. In this connection it is clearly stated in the F.I.R. Ext. P-2 that accused 5 attempted to thrust a spear in his stomach but he escaped and his shirt was torn and accused 5 then hurled a stone which hurt PW 1 is corroborated by the medical evidence. It is also stated in Ext. P-2 that accused 5 gave a blow with patta kathi to the deceased. Therefore, on the identity and presence of this accused evidence of PW 1 is corroborated by Ext. P-2, by the medical evidence as well as by the evidence of PWs 18, 19 and 22 as having seen him in the unlawful assembly. His presence and participation is clearly established by more than three witnesses and, therefore, the charge is brought home to him.

29. Accused 6 and 7 are alleged to have pelted stones at deceased Gajarajan and caused injuries to him. On the important point of pelting stones at Gajarajan there is evidence of PW 1 alone against accused 6 and 7 and even in respect of that part of his evidence the learned Session Judge has noted that after PW 1 described the entire incident and then referred to his having concealed himself in the house of Krishnappa Naicker, and thereafter the witness volunteered that accused 6 and 7 pelted stones. That is an infirmity in the evidence of this sole witness on the question of pelting stones against accused 6 and 7. PW 19 has stated that he had seen accused 6 brandishing an iron pipe but a contradiction is brought on record in his evidence which shows that in the police statement he had

referred to a stick in the hand of accused 6. PWs 20, 22 and 24 referred to the presence of accused 6 in the crowd. Similarly, PWs 19, 20 and 22 referred to the presence of accused 7 in the crowd. As pointed out earlier, the High Court convicted accused 6 and 7 for the offence under Section 302/34 IPC not on the ground that they were member of the unlawful assembly but on the ground that they shared the common intention of accused 1, 2, 3, 4, 5 and 19 to commit the murder of Gajarajan and that this common intention is manifested on account of overt act of pelting stones by accused 6 and 7 at deceased Gajarajan. If the conviction thus rests on the alleged overt act of pelting stones, that aspects is spoken to by PW 1 alone. It was, however, said that on this aspect PW 1 is corroborated by Ext. P-2. The statement in Ext. P-2 on this point is slightly ambiguous. It is stated that accused 6 Guruswami threw stones at him and accused 7 Viswanathan also threw stones. Whether the stones did hit Gajarajan or not is nowhere spoken to in Ext. P-2. And again, as stated earlier, PWs 6 and 9 did not say one word against accused 6 and 7 though the High Court observed that the testimony of PW 1 is rendered of PWs 6 and 9. It would thus appear that in respect of accused 6 and 7 such corroboration is not forthcoming. It was, however said that the evidence of PW 3 Dr. C. B. Gopalakrishnan would clearly show that deceased Gajarajan had suffered injuries 5, 10, 15 and 18 by being struck by stones. When deceased Gajarajan fell down near the house of PW 10 the evidence of PW 1 is that he was encircled by members of the unlawful assembly. If thereafter accused 6 and 7 pelted stones at Gajarajan it is difficult to believe that they would hit Gajarajan and even PW 1 does not say that the stones hurled by accused 6 and 7 did hit Gajarajan. In this state of evidence we are not satisfied that accused 6 and 7 participated in the assault on Gajarajan by pelting stones and, therefore, the charge under Section 302/34 IPC is not brought home to them.

30. The last in this group of accused is accused 19 who is convicted for an offence under Section 302/34, IPC. We must frankly say that the High Court was in serious error in convicting accused 19 for an offence under Section 302/34, IPC on the allegation that he brought a stone weighing about 4 kg. and dropped it on the head of deceased Gajarajan. In the F.I.R. Ext. P-2 PW 1 has stated that accused 19 carried a stone and threw it on the head of Gajarajan. This one sentence in the F.I.R. has raised considerable doubt in our minds about the truthfulness of the averments made in the F.I.R. which according to the High Court was recorded as expeditiously as possible and would, therefore, render corroboration to the evidence PW 1 in his evidence has state that accused 19 dropped the stone on the head of deceased Gajarajan and a stone which was recovered, MO 2, from the scene of occurrence was identified by the witness to be the one which was dropped by accused 19 on the head of Gajarajan. PW 3 Dr. Gopalakrishnan who has been subjected to cross-examination on this facet of the case, has admitted in cross-examination that if a man stood near deceased Gajarajan and dropped a stone about 4 kg. in weigh, he would expect that the skull would be broken into multiple bits, and he further stated that if the stone is thrown with great force, the skull would be crushed. If this part evidence is correlated to the external injuries found on the person of deceased Gajarajan it would appear that the evidence of the witness PW 1 on the question of dropping stone is materially contradicted by the medical evidence. It was, however, said that PW 2, Vedagiri, has stated that accused 19 pelted a stone at him which caused an injury on his left hand finger. That may at best show that accused 19 was present at the scene of occurrence but that would not render corroboration to the evidence of PW 1 on the role attributed by him to accused 19. PWs 19, 22 and 23 refer to his presence in the crowd. The analysis of the evidence would show that PW 1 is the only witness on the question of participation in the assault by accused 19 on deceased Gajarajan and that part of his evidence was added by him volunteering the information after he had described the whole incident which might show his anxiety that he may not miss involving accused 19 in the occurrence. Apart from that, the greater infirmity in the evidence is that he is contradicted by the medical evidence. Mr. Mulla learned counsel for the respondent also submitted that if the medical evidence renders the

statement of PW 1 against accused 19 unworthy of belief we may give him the benefit of such reasonable doubt as we may entertain arising from the state of evidence. Therefore in this state of evidence we feel that the High Court was not justified in holding that the charge under Section 302/34 IPC is brought home to accused 19 and he is entitled to be acquitted of this charge.

