CASE NO.:
Appeal (crl.) 627 of 2004

PETITIONER:
SREE VIJAYAKUMAR & ANR.

RESPONDENT:
STATE, BY INSPECTOR OF POLICE, KANYAKUMARI

DATE OF JUDGMENT: 13/05/2005

BENCH:
P.V.REDDI & P.P. NAOLEKAR

JUDGMENT:
JUDGMENT

P. VENKATARAMA REDDI, J.

Accused Nos. 1 & 2 in the Sessions case No. 91 of 1998 (on the file of the Additional Sessions Judge, Kanyakumari) are the appellants in this appeal. They were prosecuted along with two others for the murder of one Rajeswaran by setting him on fire on the night of 21st July, 1994 at Palavilai village. The victim was admitted into the Government hospital, Nagercoil with 90% burn injuries and he died in the hospital on 24.7.1994. The appellants and two others were also charged for attempting to murder PW1\027the brother of the deceased by stabbing him. The learned Sessions Judge convicted A1 (1st appellant herein) for the offences punishable under Section 302 and Section 324 read with 34 IPC. A2 (2nd appellant) was found guilty of the offence punishable under Section 302. In addition, he was also convicted under Section 324 IPC for causing injury to PW-1. Both of them were therefore sentenced to life imprisonment. A3 and A4 were found guilty under Sections 302 read with Section 34 and Section 324 read with Section 34 IPC. On appeal filed by the accused persons, the High Court of Madras set aside the conviction of accused Nos. 3 & 4 under Section 302 read with Section 34 IPC. Their conviction under Section 324 read with Section 34 IPC was however maintained. Appellants 1 & 2 were convicted for the offence under Section 302 with the aid of Section 34 IPC and the sentence of life imprisonment was confirmed. Their conviction and sentence under Section 324 read with Section 34 was also confirmed. The first two accused have therefore come forward with this appeal.

The case of the prosecution, as per the charge-sheet and the evidence of prosecution witnesses, is as follows: The four accused are brothers. The deceased Rajeswaran and PWs 1 & 3 are also brothers. The accused and the deceased are related to each other and they were residing in the same lane. A dispute arose between the father of the accused and the deceased and his family members in connection with an electricity line passing through the father’s house of the accused. A civil suit was filed which ended in favour of the family of the deceased. According to PW1, that happened three years earlier. On account of the said dispute, there were ill-feelings between the members of the two families. On 21.7.1994, at about 7.30 p.m. when Rajeswaran was going past the shop of the 2nd appellant Rajagopal to purchase some articles from a nearby shop, the 1st appellant

Vijaya Kumar came out of the shop of the 2nd appellant and started abusing him and then took out a bottle and hit it on the head of the deceased, as a result of which, the bottle broke and the liquid spread over his body. A3 & A4 who were the acquitted accused, caught hold of Rajeswaran and did not allow him to move. At that moment, the 2nd appellant Rajagopal picked up a lighted kerosene lamp from his shop and threw it on Rajeswaran. Resultantly, Rajeswaran's body caught fire and he rolled on to the ground. PW1\027the brother of the deceased, who was in a shop, tried to go close to his brother; however, the accused 1, 3 & 4 caught hold of him and the 2nd accused (appellant No.2) stabbed him on the chest and shoulder with a button knife. PW3, the younger brother of PW1, who was at a nearby shop and some others noticed the incident and rushed to the scene and raised alarm. After the accused ran away, PW3 and PW4 took the victims in an auto-rickshaw to Kuzhithurai Government hospital. After first aid, they were taken to Kottar Government hospital. By that time, it was 10.30 p.m. The Head Constable (PW 12) attached to Kaliyakkavilai police station came to the hospital at 11.30 a.m. and made enquiries with the victim Rajeswaran about the incident. The statement which he recorded, namely Ext.P3, was treated as first information report. PW12 also examined A2 at the hospital. PW8\027Dr. Vimala, the Medical Officer of Kuzhithurai Government hospital, who examined the deceased and PW1 found 90% burn injuries on the body of the deceased. She found a stab injury 2"x1" on the right side of the chest and two other stab injuries on the back of PW1. She issued a wound certificate in which she expressed the opinion that the injuries were simple. The deceased as well as PW1 were referred to the Government hospital, Nagercoil. It appears that PW7, who was a Fire Officer, having received a telephone message, went to the provision shop of the accused No.2 and noticed fire at some portion of the shop. After putting off the fire, he found A2 with injuries lying inside the shop and took him to Kuzhithurai Government hospital. PW8 examined him and found that there was a deep lacerated injury 6" long 2" wide on the lateral aspect of the left leg and another lacerated injury on the left thumb and two abrasions. She opined that the injuries were simple in nature. Then, A2 was referred to the Government hospital, Nagercoil. PW8 found two abrasions on the anterior and posterior aspect of right shoulder of accused No.4 as well. PW8 also examined accused No.1 at about 9.10 p.m., found a diffuse swelling behind left ear and a lacerated injury of 1"x5x5 cm between the left thumb and index finger and treated him as out patient.

