REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No.1305 OF 2008

Bilal Hajar @ Abdul Hameed ....Appellant(s)

VERSUS

State Rep. by the
Inspector of Police ...Respondent(s)

J U D G M E N T

Abhay Manohar Sapre, J.

1. This appeal is directed against the final judgment and order dated 08.11.2006 passed by the High Court of Madras in Criminal Appeal No.1200 of 2003 whereby the High Court dismissed the appeal filed by appellant herein.

2. In order to appreciate the issues involved in this appeal, it is necessary to set out the facts of the case in detail hereinbelow.

3. The case of the prosecution may be briefly stated as follows.

4. In all nine persons were tried for commission of various offences in Session Trial No.239 of 2000 by the Additional Court of Sessions (Fast Track No.111) Coimbatore.

5. The details of the offences under the Indian Penal Code (for short "IPC") for which the accused were tried are set out herein below:

(1)	A - 1 to A- 9	Section 120-B, IPC
(2)	A-1 to A- 5	Section 148, IPC
(3)	A- 1 to A- 5	Section 302, IPC
(4)	A-1	Section 332, IPC

6. On 19th August 1991, some posters were found pasted on the walls of public streets in the city of Coimbatore. These posters contained threats that seven persons belonging to a particular community would be killed. One person, out of the seven named person, was “Siva Kumar @ Siva”.

7. Siva on coming to know of his name being published in the poster scolded in filthy language the members of a particular community in a public meeting held on 30.08.1991, as according to him, the members of that community had pasted such posters wherein he and six others named therein were given threat of murder.

8. On 01.09.1991 between 2.30 p.m. to 3.30 p.m., all the nine accused (A-1 to A-9) assembled in the house of the appellant (A-6) and they hatched a criminal conspiracy to murder Siva. In furtherance of the criminal conspiracy, on 05.09.1991, around

7.45 a.m. accused (A-1 to A-5) along with one absconded accused armed with deadly weapons assembled at Kovai Mill Road, Coimbatore and accused (A-1 and A-3) attacked Siva with knife, who was passing through the road. Accused (A-1) also stabbed one Constable Chinnathambi (PW-1) with knife, who had come to the spot. Injured Siva was taken to the nearest hospital where he succumbed to injuries and was declared dead.

9. This incident led to arrests of nine accused. Investigation was carried out and after completing it, the charge-sheet was filed against the nine accused and they were put to trial for commission of various offences as detailed above. By order dated 29.07.2003, the Sessions Judge convicted the accused persons as under:

> **"The punishment of life imprisonment to accused Nos.1 to 9 under Section 120(b)(1) and a fine of Rs.10,00/- is imposed, failing which 1 year RI have to undergo. For accused Nos. 1 to 4, life imprisonment under Section 302 of IPC and a fine of Rs.25,000/-**

as fine, failing which 1 year RI under Sections 148 of IPC to accused Nos.1 to 4 should undergo the RI in the same period. Under Section 428 of Criminal Procedure Code, the period of jail while in the trail period may be deducted. Rs.1,00,000/- is to be given to the ward of the Siva as compensation from the total fine of Rs.1,90,000/- under Section 357 of Cr.P.C."

10. The convicted accused felt aggrieved and filed their respective criminal appeals, some jointly and some separately in the High Court of Madras questioning therein the legality and correctness of their respective convictions and sentences awarded to them.

11. By a common impugned order, the High Court dismissed the appeals of the accused, except that of accused (A-9) who was acquitted. The conviction of accused (A-2) under Section 120B was set aside.

12. The accused (A-6) alone felt aggrieved by his conviction and award of sentences and he has filed the present appeal by way of special leave to appeal in this Court. So far as other accused are

concerned, they did not file any appeal in this Court against their respective conviction/sentences. Their conviction and sentences have, therefore, become final. They are undergoing their jail sentences as awarded to each of them.

13. So the only question involved in this appeal is whether the Courts below were justified in holding the appellant (A-6) guilty for commission of only the offence under Section 120-B IPC.