31. The analysis of the evidence keeping in view the appreciation of evidence by the High Court would show that the charge under Section 302/34, IPC is brought home to accused 1, 2, 4 and 5 only and the charge against accused 3, 6, 7 and 19 fails.

32. At this stage we are faced with an anomalous situation arising from the judgment of the High Court. We are satisfied that accused 3, 6, 7 and 19 did not participate in the assault on deceased Gajarajan. They will, therefore, be in the same position as the High Court held in respect of accused 8, 9, 10, 16, 17 and 20 whose participation in the assault on deceased Gajarajan as alleged by the prosecution was not held proved by the High Court. Now, under head 4 accused 11-15, 18 and 21-28 were charged for an offence under Section 302/149, IPC, no such charge in the alternative against accused 1 to 10, 16, 17, 19 and 20 was framed. While convicting accused 11-15, 18 and 21-27 for an offence under section 326/149, IPC those who were acquitted of the charge under Section 326/34, IPC viz., accused 8, 9, 10, 16, 17, 20 were not convicted on the alternative charge under Section 302/149 IPC even though they were held to be members of the unlawful assembly, a fact discernible from the finding recorded on charges 1 and 2 in which accused 8 and 20 have been convicted for an offence under Section 147 IPC being members of an unlawful assembly and committing the offence of rioting, and accused 9, 10, 16 and 17 have been convicted for an offence under Section 148 IPC in that they committed an offence of rioting armed with deadly weapons. Yet, when it came to the questions of vicarious liability for an offence under Section 326/149, IPC accused 8, 9, 10, 16, 17 and 20 have not been convicted for the same though they are held to be member of the unlawful assembly. It may be that the High Court acquitted them for the charge under Section 302/34, IPC, on the ground that they were not shown to be participants in the assault on Gajarajan, yet if the High Court recorded a finding that the minimum common object of the unlawful assembly was to cause grievous hurt and if the members of the unlawful assembly knew that such offence was likely to be committed in prosecution of the common object of the unlawful assembly then consistent with the finding the High Court could not have failed to record a finding against accused 8, 9, 10, 16, 17 and 20 convicting them for an offence under Section 326/149 IPC. But that having not been done, by necessary implication the acquittal of accused 8, 9, 10, 16, 17 and 20 for the offence under Section 326/149 IPC, has become final as it has not been challenged by the State by way of appeal. We cannot convict them for the offence under Section 326/149, IPC, in this appeal by the accused against their conviction and sentence for other offences. Accused 3, 6, 7 and 19 who according to us are not have participated in the assault on deceased Gajarajan should be similarly treated in respect of charge 4. Suffice it to say that no charge under Section 302/149, IPC was framed against them.

33. Under charge 4, the High Court has convicted accused 11-15, 18, 21-27 for an offence under Section 326/149, IPC observing that these accused at least must have known that an offence under section 325 (see original), IPC was likely to be committed in prosecution of the common object of the unlawful assembly, particularly in view of the fact that Gajarajan was attacked and beaten by accused 1, 2, 3, 4, 5, 6, 7 and 19. After holding that these accused must have known that at least an offence of grievous hurt was likely to be committed in prosecution of the common object of the unlawful assembly and after referring to Section 325, IPC, the High Court convicted the aforementioned accused under Section 326/149, IPC. Apart from that, once the High Court after holding that accused 8, 9, 10, 16, 17 and 20 were members of the unlawful assembly though they

were not shown to have participated in the assault on Gajarajan, ought to have logically convicted them under Section 326/149, IPC consistent with its finding in paragraph 65. That having not been done and the acquittal of accused 8, 9, 10, 16, 17 and 20 for the offence under section 326/149, IPC having become final, accused 3, 6, 7 and 19 would have to be acquitted of the same charge for the reasons hereinbefore mentioned. It would thus not only be unfair but self-contradictory to sustain the conviction of accused 11-15, 18 and 21-27 for the offence under Section 326/149, IPC. That would be an unequal treatment and, therefore, even though as members of the unlawful assembly they could have been fixed with vicarious liability, in view of the situation obtaining on the finding of the High Court, we have no option but to acquit them for the offence under Section 326/149, IPC. Accordingly, the conviction of accused 11-15, 18 and 21-27 for the offence under section 326/149, IPC as recorded by the High Court and the sentence imposed upon them for the same are set aside.

34. At this stage we must examine the prosecution case under charges 1 and 2. Under charge 1, accused 1, 6, 7, 8, 11, 12-15, 19-23, 26 and 27 have been convicted for an offence under section 147, IPC and under charge 2, accused 2, 3, 4, 5, 9, 10, 16, 17, 18, 21, 24 and 25 have been convicted for an offence under Section 148, IPC.