At about midnight time, the Judicial Magistrate, Nagercoil (examined as PW2) having received requisition from the Government Headquarters Hospital, proceeded to the hospital and recorded the statement of the deceased Rajeswaran at 12.30 a.m. which is in the nature of dying declaration. This was done in the presence of the Doctor. It is marked as Ext.P2 and it reads as follows:

"Today the 21.7.1994 at night 7'O clock when I was on the way to shop for buying petals and Aricanuts, suddenly Sree Vijayakumar hit the bottle on my head, his younger brother Rajagopal threw the fire on me. Fire caught on my body. In connection with laying electric connection through the space near their house, enmity arose among us and a case was filed. That case was decided in my favour and hence they did it. At the time of the incident Gunasekharan and Jayapal extended

help. When I ran away and fell down on the ground and rolled, my brother Ambeeswaran tried to help me and as such he also received burn injuries. My another brother was attacked by Rajagopal with a button knife."

In Ext.P2, there is an endorsement by the Doctor that the patient was conscious and answering the questions. The Magistrate obtained the thumb impression of Rajeswaran. PW2 deposed that Rajeswaran was conscious and he answered the preliminary questions put by him and then only he recorded his statement.

Rajeswaran died in the morning hours of 24th July, 1994. The Inspector of Police\027PW14 conducted the inquest of the deceased in the presence of panchayatdars and sent the dead body for postmortem. Postmortem was conducted by PW9\027the Civil Surgeon working at Kottar Government Headquarters Hospital in the evening of 24th July. He took out the skin from the body and preserved it in Sodium Chloride solution for chemical analysis. Ext.P12 is the postmortem report and Ext.P13 dated 25.12.1995 is the opinion given by him after the receipt of skin test from the Chemical Examiner according to which Rajeswaran died on account of shock resulting from deep burn injuries. The chemical examiner's report is Ext.P27. Petrol was detected on the pieces of black lumps received from the Judicial Magistrate, Kuzhithurai with his letter dated 10.10.1994.

There was a counter-complaint given by the accused Rajagopal lodged at Kaliyakkavilai police station. In that complaint, the deceased, PWs 1 & 3 and another, were shown as the accused. The substance of the complaint was that the accused came to his shop and insisted on giving some articles on credit and on refusal, the deceased and PW3 abused him leading to a quarrel and fight, in the course of which PW1 inflicted injuries on him and when his brothers arrived at the scene, one of the accused attacked them and caused injuries. Crime was registered as No. 378 of 1994. Surprisingly, the counter complaint was inquired into by PW16-Inspector of Police after considerable delay, i.e., in the year 1996. He submitted the final report (Ex.P28) to the Judicial Magistrate on 16.02.1998. He found no truth in the allegations made in the complaint lodged by the second accused and he came to the conclusion that it was filed as a counter-blast to the report of the deceased. It is also surprising that the investigation even in regard to Cr. No.377/94 giving rise to the present case went on for three years and 4 or 5. Investigating Officers changed, though the identity of accused was known and all of them were arrested soon after the incident.

In reply to the questions put under Section 313 Cr.P.C., the appellants totally denied the incident and their involvement.