14. It is pertinent to mention here that so far as the appellant (A-6) is concerned, he was prosecuted and eventually convicted for an offence punishable under Section 120-B, IPC and was accordingly awarded life sentence. In other words, the appellant (A-6) was charged with the offence punishable under Section 120-B, IPC and was convicted as such.

15. Heard Mr. K.K. Mani, learned counsel for the appellant and Mr. M. Yogesh Kanna, learned counsel for the respondent-State.

16. Learned counsel Mr. K.K. Mani appearing for the appellant while assailing the legality and correctness of the impugned order contended that the appellant's conviction is based only on the testimony of two witnesses, namely PW-3 and PW-4.

17. According to learned counsel, these two witnesses are the chance witnesses set up by the prosecution and therefore the two Courts below erred in placing reliance on their testimony. In his submission, both these witnesses should have been disbelieved.

18. Learned counsel then elaborated his submission by reading their testimony and pointed out inconsistencies and contradictions in their statements on certain issues, which according to him, render their statement wholly unreliable.

19. It is basically these submissions the learned counsel urged by appreciating their evidence and contended that so far as appellant (A-6) is concerned, once it is established that he was not a part of the criminal conspiracy to kill Siva on 05.09.1991, which according to the prosecution was hatched on 01.09.1991 in his house, the appellant was entitled for a clean acquittal.

20. It was urged that it is an admitted case set up by the prosecution which found proved also that the appellant was neither present and nor involved in actual commission of crime on 05.09.1991 in killing Siva but it was accused (A-1 to A-5) who were involved in murder of Siva on 05.09.1991. It is for this reason, the appellant cannot be held responsible for commission of murder of Siva, he being not a member of any criminal conspiracy to kill him.

21. In reply, learned counsel for the respondent (State), supported the impugned order, which, according to him, rightly upheld the order of the Session court and supported the reasoning and the conclusion contained therein and contended that no case is made out to reverse the concurrent finding of the two courts below. It was urged that reasoning and the conclusion is based on proper appreciation of evidence and does not call for any interference in this appeal.

22. Having heard the learned counsel for the parties and on perusal of the record of the case, we find no force in the submissions of the learned counsel for the appellant (A-6).

23. At the out set, we consider it apposite to state that when the two Courts below in their respective jurisdiction has appreciated the entire ocular evidence, then this Court would be very slow in exercise of its appellate jurisdiction under Article

136 of the Constitution to appreciate the evidence afresh unless the appellant is able to point out that the concurrent finding of two courts below is wholly perverse or is recorded without any evidence or is recorded by misreading or ignoring the material evidence.

24. We consider it apposite to recall the apt words of Justice Fazal Ali-a learned Judge while speaking for the Bench in the case of **Lachman Singh** vs. **State** (AIR 1952 SC 167 at page 169) when his Lordship observed "*It is sufficient to say that it is not the function of this Court to reassess the evidence and an argument on a point of fact which did not prevail with the Courts below cannot avail the appellants in this Court.*"

25. Despite this, we felt that since the leave has been granted to the appellant to file this appeal, it is just and proper to peruse the evidence and

particularly that of PW-3 and PW-4 with a view to find out as to whether the courts below were right in placing reliance on their testimony to sustain the appellant's conviction under Section 120-B, IPC.

26. Before we examine the evidence of PW-3 and PW-4, it is apposite to take note of the essential ingredients of Section 120 -A and Section 120-B, IPC under which the appellant (A-6) was prosecuted and eventually convicted.

27. The expression “criminal conspiracy” is defined in Section 120-A, IPC. It says that when two or more persons agree or cause to be done an illegal act or an act, which is not illegal by illegal means, such an agreement is designated a “criminal conspiracy”. It then provides an exception to the effect that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance

thereof. The explanation appended to the Section clarifies that it is immaterial whether the illegal act is the ultimate object of such agreement or is merely incidental to that object.