35. Before we examine these two charges in detail it would be necessary to find out as to when the unlawful assembly was formed, what was the common object of the unlawful assembly and who were the members of this unlawful assembly who committed the offence of rioting. To substantiate these two charges the prosecution relies on the evidence of PWs 1, 2, 4, 6, 7, 8, 9, 10, 12, 13, 16, 17, 18, 19, 20, 21, 23 and 24. Before their evidence is analysed, a very shocking feature of the case which has made the task of this Court much more difficult is the glaring contradiction in the approach of the High Court. While analysing the prosecution evidence in paragraph 45, the High Court observes that it agrees with the reasons given by the learned trial judge for disbelieving the testimony of PWS 10, 12, and 13, and confirms the acquittal of accused 8, 9, 10, 16 and 17 regarding the murderous assault on deceased Gajarajan. It would be clear that the evidence of PWs 10, 12 and 13 was discarded both by the learned Sessions Judge and the High Court, However, while appreciating the evidence in respect of charges 1 and 2 the High Court has referred to the evidence of PWs 10, 12 and 13 in paragraph 62 of the judgment and alongwith other evidence, has accepted the evidence of PWs 10, 12 and 13. To be frank, this is really incomprehensible and it might indicate the degree of indifference with which the evidence has been examined in this case while setting aside acquittal of 27 persons and convicting them all. Even Mr. Mulla learned advocate for the respondent did not invite us to re-examine the evidence of PWs 10, 12 and 13 and, therefore, it will have to be excluded from further consideration in respect of charges 1 and 2. Excluding the evidence of PWs 10, 12 and 13, we would briefly refer to the evidence of the remaining witnesses bearing on the question of charges 1 and 2.

36. It is the prosecution case that deceased Gajarajan alighted from a bus and when he was proceeding towards his house, a crowd emerged from Casuarina Thope. This Crowd is witnessed by PW 1 and he refers to the presence of accused 1-23 in this crowd. The next witness in the sequence of events who observed crowd is PW 16. Her evidence would show that she had been certain persons collecting at Casuarina Thope as well as Cashewnut Thope and some of them were armed with sticks and knives. Her evidence would show that when Gajarajan alighted from the bus, from Casuarina Thope a group of persons emerged and rushed towards Gajarajan. According to her Gajarajan was encircled and attacked near the well. She ran away towards her house. It is very surprising that this witness does not identify any one from amongst the crowd, who encircled Gajarajan near the well and attacked him. In fact, in her examination-in-chief she makes it very

clear that she could not notice or see distinctly as to who were all the persons who were present and obstructing and waylaying the deceased near the well. This is rather understandable because the witness is a resident of the very village and she is shown to be 38 years old. The evidence of this witness would suggest that a large crowd had collected but it is not possible to believe that all of them were members of the unlawful assembly. It may be mentioned that according to PW 1, the deceased was first encircled and attacked near the well. Therefore, PW 1 was present at the time of the assault on the deceased near the well. There is evidence of PW 17 to the effect that he heard a commotion emanating from school side and saw a mob consisting of 40 to 50 persons running in the street. He identified accused 2, 3, 5, 9 and 15 in the crowd. There is also evidence of PW 9 that when he was returning home with his cattle in the afternoon on the date of occurrence he saw Gajarajan alighting from the bus and a crowd running from Casuarina Thope and raising alarm 'Pidida'. There is evidence of PW 8 to the same effect. Now, if some persons had collected at one place and chased him, and some of them belaboured him, it can be in concert. Now, if some persons combined to attack Gajarajan and if they emerged together one can say that those who were the members of this assembly shared the common object of the assembly, viz., to assault and even to cause hurt to Gajarajan. That at that stage an unlawful assembly was formed is unmistakably established.

37. Mr. Chitale, however, urged that the events occurred in two distinct parts, one near the well and another near the house of PW 10 and that there was no co-relation between the two; nor the incidents that occurred near the house of PW 10 were a continuation of what occurred near the well. In this connection he also urged that in fact something had happened on that day around 12 noon and, therefore, it could not be said that those who had collected at Casuarina Thope and Cashewnut Thope and had emerged on seeing Gajarajan formed an unlawful assembly. He invited our attention on the evidence of PW 12, the wife of PW 10 who has deposed that she had heard the noise on that day around 12 noon. This is a very casual statement made by the witness. In fact nowhere it is suggested that some incident occurred at 12 noon. This submission was sought to be reinforced by referring to the statement of accused 4 who was injured and was found to be lying at the scene of the occurrence by the police officer. Accused 4 has stated that he was beaten around 2 p.m. by the members of the crowd 100 strong and amongst them was Gajarajan who caused him injury with a patta knife. The statement of accused 4 stands by itself. There is nothing in the prosecution evidence to lend any assurance to it. On the contrary there is evidence of number of witness to be presently mentioned that it was when Gajarajan arrived that members of the crowd attacked him. It is, therefore, not possible to accept the submission of Mr. Chitale that something happened at 12 noon and that at that time the aggressors were the members of the party of PW 31, PW 4 and deceased Gajarajan, and that something thereafter occurred at 2.30 p.m. in which possibly Gajarajan got injured. Further the occurrence was one whole and attack on Gajarajan which took place at different spots removed by 225 ft. is one and the same transaction. Undoubtedly, therefore an unlawful assembly was formed by the time Gajarajan was attacked near the well, but we must administer a caution that at that time the only object of the unlawful assembly discernible was to attack and belabour Gajarajan. This seems significant because the High Court has convicted accused 1, 2, 4, 5, 19, 23, 24, 25 and 27 for specific acts of assault and in respect of each such assault found proof. The remaining accused were convicted with the aid of Section 149, IPC meaning thereby that each such casual and separate act of assault on different persons was committed by the specific accused as member of the unlawful assembly and that the remaining members of the unlawful assembly knew that such offence was likely to be committed. On the facts of this case we are not disposed to draw such an inference for the reasons to be presently mentioned.