Learned Senior counsel for the appellants contended that the genesis of the incident has been suppressed by the prosecution, that no action was taken to promptly inquire into the counter complaint given by the accused; that the appellants and another accused had received serious injuries which remained unexplained by the prosecution witnesses, that the evidence of the brothers of deceased who were chance witnesses has been deliberately introduced to build up the prosecution case and that it is highly improbable that the incident had taken place in the manner in which it was put forward by the prosecution. It is further contended that the First Information Report based on the alleged statement made by the deceased to Head Constable (PW12) is not

acceptable as PW12 admitted that FIR was prepared after consultation with the superior officers and that the contents of the statement were not made known to the witnesses who signed it. Referring to the dying declaration before the Magistrate (PW2) it is submitted that it was highly doubtful whether the patient who would have been administered drugs to abate the pain would be in a position to make the statement at midnight and that in any case no reliance can be placed on it in the absence of examination of the doctor testifying to the consciousness of the patient. It is finally submitted that the appellants cannot be found guilty of the offence under Section 302 and that there is no scope to invoke Section 34 IPC.

The learned counsel appearing for the State while refuting these contentions submits that there is trust-worthy evidence of eye-witnesses apart from the dying declaration recorded by the Magistrate and that there are no grounds to interfere with the concurrent findings of fact. He submits that petrol was detected on the skin of the deceased and this fact goes to corroborate the prosecution version. As regards the injuries, it is pointed out that the accused had motive to cause harm to the deceased by reason of previous enimity. It is then submitted that the injuries sustained by the accused were simple in nature but in order to create evidence, the two accused remained in hospital for a long time\027which fact was adversely commented upon by the trial court. Under the circumstances, it is contended that the non-explanation of the simple injuries on the accused does not affect the prosecution case. It is also submitted that the appellants did not even put forward a case in conformity with the complaint lodged by them on the date of incident.

The two eyewitnesses are brothers of the deceased. According to them, they happened to be at the spot by chance at the time when the incident took place. As per PW1’s version, he was returning after making purchase of some provisions from the shop of Thomas whereas his deceased brother was going towards the shop of Thomas. He stated in the chief examination that when his brother had reached the spot in front of the 2nd accused Rajagopal, the 1st accused Vijaya Kumar attacked his brother by hitting a bottle on his head and the liquid therefrom spread over the body. A3 & A4 (who were acquitted) restrained his brother from moving. At that juncture, the 2nd accused Rajagopal threw a burning kerosene lamp from the shop which ignited the fire. Thereafter, his younger brother\027PW3 rushed to the scene from another nearby shop and tried to put off the fire. When he and his younger brother tried to rescue their brother under flames, the 2nd accused stabbed him (PW1) on his chest and shoulders with a knife. Thereafter, PW3 and PW4 (PW4 declared hostile by the prosecution) took him and his deceased brother to the hospital in an auto-rickshaw. This is the version of PW1 in the chief examination. In the cross examination, a somewhat different version was given as regards the manner of attack. He stated that the accused (four in number) followed his elder brother from east to west and waylaid him. PW1 apparently tried to paint a picture of planned attack by the four accused persons. But, no reasonable inference of premeditated attack can be drawn having regard to the facts and circumstances apparent from the evidence on record. First of all, the involvement of A3 and A4 in the attack against the deceased was ruled out by the trial Court and High Court. In the dying declaration, it was not stated that any of the accused caught hold of the deceased. Secondly, the pre-concerted attack, if it were true, would not have happened in the manner in which PW1

narrated. Breaking open the bottle containing some liquid substance by hitting it on the head which did not even result in any visible injury and A2 then picking up a lighted kerosene lamp and 'throwing' it at him, do not support the theory of planned attack with an intention to kill him. Such a course of conduct is not consistent with the inference that the two appellants were waiting to kill him. The fact that the accused also suffered injuries which are not negligible shows that there would have been some scuffle and exchange of blows, but the details thereof are not forthcoming.