28. Section 120-B, IPC provides a punishment for committing an offence of criminal conspiracy. It says that whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life, or rigorous imprisonment for a term of two years or upwards shall be punished in the same manner as if he had abetted such offence provided there is no express provision made in the Code for punishment of such conspiracy.

29. Sub-section (2) of Section 120-B, IPC, however, provides that a person who is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be

punished with an imprisonment of either for a term not exceeding six months or with fine or both.

30. Reading of Section 120-A and Section 120-B, IPC makes it clear that an offence of "criminal conspiracy" is a separate and distinct offence. Therefore, in order to constitute a criminal conspiracy and to attract its rigor, two factors must be present in the case on facts: first, involvement of more than one person and second, an agreement between/among such persons to do or causing to be done an illegal act or an act which is not illegal but is done or causing to be done by illegal means.

31. The expression "criminal conspiracy" was aptly explained by this Court in a case reported in **Major E.G. Barsay** vs. **State of Bombay** (1962) 2 SCR 195. Learned Judge Subba Rao (as His Lordship then was and later became CJI) speaking for the Bench in his distinctive style of writing said:

> **"31…….. The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts."**

32. Therefore, in order to constitute a conspiracy, meeting of mind of two or more persons to do an illegal act or an act by illegal means is a must. In other words, it is *sine qua non* for invoking the plea of conspiracy against the accused. However, it is not necessary that all the conspirators must know each and every detail of the conspiracy, which is being hatched and nor it is necessary to prove their active part/role in such meeting.

33. In other words, their presence and participation in such meeting alone is sufficient. It is well known that a criminal conspiracy is always

hatched in secrecy and is never an open affair to anyone much less to public at large.

34. It is for this reason, its existence coupled with the object for which it was hatched has to be gathered on the basis of circumstantial evidence, such as conduct of the conspirators, the chain of circumstances leading to holding of such meeting till the commission of offence by applying the principle applicable for appreciating the circumstantial evidence for holding the accused guilty for commission of an offence. (See also **Baldev Singh** vs. **State of Punjab** [2009 (6) SCC 564].

35. Keeping in view the aforesaid principle of law which is consistently followed and reiterated by this Court in several cases, the issue involved in this case is required to be examined with a view to find out as to whether appellant (A-6) was a member of a criminal conspiracy which was hatched on

01.09.1991 to kill Siva on 05.09.1991 or in other words whether there is any evidence to sustain appellant's conviction under Section 120-B, IPC and, if so, whether the evidence adduced by the prosecution is in conformity with the parameters laid down by this Court to prove the guilt of the appellant beyond reasonable doubt.

36. It has come in evidence that starting point of the incident leading to the death of Siva gained momentum due to pasting of posters on public walls in the city by the members of one community mentioning therein the name of “Siva” with six others that these seven named persons would be killed. This prima facie indicated that Siva and six others could be a soft target for their elimination by the members of a particular community in coming days. Another factor, which added to the occurrence in question was filthy language/utterances of Siva in one public meeting

held by some workers of one party soon thereafter on 30.08.1991.

37. Perusal of evidence of PW-3 and PW-4 would go to show that PW-4 was running his small tea stall under a tree near appellant's house. It was around 70 feet away from the house and one could see the appellant's house from the tea stall. PW-3 was working as a tea boy in PW-4's tea stall on daily wages during the relevant time.

38. PW-3 said in his deposition that on 01.09.1991 around 2.30 p.m., he saw appellant (A-6), Basha (A-8) and Sbeyar (A-9) getting down from the car (van) and entering in appellant's house. After some time, (A-8-Basha) came to the tea stall and asked him (PW-3) to bring 10 cups of tea to the appellant's house. PW-3 on his part then told PW-4 to prepare and give him 10 cups of tea, which PW-3 brought to the appellant's house and served everyone sitting in the room. He then waited for