38. While examining specific charges against individual accused, it may be mentioned that accused

1, 2, 3, 4, 5, 6, 8, 9, 24 and 25 are being convicted for different offences and their presence as members of the unlawful assembly is satisfactorily established. Accordingly, agreeing with the High Court, the conviction of accused 1 and 8 for an offence under section 147, IPC and conviction of accused 2, 3, 4, 5, 9, 24 and 25 for an offence under section 148, IPC, and the sentences imposed upon them for the same are hereby confirmed.

39. Now, turning to the case of the rest of the accused, we would ordinarily accept the presence of those accused as satisfactorily proved in respect of whom at least there is reliable evidence of three witnesses and while analysing the evidence we should be rather slow to accept the evidence of PW 19 standing by itself who, as we would presently point out, has been materially contradicted by her statement under section 161, Cr.P.C. Approaching the matter from this angle, we would briefly set out the evidence. The presence of accused 6 is consistently spoken to by PWs 1, 19, 20 and 24 and that evidence establishes the fact that accused 6 was a member of unlawful assembly and charge under Section 148, IPC is brought home to him. The presence of accused 7 is spoken to by PWs, 1, 19 and 20 but PW 19 has not referred to the presence of accused 7 in her police statement and, therefore, the reliable evidence is only of PWs 1 and 20. On the test that we propose to apply in this case, accused 7 will have to be acquitted. The presence of accused 11 is spoken to by PWs 1, 18 and 21, and his conviction for an offence under section 147, IPC and the sentence imposed for the same is confirmed. Against accused 12, 13 and 14 there is only evidence of PWs 1 and 21 and we would rather hesitate to accept their presence as members of the unlawful assembly and, therefore, their conviction for an offence under Section 147, IPC and the sentence imposed upon them for the same are set aside. In the case of accused 15, his presence is affirmed by PWs 1, 16, 17 and 18 which evidence is reliable and, therefore, his conviction and sentence under Section 147 are confirmed. Against accused 19 there is the evidence of PWs 1, 2, 19 and 23 and so far as accused 19 is concerned, PW 19 is consistent. Therefore, this evidence is sufficient to confirm his conviction and sentence. So far as the case of accused 20 is concerned, his presence is referred to by PWs 1, 19 and 24 and the evidence of PW 19 so far as this accused is concerned is quite consistent and his conviction and sentence are, therefore, confirmed. In respect of accused 22, there is the evidence of PW 1 alone. Similarly in respect of accused 26 there is the evidence of PWs 6 and 21 alone and in respect of accused 27 there is evidence of PWs 4 and 21 and for the reasons hereinbefore, stated, we would hold that their presents is not satisfactorily established, and, therefore, the conviction accused 22, 26 and 27 for an offence under Section 147, IPC and the sentence imposed for the same are set aside. There is evidence of PWs 1, 16 and 18 against accused 23 and that evidence is consistent and reliable and, therefore, the conviction of accused 23 for the offence under Section 147, IPC and the sentence imposed for the same are confirmed.

40. There is the evidence of PWs 1, 6, 18, 19, 20, 21 and 24 against accused 10 but we would not take into consideration the evidence of PW 19 because she is not consistent so far as accused 10 is concerned. Even then there is sufficient and reliable evidence to affirm the conviction and sentence of accused 10. There is evidence of PWs 1 and 19 only against accused 16 but PW 19 is contradicted by her police statement and, therefore, there remains the evidence of PW 1 alone against accused 16 and in the circumstances of the case it would not be possible to confirm the conviction and sentence of accused 16 for an offence under Section 148, IPC. His conviction and sentence for an offence under section 148, IPC are, therefore, set aside. Against accused 17 there is reliable evidence of PWs 1, 2, 8, 19, and 23. Similarly, against accused 18 there is reliable evidence of PWs 1, 19 and 23. and against accused 21 there is reliable evidence of PWs 1, 6 and 24 and, therefore, the conviction of each of them under section 148, IPC and the sentence imposed upon them for the same are hereby confirmed.

41. Turning now to the specific charges of hurt or grievous hurt caused by specific prosecution witnesses it would be advantageous to specify which charges are held proved by the High Court. The following chart will bear out the findings of the High Court :

#-----	Accused	Charge	Offence for
No. of Weapon used	No.	No. which prosecution convicted witness injured	-----
-----	1	7	U/s. 323, IPC PW 8 Stick 2 9 U/s.
324, IPC PW 6	Patta kathi	4 11	U/s. 324, IPC PW 2 do 4 13 U/s. 324, IPC PW 7 do
5 17	U/s. 323, IPC PW 1	Stone	19 19 U/s. 325, IPC PW 2 Stone
23 21	U/s. 323, IPC	PW 13	Stick
24 23	U/s. 324, IPC PW 4	Patta kathi	25 25 U/s. 324, IPC PW 4 Iron
Pipe	27 29	U/s. 323, IPC PW 4	Stone
3-10, 15-17, 38	U/s. 427, IPC	- -19-21 & 23	read with S. 34 (Mischief)
2, 3, 8 & 9	39	U/s. 427/34, IPC	-----
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42. Under charge 7, accused I is convicted for having caused a hurt to PW 8, Gangappa Naicker by giving a blow with a stick on his left shoulder. There is evidence of PW 8 to this effect and this evidence is borne out by the evidence of PW 15, Dr. Pragdeeswaran who found an abrasion medial 1/3 of the left clavicle 3" x 1/4". An X-Ray did not reveal any fracture of the able to identify him as the incident occurred around 2.30 p.m. in broad day light. We agree with the High Court that accused I should be convicted for the offence under section 323, IPC and there is no reason to interfere with the sentence awarded to him.