Moreover, there are some circumstances casting a doubt on the prosecution version of A1 pouring petrol on the deceased by breaking the bottle in an unusual manner by hitting it on the head of the deceased. The broken pieces of glass bottle are supposed to have been recovered by the Sub-Inspector of Police\027PW13 at the spot but he did not depose as to how he identified it as the bottle used in the course of attack. It is not his case that any witness had pointed out the same. Above all, the prosecution version that the liquid which came out of the bottle was petrol, cannot be relied upon for more than one reason. The smell of a common inflammable substance like petrol or kerosene would have been easily sensed by the witnesses. Even the Doctor\027PW9 could not find the smell of kerosene or petrol or any other inflammable liquid on the body of the deceased. In the dying declaration before the Magistrate, the deceased merely stated that the 1st accused hit him on the head with a bottle. No doubt, the Chemical Examiner's report\027 Ext.P28 reveals that he 'detected' petrol on the pieces of black lumps sent to him in a paper parcel by the Judicial Magistrate, Kuzhithurai. As seen from Ext.P26, the Inspector of Police sent a requisition to the Judicial Magistrate for sending the case properties mentioned therein for examination by the Chemical Examiner on 10.10.1994 which was nearly three months after the postmortem. Curiously, there is no evidence to the effect that the items sent to the Magistrate for onward transmission to the Chemical Examiner were the same that were handed over to him by PW9 and that they were sealed by the hospital authorities. Though PW9 stated that the skin taken from the leg was preserved in Sodium Chloride solution for chemical analysis, he did not state that any seal was affixed thereon and handed over to the Inspector. The I.O.\027PW14 who sent the requisition to the Magistrate or any other Police Officer did not state that he received the preserved sample of skin from the hospital with the seal of the hospital. Even if the sample was collected from the hospital, the possibility of meddling with it in the absence of seals cannot be ruled out especially when there was a time lag of nearly three months in sending the article to the Magistrate. No doubt, a suggestion on these lines was not put to the I.O. but the question of giving suggestion would arise only if the I.O. had deposed to the factum of collecting the sample from the hospital and sending it to the Magistrate in the same form. It is, therefore, not safe to rely on the Chemical Examiner's report to reach a conclusion that petrol was splashed on the deceased by A-1 before the burning lamp was thrown at him by A-2.

The prosecution case is sought to be established by two eye-witnesses, namely, PW-1 and 3 who are the brothers of the deceased and the dying declaration-Exhibit P-2. There is a serious doubt as to whether PW-3 had witnessed the occurrence. In the Chief examination PW3 stated that at the time of occurrence, he was working in the

shop of Radha Krishnan which is close to the place of incident but in cross-examination, he stated that he was running a fire-wood shop on his own. Though he was one of the persons who took the deceased to the hospital, a doubt looms large whether he was on the spot when the occurrence took place. However, there remains the evidence of PW-1. But, we cannot place wholesale reliance on his evidence, as he does not come forward with a truthful story of what had actually happened. His version about the manner of attack by the four accused persons and the non-explanation of injuries on the accused 1,2 and 4 raises some doubts on the credibility of his entire version. At the same time his version about the incident broadly accords with the contents of the dying declaration. His evidence cannot therefore, be eschewed in totality.

The dying declaration recorded by the Judicial Magistrate cannot be assailed on any germane ground. We cannot accept the contention of the learned counsel for the appellants that the deceased would not have been in a position to sustain his consciousness and give a statement narrating the details of the incident. The evidence of the Magistrate, PW 2 is unequivocal that the deceased was conscious and was able to answer the questions. The certificate of the doctor (Dr. Lalita Kumari) who was with him was also obtained on the dying declaration. If some persons other than the accused attacked and burnt him there is no reason why the deceased should have thought of implicating the accused while leaving out the real culprits.

The learned counsel for the appellants then contended that the non-explanation of the injuries which the accused No.1 received in the course of the same incident makes a dent on the prosecution case as the genesis of the incident was suppressed. It is pointed out that one of the injuries caused to accused No.1 was a deep lacerated injury of 6" long x 2" wide on the left leg and the accused remained in the hospital for 21 days, as seen from the evidence of PW8. It is further pointed out that the Fire Officer PW7 found A1 in an injured condition lying on the ground inside the shop. The contention of the learned counsel though plausible cannot be sustained. The fact remains that the injury was simple in nature and no fracture was found on x-ray. The trial Court rightly commented that A1 would not have remained in the hospital for such a long time for genuine reasons. The treatment of a simple injury does not, by any standards require 21 days of hospitalization. Evidently, he wanted to find out an escape route to wriggle out of the complaint against the accused. Coming to the evidence of PW 7, it is unbelievable that he would remain inside the shop which according to PW 7 partially caught fire. It is thus clear that the injuries received by accused No.1 were simple in nature and the non-explanation of those injuries by itself cannot throw reasonable doubt on the prosecution case. It is worthy of note that the counter complaint given by the accused is itself a tacit admission that the incident did take place. The deceased got burnt in the course of that incident. There is nothing to indicate that the accused apprehended danger and, therefore, acted in self defence. The contention that the FIR was fabricated in view of what has been stated by PW 12, has no merit. The FIR only incorporates the statement recorded by PW 12 at the hospital. The fact that he consulted the superior officials before formally recording the FIR does not mean that any changes or interpolations were introduced.