some time to collect the empty teacups when he heard appellant (A-6) saying to others present there that: "*whatever might be the cost, we should kill Siva within 10 days*". He said that on appellant saying this, another person-Basha (A-8) who had come to the tea stall for ordering tea said "*in no case we should go back after taking the initial step and finishing Siva*". On this A-7 (Subahier) said touching A-1 (Jahir Husain) sitting next to him that he i.e. (A-1) would be the fittest one to do the job. At this time, (A-8 Basha) saw PW-3 who was standing there and asked him as to why he (PW-3) is standing here and asked him to go out of the room. When PW-3 was leaving the place, he heard the appellant asking others as to whether they would murder Siva. All in reply to appellant's query said in a loud voice, as if, they were taking some kind of oath that they would kill Siva. PW-3 then said that on return to tea stall, he told to his boss

(PW-4) what he saw and heard in appellant's house to which (PW-4) said to him that he should ignore. PW-4 then asked him to go back after some time to collect the empty cups and bring sale money for 10 cups of tea. PW-3 then went to the appellant's house after ten to fifteen minutes when the persons assembled there paid him Rs.8 and said to retain the balance by way of tip for him. He then said that after about 4/5 days or so, he heard that Siva is murdered by stab injuries so he went to see him in Government hospital.

39. More or less on the same lines of (PW-3), PW-4 has also deposed about the incident in his deposition. In other words, PW-4 has corroborated the testimony of PW-3 on all material events and hence we do not wish to repeat his deposition in detail.

40. Having scanned the testimony of PW-3 and PW-4, we find no good ground to discard their testimony. In our opinion, their testimony is found natural, consistent and does not suffer from any contradictions much less major contradictions so as to brush aside as being wholly unreliable. The two courts below, in our view, therefore rightly relied on their testimony to sustain appellant's conviction under Section 120-B, IPC.

41. In our considered opinion, the test laid down by this Court as to how a case under Section 120-A, IPC read with Section 120-B, IPC is required to be made out by the prosecution with the aid of evidence is found proved by the prosecution beyond reasonable doubt in this case and this we say for following reasons.

42. First, there was adequate foundation laid for holding a meeting on 01.09.1991 by the accused

and the said foundation was an incident of pasting of posters on 19.08.1991 in public places all over the city and second, a public meeting held on 30.08.1991 in which Siva (deceased) uttered filthy language against the members of the community to which the accused belonged. These two facts did constitute a foundation for the commission of offence in question and they were duly proved with adequate evidence by the prosecution.

43. Second, the evidence of PW-3 and PW-4 has proved the factum of holding a meeting in appellant's house on 01.09.1991 with other accused wherein a decision was taken to kill/eliminate Siva within 10 days.

44. Third, the presence of PW-3 in appellant's house while serving a tea to all the accused is proved by the evidence of PW-3 and PW-4. Similarly the evidence of PW-3 and PW-4 further proved the exchange of talk between the accused confirming

that they will kill/eliminate Siva, the fact that Siva was killed/eliminated after five days after the meeting was held and lastly, his death was proved as homicidal

45. In our considered opinion, the complicity of the appellant in conceiving a plan to kill/eliminate Siva was therefore duly proved with the evidence adduced by the prosecution. Indeed, it was the appellant who took the lead to kill/eliminate Siva and with that end in view first he held a meeting in his house with all the other accused on 01.09.1991 and pursuant thereto got it accomplished through accused (A-1 to A-5) on 05.09.1991 when accused (A-1 & A-3) caused fatal stab injury with knife to Siva resulting in his homicidal death.

46. In our opinion, it was not necessary for the appellant to remain present at the time of actual commission of the offence on 05.09.1991 with accused (A-1 to A-5) for killing/eliminating Siva.

The appellant could be held guilty for commission of the same offence and sentence, which was awarded to accused (A-1 to A-5) as if, he had abetted the commission of the offence of murder as provided under Section 120-B, IPC.

47. We are not impressed by the submission of the learned counsel for the appellant (A-6) when he tried to point out three statements from the evidence of PW-3 and PW-4 which according to him were contradictory to each other rendering their testimony unreliable.