43. Under charge 9 accused 2 is convicted for having committed an offence under Section 324, IPC for inflicting an injury with a sharp edged weapon like a patta knife on the left calf muscle of PW 6, Subramaniam. PW 11 Dr. Ramachandran found an incised wound over the back of left leg (over the calf 5' below the knee), oblique 6 cms. x 2 cms. The medical evidence thus corroborates the evidence of PW 6 and this evidence is further corroborated by the evidence of PW 1. The High Court has accepted the evidence and we see no reason to take a different view, of the matter. Accused 2 was, therefore, rightly convicted for an offence under Section 324, IPC and we confirm the sentence of rigorous imprisonment for six months imposed upon him for the same offence.

44. Under charge 11 accused 4 is convicted for inflicting different injuries on the head of PW 2 Vedagiri with a sharp cutting instrument like patta knife. There is evidence of PW 2, to that effect. PW 11, Dr. Ramachandran examined this witness and found as many as 14 injuries on his person. Ext. P-8 is the certificate of injuries. From amongst these 14 injuries, injury 2 is incised wound over the left parietal region 4 cms. x 1/2 cm. Injury 4 is an incised wound over the back of left ear 2 x 1/4 cms. and injury is a small incised wound over the left temporal region 2 cms. x 1/2 cm. This medical evidence would amply corroborate the evidence of PW 2. On this point there is also evidence of PW 1 which would render assurance to the evidence of PW 2. The High Court has accepted his evidence and we see no reason to take a different view of the matter. Accordingly the conviction of accused 4 for an offence under section 324, IPC and the sentence of rigorous imprisonment for six months imposed upon him for the same are confirmed.

45. Under charge 13 accused 4 is convicted for an offence under Section 324, IPC for causing hurt on the hand of PW 7 by a patta knife. The injury was caused on the left index finger of PW 7. There is evidence to that effect of PW 7. There is also evidence of PW 8 to the same effect. PW 11, Dr. Ramachandran found one incised wound on the pulp of left index finger 2 cm. x 1/4 cms. The injury was found fresh and was bleeding, when examined by Dr. Ramachandran. The High Court has accepted this evidence and nothing was pointed out to us to take a different view of the matter. We

accordingly confirm the conviction of the accused under Section 324, IPC and the sentence of six months rigorous imprisonment imposed upon him.

46. Under charge 17 accused 5 was convicted for causing injury on the right knee cap of PW 1 by pelting a stone at him. This part of evidence is borne out by the evidence of PW 11, Dr. Ramachandran who found a contused wound over the inner aspect of right leg, just 2" below the knee, 2 1/2 cms. x 1 1/2 cm. of PW 1. In the opinion of Dr. Ramachandran such an injury could be caused by being hit by a stone. There is evidence of PW 6 to the effect that he saw accused 5 chasing PW 1. We agree with the High Court that this evidence is sufficient to bring home the charge against accused 5 for an offence under section 323, IPC and we affirm the conviction and sentence of accused 5 on this count.

47. Under charge 19 accused 19 has been convicted for causing injuries to PW 2 by hurling stones at him. According to the evidence of PW 2, by the stones pelted at him by accused 19 he was hurt on his left finger, chest and on at the knee. Dr. Ramachandran examined PW 2 on November 27, 1968, i.e. on the date of the occurrence itself. He found as many as 14 injuries on his person. In the opinion of Dr. Ramachandran injuries 1, 2 and 4 of PW 2 could have been caused by a patta knife and the remaining injuries could have been caused by being hit by stones or other objects. An X-ray examination of injury 7 being a contusion over the dorsum of left hand revealed a fracture of the middle left ring finger and in his opinion it was a case of grievous hurt. Now, the charge in this case is that the principal attack was directed against Gajarajan and some members of the crowd were pelting stones. PW 2 has suffered as many as 14 injuries, some with deadly weapon like patta knife. It also appears that apart from accused 19 there were others from the mob who pelted stones. It is, therefore, difficult to believe that PW 2 when he was a victim of simultaneous assault by a number of assailants and ordinarily when stones were being pelted from a distance he would be able to identify and say with precision that a stone hurled by a particular accused caused him a particular injury. Along with this we have to bear in mind that an omission was brought on record with reference to his police statement which showed that he had not stated that a stone hurled by a particular accused caused him the particular injury. His attempt at specification and the further attempt to attribute injury 7 to accused 19 clearly suggests an improvement and the improvement seems to be motivated, viz., to attribute specific injury to accused 19. At one stage according to PW 1, accused 19 was very near Gajarajan who had fallen in front of the house of PW 10 and was seen dropping a stone on his head. PW 2 was at some distance. Therefore, stones, if at all hurled at PW 2, must have been from a distance and again PW 1 does not say that he saw accused 19 hurling stones at PW 2. In this state of evidence we are not satisfied that accused 19 caused injuries to PW 2 by hurling stones and his conviction for an offence under Section 325, IPC cannot be sustained and it must be set aside as also the sentence imposed upon him for the same.