The next question is what are the conclusions to be drawn as regards the offences committed by the two

appellants, going by the version in the dying declaration coupled with the evidence of PW 1 to the extent it is in conformity with the dying declaration. The accused No.1 hit the deceased on his head with a bottle. Assuming that some liquid spread over the body, there is no satisfactory evidence to establish that it was petrol or kerosene or such other highly inflammable liquid. This aspect we have already adverted to. If the idea of A1 was to pour some inflammable liquid on the body of the deceased, in all probability, he would not have resorted to the odd way of hitting the bottle containing offensive liquid on his head. In the dying declaration there is no reference to the fact that any inflammable liquid spilled over from the bottle. Even if some liquid came out of the bottle as per the version of PW1, it cannot be taken for granted that it was inflammable liquid. Coming to the act of the 2nd accused in throwing a burning kerosene lamp soon after the attack of A1 with bottle, we are inclined to think that it was a random act resorted to by the 2nd accused at the spur of the moment, apparently to cause harm to the deceased. It was not a pre-planned act done with the definite intention of causing death. It is not the case of the prosecution that A2 went close to the deceased and lit up his clothes with the kerosene lamp. Hurling a small burning lamp towards a person may not definitely cause fire to the clothes. No doubt it was a dangerous act and it was likely to cause fire. But in view of the fact that the candle like lamp comes into contact with the clothes of the targeted person for a split second, it may or may not be in a position to ignite the fire. A person throwing the kerosene lamp in that fashion cannot at any rate be imputed with the intention to cause the death or causing such bodily injury as is likely to cause death. He can only be imputed with the knowledge that by such a dangerous act, he was likely to cause death. The overt act of accused No.2 in throwing the burning kerosene lamp at the deceased would, in our view, give rise to the offence of culpable homicide not amounting to murder punishable under Part II of Section 304. The discussion supra also leads to the inference that the appellants would not have shared the common intention though the common intention could spring up at the spot. One accused hitting the deceased with a bottle on his head which did not cause even a visible injury and the other accused throwing a burning kerosene lamp from a distance cannot be said to be acts done in furtherance of common intention to cause the death of Rajeswaran. These are random acts done without meeting of minds. They can only be held guilty for the individual overt acts. A2 is, therefore, liable to be convicted under Section 304 (Part II). Accordingly, he is convicted and sentenced to undergo imprisonment for seven years and to pay a fine of Rs.500/-. In default of payment of fine, he shall undergo imprisonment for a further period of three months. His conviction and sentence under Section 302 IPC is set aside.

Appellant No.1 (A-1) can only be convicted under Section 323 for causing hurt to the deceased by hitting him with a bottle. He is sentenced to undergo imprisonment for six months.

The evidence in regard to the attack on PW 1 by appellant No.1 with a knife which caused incised wounds to PW 1 is quite cogent and convincing. The conviction under Section 324 and the sentence of 1 year imposed by trial court, as far as A1 is concerned, is confirmed. Both the sentences shall run concurrently. A-1 is acquitted of the charge under Section 302. We are informed that appellant

No.1 has so far undergone imprisonment of more than 1 year. Hence, we direct that A-1 Vijaya Kumar shall be set at liberty forthwith.

Before closing, we may add that the High Court readily assumed, without analyzing the evidence on record that the bottle with which the deceased was hit contained petrol. The High Court did not properly address itself to the question of common intention and the nature of offence.

The appeal is accordingly allowed.

JUDIS