48. The first one was that PW-3 said that “he alone” went to the hospital to see the dead body of Siva whereas PW-4 said that “We” went to the hospital to see the dead body of Siva.

49. In our opinion, there is no contradiction in their version on the issue of visit to the hospital. Whether both went together or went individually with some time gap between their visits is hardly of

any significance so as to discard their entire testimony.

50. The second instance which was pointed out by the learned counsel for the appellant was that why should PW-3 go to see the dead body of Siva in the hospital when he was in no way connected with him and nor was he connected with the accused. This fact according to learned counsel appears unnatural and thus renders PW-3 testimony unreliable.

51. In our view, the second instance also has no substance. It is for the reason that the appellant (A-6) had an opportunity to cross-examine PW-3 and PW-4 on all the so-called contradictions to the two witnesses but he failed to avail of this opportunity by not cross-examining PW-3 and PW-4. On the other hand, the appellant adopted the cross examination done by other accused on PW-3 and PW-4 and gave up his right of cross-examination to these two witnesses. In this view of the matter; he

cannot now be permitted to find fault in the evidence of PW-3 and PW-4 and rely upon some contradictions which otherwise do not show any contradiction much less major one affecting their testimony.

52. In any event, the second instance even otherwise has no substance for the simple reason that PW-3 and PW-4 were the only persons who were aware of the meeting held on 01.09.1991 at the appellant's house where PW-3 had heard the plan for elimination of Siva and on his return from appellant's house, he told to PW-4 of the said incident. In these circumstances and with this background, if PW-3 went to the hospital, which was very near to the tea stall, there is nothing unnatural in his visit.

53. Yet, another last circumstance pointed out by the learned counsel for the appellant was that PW-3 joined the services of PW-4 on 01.05.1991 and left

within five days. This according to learned counsel shows that he was a chance witness. We do not agree.

54. PW-3 was working as a daily wager on payment of Rs.7/- per day with PW-4. In these circumstances, if PW-3 worked for one week or so and discontinued thereafter would not mean that he did not work at all with PW-4. After all, this was not an appointment in some systematic organization but was with one individual in his tea stall running under a tree. There is, therefore, nothing by which one could conclude that PW-3 did not work at all with PW-4 during those five days. There might be myriad reasons for PW-3 to leave this job. It is more so when it was proved that PW-4 was running his teashop on that spot for quite a long time and therefore was conversant with the locality and passersby.

55. It is also not the case of appellant that PW-3 had any previous enmity with any of the accused and with that end in view, he stepped in witness box to speak against them. PW-3 was a young boy aged around 17 years with no criminal background. As mentioned above, all this could be put to PW-3 and PW-4 in their cross examination by the appellant but he did not choose to do so and gave up his right to cross examine these witnesses.

56. In the light of detailed foregoing discussion, we are of the considered opinion that the prosecution was able to prove beyond all reasonable doubt with the aid of evidence that the appellant (A-6) was one of the active members of the criminal conspiracy along with other accused and hatched the plan in his house in the meeting which was held on 01.09.1991 to kill/eliminate Siva and in furtherance thereof accused (A-1 to A-5) successfully killed/eliminated Siva on 05.09.1991 by causing

Siva stab injuries with the aid of knife resulting in his homicidal death. The appellant's conviction and award of life sentence as prescribed under Section 302 read with Section 120-B, IPC was, therefore, rightly held made out along with other accused persons by the two courts below. We, therefore, concur with their view and accordingly uphold it.

57. We may only mention that it was not the case of the appellant and nor was urged also that his case falls under Section 120-B (2), IPC and therefore he be awarded less sentence as prescribed therein.

58. In view of the foregoing discussion, we find no merit in this appeal. The appeal thus fails and is accordingly dismissed.

.....J.
[ABHAY MANOHAR SAPRE]

.....J.
[INDU MALHOTRA]

New Delhi;
October 10, 2018