48. Under charge 21 accused 23 was convicted for an offence under Section 323, IPC for causing injury with a stick to PW 13. There is evidence of Dr. Pragdeeswaran to the effect that PW 13 was examined by him on November 28, 1968. The Medical Officer did not find any visible mark of injury but deposed that he found tenderness over the muscles on the back of PW 13 at that time. The name of accused 23 is Pazhandi Naicker. In the F.I.R., Ext. P-2 it is stated that Pachammal wife of Pazhandi Naicker was having a stone. In his evidence PW 1 claimed that he knew Pazhandi Naicker accused 23. He also deposed that he had seen accused 23 in the mob that chased Gajarajan after emerging from Casuarina Thope. Now, it is not made clear whether the person referred to by PW 1 in F.I.R., Ext. P-2 as described herein above is the same whose presence he referred to in the mob. It was rightly pointed out by Mr. Chitale that accused 23 is 91 years old and that PW 13, Thirumathi Kannammal is a woman and if the stick blow was given to a woman, it is difficult to believe that

there would not appear any visible mark of injury. Therefore, in the absence of medical evidence corroborating the evidence of PW 13, we are not inclined to accept the evidence of PW 13 that a blow was given to her with a stick by accused 23. Charge 21 is not thus brought home to accused 23 and his conviction for an offence under section 323, IPC and the sentence imposed upon him for the same set aside.

49. We would next deal with the two charge 23 and 25 together. Under charge 23 accused 24 is alleged to have caused an injury to PW 4 with patta knife. Similarly, under charge 25 accused 25 was alleged to have caused an injury on the left hand of PW 4 with an iron pipe. PW 4 Gnanamurthi is a brother of deceased Gajarajan as also of PW 31. PW 4 was examined by PW 15, Dr. Pragdeeswaran on November 27, 1968 at about 6.30 p.m. He found as many as 11 injuries on the person of PW 4. In his opinion injury 1 an incised wound 1// x 2// over the frontal region, could have been caused by a sharp edged weapon and the remaining injuries of PW 4 could have been caused by a blunt weapon depending upon the force with which it was used. His further opinion is that an X-Ray of injury 11 revealed a fracture on the ankle in the lower end of tibia. He had also produced the certificate of injuries, Ext. P-30 Mr. Chitale urged that the names of accused 24 and 25 are not mentioned in the F.I.R., Ext. P-2. Accused 24 is the son of accused 11. Now, it is certainly true that the names of accused 24 and 25 are not shown in the F.I.R., Ext. P-2 lodged by PW 1, But we must remember that witness PW 4 is an injured witness. There is also the evidence of PW 6 who is an injured witness and whose presence cannot be disputed at the scene of occurrence. PW 6 lends assurance to the evidence of PW 4 against both accused 24 and 25 on the point of causing injuries to PW 4. It was again pointed out to us that PW 6 is not a resident of village Karpakkam. That may be so. But his cross-examination does not reveal that he was not able to identify the accused. The High Court has accepted the evidence of PW 4 against accused 24 and 25 under charges 23 and 25 for an offence under Section 324, IPC and the sentence imposed upon each of them for the same.

50. Under charge 29 accused 27 is convicted for an offence under Section 323, IPC for causing hurt to PW 4 by pelting a stone at him. There is the evidence of PW 4 that a stone was hurled by accused 27 which caused hurt on his left leg. Dr. Pragdeeswaran found a minor abrasion over the left leg of PW 4 at injury 10. PW 6 has deposed that he had seen accused 27 having a bag full of stones. But in his examination-in-chief he does not say that accused 27 hurled a stone and caused hurt to PW 4. At some stage in cross-examination as it was of a rambling character there appears in evidence that accused 27 did hurl stone at PW 4. But an omission was brought on record with reference to his police statement in which he had not stated that accused 27 was one of the assailants of PW 4. Therefore, it could not be said that the evidence of PW 6 lends assurance to the evidence of PW 4. PW 21 tried to refer to the presence of some accused persons but he is not clear whether he had seen accused 27 in the assembly. In this state of evidence there is evidence of PW 4 alone against accused 27 and if a stone is hurled from a distance and if he was being attacked by other accused with stones, it is difficult to believe that he would be able to say with certainty that it was the stone hurled by PW 27 which hit him and, therefore, the case against accused 27 on this point is not free from doubt. The offence under Section 323, IPC has not, therefore, been brought home to her and her conviction and sentence for the offence under Section 323, IPC are set aside.

51. Under charge 38 accused 3-10, 15-17, 19-21 and 23 have been convicted for an offence under Section 427 read with Section 34, IPC in that all the accused in furtherance of the common intention caused damage to the pump set belonging to PW 31 and his brothers and also caused damage to the zinc sheet shed under which the engine and the pump set were installed. In this connection the prosecution has examined two witnesses, PWs 19 and 20. PW 19 is the sister of deceased Gajarajan

and her daughter Sarasu was married to deceased Gajarajan. PW 19 has deposed that on the date of the occurrence around 2.30 p.m. her daughter Sarasu came rushing to her house and told her about a commotion being raised in the village near the school. She asked her daughter Sarasu to go to Royapettah Hospital to inform PW 31 about the trouble. She then proceeded to the house of her brother and she saw a crowd demolishing the house of her brother. In the crowd she saw accused 6 armed with an iron rod who rushed at her. She went near the cattle shed. The zinc sheet shed was nearby and in the shed the engine and pump set were installed. She deposed that she saw accused 3, 8, and 10 damaging the pump set. Accused 9 threw a big stone on the engine and the pump set and accused 3, 8 and 10 damaged the pump set by striking the engine with iron rods and sticks. The crowd also caused damage to the zinc sheet shed. Accused 7 went inside the house. She then stated that a crowd of 50-60 persons entered the house and ransacked the doors, windows, etc. In this crowd she recognized accused 1, 2, 3, 4, 6, 8, 9, 10, 15, 16 and 17 who were demolishing the doors and windows. She further deposed that she saw accused 5, 19, 23 and 28 in the crowd. She added that accused 20 and 21 were also in the crowd. She stated that after causing damage to the house all the accused ran away. Now, there is evidence showing that the house was ransacked and the engine and pump set were damaged vide Exts. P-31 and P-32. The question is : how many accused participated in causing the mischief ? In the cross-examination she was specifically confronted with her police statement and it transpired that she had not named accused 6, 3, 8, 10, 9, 7, 2, 16, and 23 in her police statement as being members of the crowd causing damage to the pump set or the shed. Of course, we must make it clear that the question has been asked in the most objectionable manner and it is surprising that it was allowed to be put in that form. The relevant portion of the cross examination reads as under :

It is not (six) the following accused against whom I allege as having taken part in the occurrence, to the police when I examined A-1 Muthu Naicker, A-4 Singarm, A-15 Narayanaswami, A-21 Muthu, A-20, Govindan, A-28 Uli, A-17 Ramalingam, A-18 Ramakrishnan, A-19 Rajabathar, A-5 Raman as persons armed (with) pipes, knives and sticks at that time. (The learned PP concedes that the witness has mentioned only the names of aforementioned persons and not others whom the witness implicated along with these persons in this Court examination -in-chief).

52. This is the most objectionable manner of using the police statement and we must record our emphatic disapproval of the same. The question should have been framed in a manner to point out that from amongst those accused mentioned in examination-in-chief there were some whose names were not mentioned in the police statement and if the witness affirms this no further proof is necessary and if the witness denies or says that she does not remember, the investigation officer should have been questioned about it. The sum total of the recorded evidence is that the witness has not referred to the presence of accused 6, 3, 8, 10, 9, 7, 2, 16 and 23 in her police statement in the crowd. This omission is very important because she is the only material witness on this point. The High Court unfortunately has omitted to take any note of this omission. The High Court, however, observed that the evidence of PW 19 is corroborated by the evidence of PW 20. PW 20 Thirumathi Rani Ammal is the wife of PW 4 Gnanamurthi the brother of deceased Gajarajan and PW 31. She deposed that she saw a crowd passing from opposite her house. She said that some members of the crowd were armed with weapons and on reaching near the house they entered the house and broke open the windows and doors with which they were armed. She said that accused 9 entered the house and pushed out the two electricians working in the house. A grievance was made by Mr. Chitaley that these two electricians were not examined. As we are not satisfied about the evidence in respect of this charge, we are not inclined to attach any importance to the non-examination of the two electricians. Suffice it to say that they were strangers and would not have thrown any light on the

participation of accused in the occurrence. The witness has stated that she saw accused 2, 3, 6, 7, 8, 9, 10 in the crowd. She deposed that accused 3, 8, 9 and 10 caused damage to the pump set. It would thus appear that witness PWs 19 and 20 are consistent that accused 3, 8, 9 and 10 were seen causing damage to the pump set. But it simultaneously transpires that PW 19 has not referred to the presence of accused, 3, 8, 9 and 10 in her earlier police statement. The High Court merely made a cryptic statement that there is evidence of PWs 19 and 20 on this part of the prosecution case and that evidence is borne out by MO 35 showing broken parts parts of oil engine, MO 36 wooden pieces of the window, MO 37 another broken wooden part recovered from the scene of occurrence. There is no doubt that the house of the deceased and his brothers was ransacked. There also no doubt that some damage was caused to the pump set and the engine, but on the question as to who took part from amongst the big crowd in this nefarious activity there is lack of consistency between the evidence of PWs 19 and 20, and PW 19 the material witness is contradicted by her earlier statement. If we eliminate accused 2, 3, 6, 7, 8, 9, 10, 16 and 23 as having not been implicated at the earliest moment which would show that there was an improvement at the time of the evidence and if the evidence is that others were merely in the crowd, it cannot, be said that charge 38 is brought home to the accused who are convicted. There is a reasonable doubt about the veracity of the prosecution case on this point and the accused are entitled to the benefit of doubt.

53. Under the last charge 39, accused 2, 3, 8 and 9 have been convicted for committing an offence under Section 427 read with Section 34, I.P.C. in that these accused along with several others entered the house of PW 18, Thirumathi Andal Ammal and caused damage to the tailoring machine, radio, glass almirah and other articles of household, furniture. PW 18 deposed that a crowd were armed with knives and other weapons. She estimated the strength of the crowd to be 40 or 50 persons. She stated that some members of the crowd asked her whether of the crowd asked her whether her husband Vembuli Naicker was available inside the house or not and then immediately the members of the crowd entered her house. Among others, she recognized accused 1, 2, 3, 4, 5, 8, 9, 10, 11, 15, 17, 23. She said that from amongst these accused 2, 3, 8 and 9 one Kasi damaged the tailoring machine, radio, glass almirah, etc. Some others caused damaged to the doors. She deposed that accused 8 enquired whether her husband Vembuli Naicker was available as he was to be cut to pieces whereupon she ran to the back yard and hid herself behind a bush. Some time after further searching the house the crowd left the house. MO 28, MO 29, MO 30, MO 31, MO 32 and MO 33 evidence the damage to the furniture and the broken pieces recovered from the scene of vandalism. Here is the only evidence on this point. There is no infirmity pointed out in the evidence. If some accused caused damage to the articles belonging to her in her house in her presence and if the High Court chose to place implicit reliance on her evidence there is no reason to take another view of the matter and her evidence has been accepted only against accused 2, 3, 8 and 9 who have been convicted for an offence under sections 427/34, IPC. We agree with the High Court on the analysis of the evidence of PW 18 and confirm the conviction of accused 2, 3, 8 and 9 for an offence under section 427/34, IPC, and the sentence imposed upon them for the same.

54. Turning now to the charges under heads 4, 8, 10, 12, 14, 18, 20, 22, 24, 26 and 30, it must pointed out that under these charges all the accused were convicted with the aid of Section 149, IPC in respect of specific offences committed by each individual accused in the case of one the other prosecution witness. Without elaborating we must at once say that in a case of this nature where a large crowd collected all of whom are not shown to be sharing the common object of the unlawful assembly, a stray assault by any one accused on any particular witness could not be said be an assault in prosecution of the common object of the unlawful assembly so that the remaining accused could be imputed the knowledge that such an offence was likely to be committed in prosecution of the common object of the unlawful assembly. To illustrate, when it is alleged that a certain accused

pelted a stone and caused an injury to some one who came within the trajectory of the stone, could it be said that all other members of the unlawful assembly knew that such an offence would be committed ? We are, therefore, not inclined to sustain the conviction of the accused for charges under heads 4, 8, 10, 12, 14, 18, 20, 22, 24, 26 and 30 and accordingly the conviction of the accused under the aforementioned charges and the sentence imposed for the same are set aside and they are acquitted of these charges.

55. Summing up the findings recorded by us under various charges, we confirm the conviction and sentence imposed upon accused 1, 6, 8, 11, 15, 19, 20 and 23 for the offence under Section 147, IPC We set aside the conviction and sentence of accused 7, 12, 13, 14, 22, 26 and 27 and acquit them of the offence under Section 147, IPC.

56. The conviction and sentence of accused 2, 3, 4, 5, 9, 10, 17, 18, 21, 24 and 25 for the offence under Section 148, IPC are confirmed. The conviction and sentence of accused 16, for the offence under Section 148, IPC is here by set aside and he is acquitted of the charge.

57. The conviction of accused 1, 2, 4 and 5 for the offence under Section 302/34, IPC and the sentence of life imprisonment imposed upon each of them are hereby confirmed. The conviction of accused 3, 6, 7 and 19 for the offence under section 302/34, IPC and the sentence of imprisonment for life imposed upon each of them are hereby set aside and each one of them is acquitted of that charge.

58. The conviction and sentence of accused 11, 12, 13, 14, 15, 18, 21, 22, 23, 24, 25, 26 and 27 for the offence under Section 326/149, IPC are here by set aside and each one of them is acquitted of the said charge.

59. The conviction and sentence of accused 1 for the offence under Section 323, IPC under charge 7 are hereby confirmed.

60. The conviction and sentence of accused 2 under charge 9 for an offence under Section 324, IPC are hereby confirmed.

61. The conviction and sentence of accused 4 under charges 11 and 13 for an offence under Section 324, IPC are hereby confirmed.

62. The conviction of accused 5 for an offence under Section 323, I.P.C. under charge 17 and sentence imposed upon him for the same are hereby set aside and he is acquitted of that charge.

63. The conviction and sentence of accused 23 for an offence under Section 323, IPC under charge 21 are hereby set aside and he is acquitted of that charge.

64. The conviction and sentence of accused 24 for an offence under Section 324, IPC under charge 23 hereby confirmed.

65. The conviction and sentence of accused 25 for an offence under charge 25 are hereby confirmed.

66. The conviction and sentence of accused 27 for an offence under Section 323, IPC under charge 29 are set aside and the accused is a acquitted of that charge.

67. The conviction of accused 3, 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 19, 20, 21 and 23 of an offence

under section 427/34,IPC under charge 38 and the sentence imposed upon them for the same are hereby set aside and all the accused here in mentioned are acquitted of that charge.

68. The conviction of accused 2, 3, 8 and 9 for an offence under section 427/34, IPC and the sentence imposed upon them for the same under charge 39 are hereby confirmed.

69. The conviction of the various accused by the High Court under charges 8, 10, 12, 14, 18, 22, 24, 26 and 30 for offences under section 323, 324 and 325, IPC read with Section 149, IPC and separate sentence imposed upon them for the same are set aside and all the accused therein involved are acquitted of these offences.

70. The substantive sentences are directed to run concurrently.

71. Criminal Appeals 230 and 238 of 1972, and 97 of 1973 are partly allowed to the extent conviction and sentence for various offences hereinabove set out are the aside and dismissed to the extent conviction and sentence are confirmed. Those of the accused who are sentenced to suffer imprisonment should be given adjustment for the period they were in prison either as trail prisoners or as convicts after the High Court convicted them, according to law.

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